

2017 WL 5499156

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RULINGS BY SUMMARY ORDER DO NOT HAVE
PRECEDENTIAL EFFECT. CITATION TO A
SUMMARY ORDER FILED ON OR AFTER
JANUARY 1, 2007, IS PERMITTED AND IS
GOVERNED BY FEDERAL RULE OF APPELLATE
PROCEDURE 32.1 AND THIS COURT'S LOCAL
RULE 32.1.1. WHEN CITING A SUMMARY ORDER
IN A DOCUMENT FILED WITH THIS COURT, A
PARTY MUST CITE EITHER THE FEDERAL
APPENDIX OR AN ELECTRONIC DATABASE
(WITH THE NOTATION "SUMMARY ORDER"). A
PARTY CITING A SUMMARY ORDER MUST
SERVE A COPY OF IT ON ANY PARTY NOT
REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

AMERICAN FEDERATED TITLE
CORPORATION, a Florida corporation, Plaintiff-
Counter-Defendant-Appellant,
Robert Cornfeld, Counter-Defendant,
v.
GFI MANAGEMENT SERVICES, INC., a New
York corporation, Allen I. Gross, Edith Gross,
Defendants-Counter-Claimants-Appellees.

No. 16-3148-cv

November 16, 2017

Appeal from a judgment of the United States District
Court for the Southern District of New York (Wood, J.).

***1 UPON DUE CONSIDERATION WHEREOF, IT
IS HEREBY ORDERED, ADJUDGED, AND
DECREED** that the judgment entered on August 12,
2016, is **AFFIRMED**.

Attorneys and Law Firms

FOR APPELLANT: FRANKLIN L. ZEMEL, Arnstein &
Lehr, LLP, Fort Lauderdale, FL (Joshua M. Atlas,
Arnstein & Lehr, LLP, Fort Lauderdale, FL; Marc J.
Rachman, Davis & Gilbert LLP, New York, NY, on the
brief).

FOR APPELLEES: JOSEPH ZELMANOVITZ
(Abraham Neuhaus, on the brief), Stahl & Zelmanovitz,
New York, NY.

PRESENT: Gerard E. Lynch, Susan L. Carney, Circuit
Judges, Alvin K. Hellerstein,* District Judge.

* Judge Alvin K. Hellerstein, of the United States District
Court for the Southern District of New York, sitting by
designation.

SUMMARY ORDER

In 2007, plaintiff-appellant American Federated Title
Corporation ("AFTC") negotiated a Purchase and Sale
Agreement ("PSA") with GFI Acquisition, LLC
("GFIA")—one of several entities owned by defendants-
appellees Allen I. Gross and Edith Gross—by which
AFTC would sell real property in Florida to GFIA. Since
2007–08, the parties have been involved in protracted
litigation arising from the PSA and the bankruptcies of
three other related companies controlled by the Grosses
("the A&M companies").¹ AFTC now sues GFI
Management Services, Inc. ("GFIM") and the Grosses
(collectively, "defendants") to recover on judgments
totaling \$7.5 million entered against GFIA and the A&M
companies in bankruptcy court in the Southern District of
New York. After a three-day bench trial, the District
Court rendered a mixed verdict, finding for AFTC on
some of its claims and against it on others. The court later
denied AFTC's motion for reconsideration of that verdict.
AFTC alone appeals, arguing that the District Court erred
in: (1) concluding under New York law that management
fee payments made by the A&M companies to GFIM
were not constructively fraudulent conveyances; and (2)
declining to pierce the A&M companies' and GFIA's
corporate veils so as to permit AFTC to recover against
the Grosses and GFIM on the bankruptcy court
judgments. We assume the parties' familiarity with the
underlying facts, the procedural history of the case, and
the issues on appeal, to which we refer only as necessary
to explain our decision to affirm.

¹ The A&M companies are: A&M Florida Properties,
LLC ("A&M I"); A&M Florida Properties II, LLC
("A&M II"); and A&M Florida Properties III, LLC
("A&M III").

On appeal from a district court's judgment entered after a
bench trial, "we review the court's findings of fact for
clear error and its conclusions of law *de novo*." *Merck*

Eprova AG v. Gnosis S.p.A., 760 F.3d 247, 255 (2d Cir. 2014) (quoting *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 96 (2d Cir. 2010)). “In considering claims based in New York law (as here), this Court ‘determine[s] *de novo* what the law of New York is.’ ” *In re Sharp Int’l Corp.*, 403 F.3d 43, 49 (2d Cir. 2005) (quoting *McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d Cir. 1997)).² To determine New York law, we look first to decisions of the New York Court of Appeals, and, if that court has not ruled on the issue, we “may consider lower New York court opinions as the best indicators of how the Court of Appeals might decide an issue.” *Id.* (internal quotation marks omitted). To the extent AFTC challenges the District Court’s denial of its motion for reconsideration, we review that decision for abuse of discretion. *See RJE Corp. v. Northville Indus. Corp.*, 329 F.3d 310, 316 (2d Cir. 2003) (per curiam).

² The parties agree that New York law governs this dispute.

I. Management fee payments

In challenging the District Court’s conclusion that the management fee payments to GFIM should not be deemed constructively fraudulent conveyances, AFTC argues: (1) that the District Court should have applied an “*irrebuttable* presumption that the management fee payments lacked good faith,” Appellant’s Br. 19 (emphasis in original); and (2) that the District Court did not properly consider the good faith element of fair consideration in its analysis. We find neither argument persuasive.

*2 Sections 272, 273, and 273-a of New York’s Debtor and Creditor Law together provide the building blocks for identifying fraudulent conveyances under New York law. Sections 273 and 273-a provide that, to be deemed fraudulent, payments for such conveyances must have been made “without a fair consideration,” in addition to the transferor failing to meet certain requirements related to its financial health. *See* N.Y. Debt. & Cred. Law § 273; *see also* N.Y. Debt. & Cred. Law § 273-a. New York law deems “fair consideration” to have been given “for property, or obligation” in two circumstances:

- a. When in exchange for such property, or obligation, as a fair equivalent therefor, and *in good faith*, property is conveyed or an antecedent debt is satisfied, or
- b. When such property, or obligation is received *in good faith* to secure a present advance or antecedent

debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

N.Y. Debt. & Cred. Law § 272 (emphasis added).

We have recognized that, under New York law, “even the preferential repayment of pre-existing debts to some creditors does not constitute a fraudulent conveyance, whether or not it prejudices other creditors, because the basic object of fraudulent conveyance law is to see that the debtor uses his limited assets to satisfy *some* of his creditors; it normally does not try to choose among them.” *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 634 (2d Cir. 1995) (internal quotation marks and alteration omitted) (emphasis in original). We have also held, however, that this general rule does not apply to repayment of a pre-existing debt when that debt is owed to “an officer, director, or major shareholder of the transferor.” *See Atlanta Shipping Corp., Inc. v. Chem. Bank*, 818 F.2d 240, 249 (2d Cir. 1987).

The thrust of AFTC’s first argument—that the District Court erred in finding that the management fee payments to GFIM were made for “fair consideration”—is that we should not adhere to our decision in *HBE Leasing Corp. v. Frank*, 48 F.3d 623 (2d Cir. 1995). In *HBE Leasing*, we distinguished “preferential payments of *pre-existing* obligations ... to a debtor corporation’s shareholders, officers, or directors” from transfers made in exchange for “*contemporaneous* advance[s] of funds.” *Id.* at 634–35 (first emphasis added). We observed there that the latter category of payments “could not be found to be fraudulent[]” because “a present advance of commensurate value does not ordinarily prejudice other creditors” and thus does not trigger an irrebuttable presumption of an absence of good faith. *Id.* at 635.

AFTC claims that *HBE Leasing* is no longer good law because “state court appellate decisions have all evolved beyond, if not having all outright contradicted, the good faith limitation in *HBE*.” Reply Br. 5. In support of this sweeping contention, AFTC cites three New York appellate division cases (from two different departments), as well as a mix of district court and bankruptcy court decisions, some of which predate our decision in *HBE Leasing*. But the cited appellate division cases present factual scenarios materially different from that at hand.³ And at least one of the decisions on which AFTC relies condemns transfers for contemporaneous value only upon a specific finding that the purportedly fraudulent transfer harmed the creditor. *See Matter of Bernasconi v. Aeon, LLC*, 105 A.D.3d 1167, 1169, 963 N.Y.S.2d 437 (App. Div. 3d Dep’t 2013) (“[W]here ... a corporate insider participates in both sides of the transfer and the insider

controls the transferee, the transfer will be deemed to have been made in bad faith *if made to a creditor's detriment....*" (emphasis added)). Here, the District Court found the opposite had occurred. *See Am. Federated Title Corp. v. GFI Mgmt. Servs., Inc.*, 126 F.Supp.3d 388, 411 (S.D.N.Y. 2015) ("As transfers made for equivalent value, the management fees could not have served to *reduce* the value of the A&M companies and frustrate AFTC's efforts to collect its debts." (emphasis in original)).

³ *See Matter of Bernasconi, v. Aeon, LLC*, 105 A.D.3d 1167, 1167, 963 N.Y.S.2d 437 (App. Div. 3d Dep't 2013) (noting transfer of "entire remaining bank balance"); *Matter of Mega Pers. Lines, Inc. v. Halton*, 9 A.D.3d 553, 554, 780 N.Y.S.2d 409 (App. Div. 3d Dep't 2004) ("[Transferor] transferred substantially all of its assets to [transferee]..."); *Mfrs. & Traders Tr. Co. v. Lauer's Furniture Acquisition, Inc.*, 641 N.Y.S.2d 947, 226 A.D.2d 1056, 1057 (App. Div. 4th Dep't 1996) (same).

***3** Moreover, post-*HBE Leasing* decisions of several state and federal courts echo the distinction that we drew in *HBE Leasing*. *See, e.g., Bank of Comm'ns v. Ocean Dev. Am., Inc.*, 904 F.Supp.2d 356, 361 (S.D.N.Y. 2012); *Staudinger+Franke GMBH v. Casey*, No. 13 Cv. 6124(JGK), 2015 WL 3561409, at *11 (S.D.N.Y. June 8, 2015). And in *Cilco Cement Corp. v. White*, 55 A.D.2d 668, 390 N.Y.S.2d 178 (App. Div. 2d Dep't 1976), a pre-*HBE Leasing* case, the Appellate Division declined to apply the presumption of impropriety for which AFTC argues, instead concluding that continued salary payments to corporate officers of a failing corporation were not fraudulent conveyances in light of services contemporaneously rendered. *See* 55 A.D.2d at 668–69, 390 N.Y.S.2d 178. Just as the insider's salary was approved so that he could "try[] to keep the struggling debtor 'afloat' and save the business," Reply Br. 10, so too the management fee payments here compensated GFIM for work that enabled the AFTC-owned properties to retain their rental and sale values.⁴ We therefore find no reason to fault the District Court for following *HBE Leasing* and declining to apply an irrebuttable presumption that the payments for contemporaneous value lacked fair consideration.

⁴ Although AFTC asserts that it did not stipulate to the reasonableness of the management fee payments, it does not affirmatively argue on appeal (and apparently did not argue before the District Court) that they were unreasonable in amount.

that the transfers were not shown to be tainted by an absence of good faith. Although, in its initial bench trial ruling on the conveyances, the District Court did not explicitly evaluate the good faith element of fair consideration, it did so in its ruling on AFTC's motion for reconsideration. *See Am. Federated Title Corp. v. GFI Mgmt. Servs., Inc.*, 13-CV-6437 (KMW), 2016 WL 4290525, at *3–*5 (S.D.N.Y. Aug. 11, 2016). There, the District Court observed pointedly that AFTC adduced no evidence that the transfers were made in bad faith. No more was required.⁵

⁵ To the extent AFTC asserts that it "demonstrated at trial" that the Grosses orchestrated a fraudulent scheme, *see* Appellant's Br. 28, the District Court found to the contrary, *see Am. Federated Title Corp.*, 126 F.Supp.3d at 410–11. AFTC has fallen well short of establishing on appeal that this factual finding was clearly erroneous.

II. Piercing the corporate veil

AFTC also challenges the District Court's decision not to pierce the corporate veil, thereby preventing AFTC from reaching the Grosses' and GFIM's assets to satisfy the bankruptcy court judgments.

The parties agree that the New York Court of Appeals' decision in *Matter of Morris v. New York State Department of Taxation and Finance*, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (1993), establishes the applicable standard under New York law. In *Morris*, the court stated, "Generally, ... piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) [] such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Id.* at 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157; *see id.* at 141–42, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (requiring proof of "a wrongful or unjust act toward plaintiff," in addition to "complete domination"). Significantly, the *Morris* court further observed that the decision to pierce the corporate veil in a given instance does not rest on a mechanistic analysis: it "will necessarily depend on the attendant facts and equities." *Id.* at 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157.

AFTC first argues that the District Court applied an incorrect legal standard to AFTC's veil-piercing demand, in that the court required proof of an "intentionally unjust" act. *See* Appellant's Br. 39. But as *Morris* reflects, in New York as elsewhere, "a simple breach of contract, without more, does not constitute a fraud or wrong

We also identify no error in the District Court's ruling

warranting the piercing of the corporate veil.” *Bonacasa Realty Co., LLC v. Salvatore*, 109 A.D.3d 946, 947, 972 N.Y.S.2d 84 (App. Div. 2d Dep’t 2013). The District Court correctly recognized a sound justification for the rule: “If a controlling party could be held liable for any corporate transaction, regardless of the intent with which it was carried out, then proof of external control and causation alone could suffice to pierce the corporate veil.” *Am. Federated Title Corp.*, 126 F.Supp.3d at 404 n.7.

*4 Although *Morris* does not explicitly restrict the types of “wrong[s]” that may justify veil piercing to those committed purposefully, the *Morris* court found probative in its decision not to pierce that it had before it no “evidence of an *intent* to defraud.” See 82 N.Y.2d at 143, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (emphasis added). Here, the District Court’s emphasis on the evidence (or lack thereof) of any wrongful intent in defendants’ acts reflected a similar effort to distinguish wrongs that, while perhaps giving rise to a claim for contract damages, fall short of supporting the extraordinary remedy of piercing the corporate veil. As in *Morris*, analysis of defendants’ intent here offered one method of assessing whether the corporate form was sufficiently abused to permit veil piercing. The District Court’s analysis of the veil-piercing claim is therefore fully consistent with *Morris* and New York law.

Second, AFTC takes issue with the District Court’s resolution of several factual questions underlying its decision against piercing.⁶ In doing so, it attempts to recast disagreements with many of the District Court’s factual findings as errors of law. For example, the District Court rejected AFTC’s contention that the reason defendants, the A&M companies, and GFIA pursued aggressive litigation strategies was to effectuate an asset-stripping scheme. See *Am. Federated Title Corp.*, 126 F.Supp.3d at 412 (“Through the PSA Action, the A&M companies and GFIA fought to compel AFTC to close on the PSA, which would have eliminated the A&M companies’ arrearages and granted GFIA title to the leased properties.”); *id.* (finding that A&M companies pursued bankruptcy stays to preserve status quo pending resolution of PSA Action).⁷ AFTC casts these as legal errors, but they are in essence factual findings about motivation. AFTC has failed to demonstrate any clear error in these findings.

⁶ The District Court declined to decide whether AFTC was required to prove its constructively fraudulent conveyance and veil-piercing claims by a preponderance of the evidence or a clear-and-

convincing evidentiary standard. See *Am. Federated Title Corp.*, 126 F.Supp.3d at 405–06. We too decline to decide this question, as neither AFTC nor defendants appealed the District Court’s ruling in this regard and our resolution of this appeal is the same under either standard.

⁷ The “PSA Action” was the March 2008 suit GFIA and the A&M companies brought against AFTC, in which GFIA and the A&M companies alleged “that AFTC had fraudulently induced, and then breached, the PSA.” *Am. Federated Title Corp.*, 126 F.Supp.3d at 397.

Similarly, the District Court rejected AFTC’s argument that veil piercing was warranted because GFIA pursued plainly meritless litigation as an undercapitalized “dummy” entity. See *Am. Federated Title Corp.*, 2016 WL 4290525, at *3. In so ruling, the District Court noted that it “previously found[] [that] GFIA had legitimate reasons for pursuing the PSA Action.” *Id.* Even reviewed *de novo*, this determination appears to be entirely correct. The litigation’s ultimate lack of success does not establish or even suggest that GFIA was a “dummy” entity. AFTC’s willingness to contract with GFIA in the PSA, with full knowledge of its status, tends to confirm the correctness of this conclusion. However strongly AFTC may have believed in its defenses to the PSA Action, the District Court found that GFIA pursued that action for legitimate reasons. See *Am. Federated Title Corp.*, 126 F.Supp.3d at 412. We are not persuaded that this conclusion was erroneous, much less clearly erroneous.

We therefore find no error in the legal standard applied by the District Court to AFTC’s veil-piercing claim or in the District Court’s evaluation of the evidence that AFTC presented to support that claim.

* * *

We have considered the remainder of AFTC’s arguments and conclude that they are without merit. The judgment of the District Court is **AFFIRMED**.

All Citations

--- Fed.Appx. ----, 2017 WL 5499156

699 Fed.Appx. 91

This case was not selected for publication in West's Federal Reporter.

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

United States Court of Appeals,
Second Circuit.

IN RE: CONGREGATION BIRCHOS YOSEF
Debtor,
Bais Din of Mechon L'Hoyroa, Appellant,
v.
Congregation Birchos Yosef, Debtor-Appellee.

No. 16-3620-bk
|
November 1, 2017

Appeal from the judgment of the United States District Court for the Southern District of New York (Seibel, *J.*).
ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

FOR APPELLANT: Y. DAVID SCHARF (Joseph T. Moldovan, on the brief), Morrison Cohen LLP, New York, NY.

FOR DEBTOR-APPELLEE: MICHAEL LEVINE, Levine & Associates, P.C., Scarsdale, NY.

Present: ROBERT A. KATZMANN, Chief Judge,
RAYMOND J. LOHIER, JR., CHRISTOPHER F. DRONEY, Circuit Judges.

SUMMARY ORDER

Appellant Bais Din of Mechon L'Hoyroa ("the Bais Din") appeals from a judgment of the Southern District of New York (Seibel, *J.*) entered October 20, 2016, dismissing the Bais Din's appeal from a bankruptcy court order enforcing the Bankruptcy Code's automatic stay, 11 U.S.C. § 362(a). We assume the parties' familiarity with the underlying facts, the history of the case, and the issues on appeal.

The bankruptcy court's order declared that certain defendants in adversary proceedings brought by Congregation Birchos *92 Yosef had violated the automatic stay by initiating proceedings in the Bais Din, a rabbinical court, after the automatic stay went into effect, and it held those defendants in contempt. The bankruptcy court further ordered that decrees issued by the Bais Din in furtherance of those rabbinical proceedings, which violated the stay, were void *ab initio* and of no force or effect. The Bais Din, which was not a party in the adversary proceeding, appealed the bankruptcy court's order to the district court, arguing that the order violated the Free Exercise Clause and the Religious Freedom Restoration Act. Following supplemental briefing on the question of standing, the district court dismissed the appeal for lack of jurisdiction, finding that the Bais Din did not have standing to appeal the bankruptcy court's order. This appeal followed.

"When reviewing [a] dismissal ... for lack of subject matter jurisdiction, we review factual findings for clear error and legal conclusions *de novo*...." *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012). The Bais Din, as the party invoking federal jurisdiction, bears the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Although "[t]he current Bankruptcy Code prescribes no limits on standing beyond those implicit in Article III of the United States Constitution [...], this Court and others have 'adopted the general rule, loosely modeled on the former Bankruptcy Act, that in order to have standing to appeal from a bankruptcy court ruling, an appellant must be 'a person aggrieved'—a person 'directly and adversely affected pecuniarily' by the challenged order of the bankruptcy court.'" *DISH Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 88–89 (2d Cir. 2011) (quoting *Int'l Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 747 (2d Cir. 1991)). This standard "reflect[s] the understandable concern that if

appellate standing is not limited, bankruptcy litigation will become mired in endless appeals brought by the myriad of parties who are indirectly affected by every bankruptcy court order.” *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988).

As the district court correctly concluded, the Bais Din failed to demonstrate that it suffered a pecuniary harm. Quite the opposite, the Bais Din did not even allege a pecuniary harm before the district court, claiming instead that the automatic stay inhibited the free exercise of religion by “preventing the Bais Din from issuing notices to or against” individuals who violate Jewish law’s prohibition on initiating proceedings in secular courts without prior permission from a rabbinical court. Whatever the merits of that claim, it does not reflect a pecuniary injury. Moreover, to the extent that the Bais Din seeks to vindicate a non-pecuniary injury, nothing in this or the district court’s opinion prevents it from filing a civil action.

The Bais Din’s alternative theories of standing were not raised before the district court, and so they have been forfeited. *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) (“[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.” (alteration in original) (citation omitted)).

Accordingly, we **AFFIRM** the district court’s dismissal of the Bais Din’s appeal for lack of standing without considering the merits of the Bais Din’s underlying claims.

All Citations

699 Fed.Appx. 91

700 Fed.Appx. 354 (Mem)

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.

United States Court of Appeals,
Fifth Circuit.

In The MATTER OF : Joe Jesse MONGE; Rosana
Elena Monge Debtor
LAW OFFICES OF MICHAEL R. NEVAREZ, A
Professional Corporation, doing business as The
Nevarez Law Firm, P.C., Appellant

v.

Joe Jesse MONGE; Rosana Elena Monge,
Appellees

No. 17-50319

|
Summary Calendar

|
Filed November 2, 2017

Appeal from the United States District Court for the
Western District of Texas, USDC No. 3:16-CV-525

Attorneys and Law Firms

Michael R. Nevarez, Nevarez Law Firm, P.C., El Paso,
TX, for Appellant

E.P. Bud Kirk, El Paso, TX, for Appellees

Before DAVIS, CLEMENT, and COSTA, Circuit Judges.

Opinion

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Joe and Rosana Monge engaged the Law Offices of Michael R. Nevarez ("Nevarez") to pursue various *qui tam* actions. Eventually, the Monges ran out of money and declared bankruptcy. Nevarez sued the Monges for unpaid legal bills. Upon discovering that Nevarez

continued pursuing the *qui tam* actions without the Monges' knowledge or consent, the Monges countersued in bankruptcy court and argued, *inter alia*, that Nevarez's actions violated the automatic bankruptcy stay.

Nevarez argued that their retainer agreement required arbitration of all of the Monges' claims. The bankruptcy court largely agreed, except as to the Monges' claim that Nevarez's continued pursuit of the *qui tam* actions violated the automatic bankruptcy stay. The bankruptcy court issued three orders to that effect. In one of those orders, the bankruptcy court decided that the Monges' claim that Nevarez's continued pursuit of the *qui tam* actions was not arbitrable. Accordingly, the bankruptcy court denied Nevarez's motion to stay pending arbitration.

Nevarez appealed these three orders to the district court. Before the district court ruled on that appeal, however, the bankruptcy court issued a final judgment on all issues between the Monges and Nevarez. Nevarez appealed the final judgment to the district court in a separate action. Thus, there were two actions with nearly identical claims before the district court.

The district court exercised its discretion under Federal Rule of Bankruptcy Procedure 8003(b)(2) to consolidate the two lawsuits, and then it dismissed the appeal containing the three interlocutory orders and rendered final judgment in that action. The district court stated it intended to consider those interlocutory orders in the separate action with the final judgment, which remains pending. Nevarez appealed the dismissed action to this court.

The Monges moved to dismiss the appeal before this court because the district court has not yet had an opportunity to rule on the merits of the issues. Nevarez contends that the bankruptcy court's decision to decline staying the case until arbitration occurred, though interlocutory in nature, was appealable in light of section 16 of the Federal Arbitration Act. 9 U.S.C. § 16(a)(1)(A); *see In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1061 (5th Cir. 1997). Because the district court rendered final *356 judgment in the action with the three interlocutory orders after consolidating the appeals, Nevarez contends dismissal is inappropriate here.

Although Nevarez is correct that a bankruptcy court's decision to deny a motion to stay is appealable and the district court here rendered final judgment, the district court has not had an opportunity to consider these issues because it consolidated the cases. Dismissal is consistent with the statutory scheme of district court appellate

review of bankruptcy decisions that occurs except in narrow and statutorily specified circumstances—none of which applies here. *See* 28 U.S.C. § 158(d)(2)(A). Because dismissal is appropriate, Nevarez’s motion for sanctions fails.

IT IS ORDERED that appellees’ opposed motion to dismiss appeal is GRANTED.

IT IS FURTHER ORDERED that appellant’s motion for sanctions is DENIED.

IT IS FURTHER ORDERED that appellant’s motion to supplement the record is DENIED.

All Citations

700 Fed.Appx. 354 (Mem)

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875 F.3d 1229
United States Court of Appeals,
Ninth Circuit.

IN RE Charlene M. MILBY, Debtor,
Jon A. Milby; D&J Trucking Company, a
California Corporation; Sandra Holder Milby, an
Individual; Sanjon, Inc., a California Corporation;
5th Street Condo, LLC, California Limited Liability
Company; Charlene M. Milby; [Charlene's
Transportation, Inc.](#), a California Corporation,
Appellants/Cross-Appellees,

v.

Patricia A. Templeton, Individuals on behalf of the
Bankruptcy Estate of Debtor Charlene M. Milby,
and Derivatively on behalf of [Charlene's
Transportation, Inc.](#); [G. Cresswell Templeton, III](#),
Bankruptcy Estate of Debtor Charlene M. Milby,
and Derivatively on behalf of [Charlene's
Transportation, Inc.](#), Appellees/Cross-Appellants.

Nos. 16-60022, 16-60023

Argued and Submitted September 1, 2017
Pasadena, California

Filed November 21, 2017

Synopsis

Background: Creditors, on behalf of themselves and bankruptcy estate, filed adversary complaint against Chapter 7 debtor and transferees, seeking to avoid allegedly fraudulent transfers made by debtor. Defendants moved for summary judgment on ground that the claims were untimely. The United States Bankruptcy Court for the Central District of California, Peter Carroll, J., [2015 WL 967714](#), granted summary judgment and dismissed the claims, and subsequently denied creditors' motion for reconsideration. Creditors appealed. The United States Bankruptcy Appellate Panel of the Ninth Circuit, [Faris, J., 545 B.R. 613](#), affirmed in part, vacated in part, and remanded. Appeal was taken.

Holdings: The Court of Appeals, [Bybee](#), Circuit Judge, held that:

^[1] debtor's failure to disclose transfers on schedules or statement of financial affairs, false oaths in bankruptcy papers and in response to questions at creditors' meetings,

and failure to turn over documents and cooperate with trustee were extraordinary circumstances that stood in the way of timely prosecution of fraudulent transfer claims;

^[2] trustee, and then creditors suing on estate's behalf, exercised requisite diligence in pursuing fraudulent transfer claims, and thus two-year statute of limitations on such claims would be equitably tolled; and

^[3] funds transfers from bank accounts held by parties other than Chapter 7 debtor were not transfers of "interest of the debtor in property," and could not be avoided by trustee in exercise of strong-arm powers.

Affirmed and remanded.

West Headnotes (9)

^[1] **Bankruptcy**
🔑 [Conclusions of law; de novo review](#)

On appeal, the Court of Appeals reviews legal conclusions of the Bankruptcy Appellate Panel de novo.

[Cases that cite this headnote](#)

^[2] **Limitation of Actions**
🔑 [Suspension or stay in general; equitable tolling](#)

Doctrine of equitable tolling is read into every federal statute of limitations.

[Cases that cite this headnote](#)

^[3] **Limitation of Actions**
🔑 [Suspension or stay in general; equitable tolling](#)

Litigant seeking to equitably toll statute of

limitations bears burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented a timely filing.

[Cases that cite this headnote](#)

^{14]}

Bankruptcy

🔑 Time limitations; computation

Chapter 7 debtor's failure to disclose transfers on schedules or statement of financial affairs, false oaths in bankruptcy papers and in response to questions at creditors' meetings, and failure to turn over documents and cooperate with trustee were extraordinary circumstances that stood in the way of timely prosecution of fraudulent transfer claims, and that could serve to equitably toll two-year statute of limitations on such claims if the party bringing them displayed the requisite diligence. 11 U.S.C.A. § 546(a)(1).

[Cases that cite this headnote](#)

^{15]}

Limitation of Actions

🔑 Suspension or stay in general; equitable tolling

Mere fact that the extraordinary circumstances which stood in the way of the timely filing of cause of action cease sometime before the limitations period would normally have expired and that party fails to file cause of action in the time remaining does not prevent application of equitable tolling; application of equitable tolling is not foreclosed any time a litigant has opportunity to file before limitations period would normally expire but does not do so.

[Cases that cite this headnote](#)

^{16]}

Limitation of Actions

🔑 Suspension or stay in general; equitable

tolling

Party's diligence after the cessation of the extraordinary circumstance that stood in the way of his timely filing of cause of action may be illuminating as to his overall diligence, but is not alone determinative; it is just one factor in a broader assessment of whether he exercised the diligence required for equitable tolling of statute of limitations.

[1 Cases that cite this headnote](#)

^{17]}

Limitation of Actions

🔑 Suspension or stay in general; equitable tolling

Party's diligence in pursuing his rights prior to the end of the extraordinary circumstances that stand in the way of his timely filing of complaint are given more weight than his diligence afterward in deciding whether statute of limitations should be equitably tolled.

[Cases that cite this headnote](#)

^{18]}

Bankruptcy

🔑 Time limitations; computation

Chapter 7 trustee, and then creditors suing on estate's behalf, exercised requisite diligence in pursuing fraudulent transfer claims, and thus two-year statute of limitations on such claims would be equitably tolled based on debtor's nondisclosure, false oaths, and other conduct interfering with timely prosecution of such claims, though trustee learned of transfers when there were several days remaining on original limitations period and failed to take any action; trustee's diligence prior to discovery of transfers, the abbreviated window for trustee to act, and fact that creditors filed their fraudulent transfer claims one day after being granted leave to sue on estate's behalf weighed against denial of equitable tolling based on estate representatives' lack of diligence. 11 U.S.C.A. §

546(a)(1).

Cases that cite this headnote

[9]

Bankruptcy

Trustee as representative of debtor or creditors

Fraudulent Conveyances

Transactions Subject to Attack by Creditors

Funds transfers from bank accounts held by parties other than Chapter 7 debtor were not transfers of “interest of the debtor in property,” and could not be avoided by trustee in exercise of strong-arm powers. 11 U.S.C.A. § 544(b).

Cases that cite this headnote

*1230 Appeal from the Ninth Circuit Bankruptcy Appellate Panel, Taylor, Faris, and Corbit, Bankruptcy Judges, Presiding, BAP No. 15-1180

Attorneys and Law Firms

Karen L. Grant (argued), Law Offices of Karen L. Grant, Santa Barbara, California; Janet K. McGinnis, Law Office of Janet K. McGinnis, Santa Barbara, California; for Appellants/Cross-Appellees.

Daniel Joseph McCarthy (argued), Hill Farrer & Burrill LLP, Los Angeles, California, for Appellees/Cross-Appellants.

1231 Before: Kim McLane Wardlaw and Jay S. Bybee, Circuit Judges, and Harvey Bartle III, District Judge.

OPINION

BYBEE, Circuit Judge:

The bankruptcy estate of Debtor Charlene Milby discovered allegedly fraudulent transfers days before the

statute of limitations on avoidance claims was set to expire. This action was not filed until almost a year later. The bankruptcy court dismissed the action as time barred and held that the estate’s delay in filing after discovering the transfers precluded equitable tolling. The Bankruptcy Appellate Panel (“BAP”) reversed, holding that such post-discovery delay is irrelevant to whether equitable tolling applies.

Neither court correctly applied our law on equitable tolling. Under *Gibbs v. Legrand*, post-discovery delay does not preclude equitable tolling but is still relevant to assessing a party’s “overall diligence.” 767 F.3d 879, 891–93 (9th Cir. 2014). We affirm the judgment of the BAP because, here, the estate’s overall diligence, combined with the extraordinary circumstances preventing earlier discovery of the subject transfers, warrants equitable tolling.

I

Charlene Milby petitioned for Chapter 7 bankruptcy on September 22, 2011. Under 11 U.S.C. § 546(a)(1), the bankruptcy estate had two years, or until September 22, 2013, to file any avoidance actions.¹ Between September 5 and 18, 2013, with just days remaining on the two-year limitations period, creditors Patricia and G. Cresswell Templeton informed the bankruptcy trustee of allegedly fraudulent transfers the estate might seek to avoid. The trustee chose not to act on that information, however, concluding that the cost of litigation would likely outweigh any potential benefit. Thus, on September 19, 2013, the trustee filed a complaint to avoid certain transfers but not those the Templetons had identified.

The bankruptcy court approved a settlement of the trustee’s action in August 2014. While the court was still considering the settlement, the Templetons approached the trustee about being appointed to challenge the transfers they had previously brought to her attention. The trustee agreed, and on September 16, 2014, the court approved the Templetons’ appointment to pursue claims on behalf of the estate or derivatively on behalf of Charlene’s company, Charlene’s Transportation, Inc. (“CTI”). The next day, September 17, 2014, the Templetons filed this avoidance action on behalf of the estate and also, they contend, derivatively on behalf of CTI.

The Templetons’ complaint challenged transfers from bank accounts allegedly owned by Defendants Charlene Milby; her father, Jon A. Milby; her step-mother, Sandra

Holder Milby; and various companies. The complaint asserted four counts: (1) actual fraud under 11 U.S.C. § 544(b) and Cal. Civil Code § 3439.04(a)(1); (2) constructive fraud under 11 U.S.C. § 544(b) and *1232 Cal. Civil Code §§ 3439.04(a)(2) and 3439.05; (3) aiding and abetting fraud; and (4) unjust enrichment. The Milby Defendants moved for summary judgment, arguing that the first three counts were barred by the two-year limitations period on avoidance actions. The Templetons conceded that the limitations period would normally have expired on September 22, 2013—nearly a year before the action was filed—but argued that equitable tolling applied given Charlene’s misconduct in failing to disclose the subject transfers or to cooperate with the bankruptcy trustee.

In deciding summary judgment, the bankruptcy court first analyzed whether the subject transfers were “an interest of the debtor in property” as required to state a claim under § 544(b). *In re Milby*, No. 9:11-BK-14487-PC, 2015 WL 967714, at *10 (Bankr. C.D. Cal. Mar. 2, 2015). The court held that only the transfers alleged in paragraph 30 of the Templetons’ complaint so qualified. *Id.* at *12. It therefore dismissed without prejudice any claim based on the remaining transfers alleged in paragraphs 31–35 for failure to state a claim and granted the Templetons leave to amend to challenge those transfers under a different theory. *Id.*

The bankruptcy court then considered whether the claims based on the paragraph 30 transfers were timely. *Id.* It found that equitable tolling did not apply because the estate had the opportunity to assert claims based on the subject transfers before the limitations period would normally have expired but did not do so. *Id.* at *16. Thus, the court held that the Templetons’ first three claims based on the paragraph 30 transfers were untimely and dismissed those claims with prejudice. *Id.* at *17. It also dismissed the unjust enrichment claim for failure to state a claim. *Id.* The Templetons filed a notice that they would not amend their complaint, thereby allowing a final judgment to issue.

^[1]On appeal, the BAP vacated in part the judgment for Defendants. *In re Milby*, 545 B.R. 613, 625 (9th Cir. BAP 2016). In a published opinion, the BAP held that the bankruptcy court erred in considering the estate’s diligence after discovering the subject transfers. *Id.* It ruled that equitable tolling could apply and remanded for further proceedings. *Id.* And in a separate, unpublished opinion, the BAP affirmed the bankruptcy court’s dismissal of any claims based on the paragraph 31–35 transfers. *In re Milby*, No. AP 14-01132-PC, 2016 WL 778164, at *4 (9th Cir. BAP Feb. 24, 2016). Defendants

appealed the BAP’s decision respecting equitable tolling, and the Templetons cross-appealed the decision affirming dismissal of their claims based on the paragraph 31–35 transfers.²

II

^[2] ^[3]The doctrine of equitable tolling is “read into every federal statute of limitation.” *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946). Indeed, we have previously applied equitable tolling to § 546(a)(1). *Gladstone v. U.S. Bancorp*, 811 F.3d 1133, 1143 (9th Cir. 2016). “A litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Gibbs*, 767 F.3d at 884–85 (quotation marks omitted).

^[4]The bankruptcy court had no difficulty finding that the second element of equitable tolling was met here. The court described at length the extraordinary *1233 circumstances preventing the estate from initially filing the claims at issue, referring for example to “the Debtor’s egregious conduct, including ... the failure to schedule assets, false oaths in the schedules and in response to questions at creditors’ meetings, and failure to turn over documents and cooperate with the trustee.” *Milby*, 2015 WL 967714 at *13. The court also noted that there was “no significantly probative evidence in the record that [the trustee] discovered, or could have discovered, the Subject Transfers earlier than September 18, 2013.” *Id.* at *15. We agree with the bankruptcy court that the Templetons successfully established the second element of equitable tolling. See *Gladstone*, 811 F.3d at 1143 (applying equitable tolling where debtor concealed transactions).

The principal issue is thus whether the Templetons also established diligence, the first element of equitable tolling. Although the bankruptcy court found the trustee “was diligent in her administration of the estate” up to the time she discovered the subject transfers, it nevertheless declined to apply equitable tolling because no “exceptional circumstances existed *after* discovery of the Subject Transfers” to prevent timely filing. *Milby*, 2015 WL 967714 at *16 (emphasis added). The BAP, in turn, reversed on the ground that “[a] court should not look at the trustee’s post-discovery diligence when considering whether equitable tolling should be applied.” *Milby*, 545 B.R. at 622.

^[5]Neither the bankruptcy court nor the BAP correctly

applied our law on equitable tolling. The bankruptcy court erred insofar as it held that equitable tolling is inappropriate any time a litigant has the opportunity to file before a limitations period would normally expire but does not do so. In other words, the bankruptcy court erred insofar as it held that failing to file a complaint after extraordinary circumstances cease but before the limitations period would normally expire is dispositive of whether equitable tolling applies. That rule is too narrow.

¹⁶¹ ¹⁷¹The BAP, for its part, erred in holding that post-discovery diligence is never relevant to whether equitable tolling applies. That rule is too broad. As we explained in *Gibbs*, “[d]iligence after an extraordinary circumstance is lifted may be illuminating as to overall diligence, but is not alone determinative.” 767 F.3d at 892. It is “one factor in a broader diligence assessment.” *Id.* That said, we give diligence before the extraordinary circumstance ends more weight than diligence afterward. *Id.* (noting that “diligence after the fact is less likely to be probative of the question of whether the extraordinary circumstance caused the late filing,” such that “diligence during the existence of an extraordinary circumstance is the key consideration”).

It appears that the BAP’s confusion stemmed from conflating diligence considered as an element of equitable tolling with the “stop-clock” rule we adopted in *Socop–Gonzalez v. I.N.S.*, 272 F.3d 1176 (9th Cir. 2001). In *Socop*, Oscar Socop–Gonzalez married a U.S. citizen while his request for asylum was pending. 272 F.3d at 1181. He asked an officer of the Immigration and Naturalization Service how he should proceed in light of his marriage and was erroneously advised to withdraw his request for asylum. *Id.* By doing so, he unwittingly triggered his own deportation—which he learned of only twenty-seven days before the ninety-day period to reopen proceedings was set to expire. *Id.* He sought legal advice and eventually moved to reopen proceedings, but the *1234 Board of Immigration Appeals refused to reopen his case because more than ninety days had elapsed. *Id.* On petition for review, we applied equitable tolling and held that “the event that ‘tolls’ the statute simply stops the clock until the occurrence of a later event that permits the statute to resume running.” *Id.* at 1195. We therefore concluded that Socop was entitled to the full ninety days to move to reopen proceedings counting from the date he learned of his deportation. *Id.*

Socop’s stop-clock rule governs the computation of time remaining on a statute of limitations when equitable tolling applies. It does not, however, preclude considering post-discovery diligence in deciding whether equitable tolling applies in the first place. In *Gibbs*, we noted an

apparent “tension” between the stop-clock rule and examining post-discovery diligence but explained how that tension is resolved:

We note some tension between examining a petitioner’s diligence after the lifting of an obstacle to timely filing, and the stop-clock rule established by an en banc panel of this Court in *Socop–Gonzalez*. *Socop–Gonzalez* rejected the approach to equitable tolling wherein courts consider whether a claimant should have been expected to file his lawsuit within the amount of time left in the statute of limitations, after an extraordinary circumstance barring filing was lifted. Instead, “the event that ‘tolls’ the statute simply stops the clock until the occurrence of a later event that permits the statute to resume running.”

.... *Socop–Gonzalez*’s “stop-clock” holding remains the law in our circuit and applies here. That rule prohibits courts from constraining litigants to a judicially imposed filing window, and warns against imposing additional diligence requirements on recipients of equitable tolling.

Courts may, however, consider a petitioner’s diligence, after an extraordinary circumstance has been lifted, as one factor in a broader diligence assessment.

767 F.3d at 891–92 (final emphasis added and citations omitted); see also *Luna v. Kernan*, 784 F.3d 640, 651–52 (9th Cir. 2015) (“[U]nder current circuit law, we must apply both the diligence-through-filing requirement imposed by *Spitsyn* and the stop-clock approach adopted in *Gibbs*.”); *Spitsyn v. Moore*, 345 F.3d 796, 801 (9th Cir. 2003) (remanding for consideration of diligence after an extraordinary circumstance in deciding whether to apply equitable tolling).

¹⁸¹Applying *Gibbs* to the case before us, we hold that the estate satisfied the diligence element of equitable tolling. The bankruptcy court found that the trustee was diligent during the time the subject transfers were concealed, and it is “diligence during the existence of an extraordinary circumstance [that] is the key consideration.” *Gibbs*, 767 F.3d at 892. Less than a week remained on the statute of limitations when the estate discovered the subject transfers in September 2013, and it would have been unreasonable to require the estate to file in that time. The trustee brought an avoidance action challenging other unconcealed transfers, and she settled that action in August 2014. Once it became apparent the trustee would not pursue the subject transfers, the Templetons asked to be appointed to do so. The bankruptcy court appointed them on September 16, 2014, and they filed their complaint the very next day.⁴ Although nearly *1235 a

year had elapsed between discovery of the subject transfers and filing, this does not, under the circumstances, undercut the estate's overall diligence. Equitable tolling applies, and the estate gets the benefit of the stop-clock rule. The action was timely filed.

III

Finally, we turn to the Templetons' cross-appeal. As noted above, the bankruptcy court found that the transfers alleged in paragraphs 31–35 of the Templetons' complaint were made by individuals and entities other than the Debtor and therefore could not serve as predicates for a § 544(b) claim. It also found that the Templetons had failed to state a claim to avoid the paragraph 31–35 transfers under any other theory. It therefore dismissed without prejudice any claim based on the paragraph 31–35 transfers, and the BAP affirmed.

^[9]We affirm the BAP's judgment in this regard for the same reasons stated in its opinion. In brief, § 544(b) provides that a bankruptcy trustee "may avoid any

transfer of an interest of the debtor in property ... that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b)(1) (emphasis added). The transfers alleged in paragraphs 31–35 were transfers from bank accounts in the names of non-Debtor Defendants and therefore could not support a § 544(b) claim. Although the Templetons argued that their complaint also adequately pled claims under other theories, both the bankruptcy court and the BAP correctly held that it did not. The bankruptcy court granted the Templetons leave to amend to plead their alternate theories, but they chose not to do so.

Accordingly, we **AFFIRM** the judgment of the BAP and **REMAND** to the bankruptcy court for further proceedings consistent with this opinion.

All Citations

875 F.3d 1229, 64 Bankr.Ct.Dec. 246, 17 Cal. Daily Op. Serv. 11,134, 2017 Daily Journal D.A.R. 11,070

Footnotes

- * The Honorable Harvey Bartle III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.
- ¹ The Templetons argue a "discovery" rule should apply, such that the limitations period began running only when the estate discovered the subject transfers in September 2013. This is not only contrary to what they argued before the district court, but also contradicts the express language of § 546(a)(1). See 11 U.S.C. § 546(a)(1) (requiring avoidance actions to be brought within two years "after the entry of the order for relief").
- ² We have jurisdiction pursuant to 28 U.S.C. § 158(d) and review legal conclusions of the BAP de novo. *In re Jones*, 657 F.3d 921, 924 (9th Cir. 2011).
- ³ The bankruptcy court ultimately denied Milby's discharge as a discovery sanction.
- ⁴ Prior to their appointment—which followed a court-approved settlement between Charlene and the trustee—the Templetons did not have the power to pursue the subject transfers. See 11 U.S.C. § 544(b) (granting to the bankruptcy trustee the power to "avoid any transfer of an interest of the debtor in property").

2017 WL 5591459
United States Bankruptcy Appellate Panel of the
Tenth Circuit.

IN RE EUROGAS, INC., Debtor.
The Slovak Republic, Appellant,
v.
Elizabeth R. Loveridge, Chapter 7 Trustee,
Eurogas, Inc., and Texas Euro Gas Corp.,
Appellees.

BAP No. UT-16-033
|
Bankr. No. 04-28075
|
November 21, 2017

Synopsis

Background: Chapter 7 trustee moved for approval of proposed compromise and for leave to abandon whatever interest estate had in certain claims. The United States Bankruptcy Court for the District of Utah, William T. Thurman, J., 560 B.R. 574, granted motion, and appeal was taken.

Holdings: The Bankruptcy Appellate Panel, Romero, J., held that:

[1] entity involved in pending arbitration with another party that was interested in acquiring whatever interest the bankruptcy estate had in certain causes of action to enhance its arbitration position did not have standing to appeal bankruptcy court order approving sale of estate's putative interest in these causes of action to this other party, despite entity's purchase of unsecured claims;

[2] in any event, bankruptcy court did not abuse its discretion in evaluating, under standards applicable to compromises and settlements rather than under standards governing sale of estate asset outside the ordinary course of business, this proposed sale;

[3] bankruptcy court did not abuse its discretion in approving, as being in best interests of estate, proposed compromise negotiated by Chapter 7 trustee, whereby estate would relinquish whatever interest it had in these causes of action; and

[4] decision to abandon causes of action was likewise not

abuse of discretion.

Appeal dismissed.

Appeal from the United States Bankruptcy Court for the District of Utah

Attorneys and Law Firms

Brent D. Wride (Michael R. Johnson with him on the brief) of Ray Quinney & Nebeker P.C., Salt Lake City, Utah, for Appellant.

Reid W. Lambert of Woodbury & Kesler, P.C., Salt Lake City, Utah, for Appellee Elizabeth R. Loveridge, Chapter 7 Trustee.

Doyle S. Byers (Mona L. Burton with him on the brief) of Holland & Hart LLP, Salt Lake City, Utah, for Appellee Eurogas, Inc.

Before MICHAEL, ROMERO, and HALL, Bankruptcy Judges.

Chapter 7

OPINION

ROMERO, Bankruptcy Judge.

*1 Appellant, the Slovak Republic, appeals the bankruptcy court's order approving a settlement agreement proposed by the Chapter 7 trustee, which provides for the bankruptcy estate's abandonment of litigation claims in exchange for consideration and waiver of claims. Because we find Appellant lacks standing, we dismiss this appeal.

I. BACKGROUND

a. The 2004 Bankruptcy

In June 2004, the Southern District of Texas bankruptcy court entered a judgment against Eurogas, Inc. (the "Debtor"), the Debtor's principals, and five other corporate entities in the amount of \$113,733,315 plus

interest. The judgment creditors, consisting of several bankrupt entities and their principals, were represented by a Chapter 7 trustee (the “Texas Trustee”). The Texas Trustee initiated the Debtor’s involuntary Chapter 7 proceeding in the District of Utah bankruptcy court in May 2004. In November 2004, the Texas Trustee filed a proof of claim in the Debtor’s bankruptcy case in the amount of \$113,371,837 (the “\$113 Million Judgment”). Texas Euro Gas Corp. (“Texas Euro Gas”) purchased the \$113 Million Judgment claim from the Texas Trustee in September 2007.¹

¹ Despite the name, it does not appear that Texas Euro Gas is affiliated with the Debtor or EuroGas, Inc.

Neither the Debtor nor its officers or representatives filed schedules or statements in the bankruptcy case, despite a court order to do so.² The appointed Chapter 7 trustee in the Debtor’s case investigated assets, liquidated them, and distributed approximately \$700,000 to creditors, representing a .56 percent distribution on the claims in the case.³ Texas Euro Gas received the majority of that distribution on account of the \$113 Million Judgment.⁴ The bankruptcy court closed the case in March 2007. During the Debtor’s bankruptcy case, the Debtor’s officers, directors, and shareholders formed a second entity also named EuroGas, Inc. (“EuroGas”). EuroGas incorporated in November 2005 and asserts that it merged with the Debtor in July 2008, assuming all of the Debtor’s assets and liabilities.⁵

² *In re Eurogas, Inc.*, 560 B.R. 574, 577 (Bankr. D. Utah 2016).

³ *Id.*

⁴ The remaining claims totaled approximately \$1.3 million. *Exhibit A to Motion to Approve Agreement* at 2, in Appellant’s App. at 21.

⁵ *Id.* at 3–4, in Appellant’s App. at 22–23.

Trustee”), urging the U.S. Trustee to reopen the bankruptcy case to investigate additional property of the estate, which Texas Euro Gas suggested had not been administered during the bankruptcy case. The assets related to the Debtor’s interest in a foreign entity. As of the date of the involuntary petition, the Debtor was the sole stockholder of an Austrian company. The Austrian company owned a thirty-three percent interest in a Slovakian corporation, Rozmin, s.r.o. (“Rozmin”).⁶ Rozmin owned a twenty-four percent interest in mining rights to talc deposits in the Slovak Republic (the “Talc Mining Rights”).⁷ The Slovak Republic revoked the Talc Mining Rights in December 2004.⁸ This led to several lawsuits in the Slovak Republic over the Talc Mining Rights, which remain unresolved (the “Talc Mining Rights Claims”). Prior to Texas Euro Gas’ letter to the U.S. Trustee, EuroGas initiated an arbitration proceeding before the International Centre for Settlement of Investment Disputes in Paris, France, seeking resolution of the Talc Mining Rights Claims (the “Arbitration”).

⁶ *Eurogas*, 560 B.R. at 578.

⁷ *Objection to Motion to Reopen Under 11 U.S.C. § 350, for an Order to Appoint Chapter 7 Trustee under Fed. R. Bankr. P. 5010 and Delay Payment of the Filing Fee Pursuant to L.B.R. 510(b)* at 4, in Appellee’s App. at 4.

⁸ *Memorandum Decision* at 6, in Appellant’s App. at 75. Rozmin immediately contested the revocation of the Talc Mining Rights, which led to three Slovakian Supreme Court decisions confirming the revocation violated the Slovak Republic’s laws. Despite these rulings, the Slovak Republic refused to reinstate the Talc Mining Rights. *Exhibit A to Motion to Approve Agreement* at 3, in Appellant’s App. at 22.

*2 The U.S. Trustee filed a motion to reopen the bankruptcy case, explaining the Chapter 7 trustee may not have administered the Talc Mining Rights Claims. The U.S. Trustee requested the bankruptcy court reopen the case to allow a trustee to investigate and potentially administer the Talc Mining Rights Claims.⁹ The bankruptcy court reopened the bankruptcy case over EuroGas’ objection. The U.S. Trustee selected Elizabeth Loveridge for appointment as the Chapter 7 trustee (“Trustee Loveridge”) on December 21, 2015.

⁹ *Motion to Reopen Under 11 U.S.C. § 350, for an Order to Appoint Chapter 7 Trustee under Fed. R. Bankr. P.*

b. The 2015 Reopening

In September 2015, Texas Euro Gas sent a letter to the United States Trustee for the District of Utah (the “U.S.

5010 and Delay Payment of the Filing Fee Pursuant to L.B.R. 510(b). Bankr. ECF No. 148.

c. Motion to Approve Settlement Agreement and Notice of Abandonment

After her appointment, Trustee Loveridge investigated ownership of the Talc Mining Rights Claims. Trustee Loveridge determined she “would be required to bring an adversary proceeding against EuroGas,” to establish the estate’s interest in the Talc Mining Rights Claims, “which would require substantial time and resources.”¹⁰ Accordingly, Trustee Loveridge negotiated a settlement agreement with EuroGas that provided for Trustee Loveridge’s abandonment of the estate’s interest in the Talc Mining Rights Claims in exchange for consideration (the “Agreement”). The pertinent portions of the Agreement provide that in exchange for consideration of \$150,000 from EuroGas to the bankruptcy estate, Trustee Loveridge would file a notice of abandonment of any remaining interest in the Talc Mining Rights Claims (the “Abandonment”). Upon bankruptcy court approval of the Abandonment, EuroGas would make an additional payment of the lesser of (a) \$100,000; or (b) the amount needed to pay administrative claims in full plus an additional \$175,000 distribution to creditors. This effectively capped EuroGas’ consideration at \$250,000. As further incentive for the Abandonment, Texas Euro Gas agreed to withdraw its proof of claim for the \$113 Million Judgment, eliminating the debt from the estate.

¹⁰ *Exhibit A to Motion to Approve Agreement* at 4, in Appellant’s App. at 23. Trustee Loveridge found the pervious Chapter 7 trustee “did not expressly abandon” the mining rights, “but may or may not have intended that the [mining rights] be abandoned upon closing of the Bankruptcy Case.” *Id.*, in Appellant’s App. at 23.

Trustee Loveridge filed the *Motion to Approve Agreement* and *Notice of Intent to Abandon Property of the Estate* (the “Settlement Pleadings”) in August 2016.¹¹ The Slovak Republic objected to the Settlement Pleadings, arguing the Agreement was effectively a sale under 11 U.S.C. § 363,¹² instead of a settlement or compromise and the Agreement was not made in good faith because it relied on the withdrawal of Texas Euro Gas’ claim—among other arguments.¹³ After Trustee Loveridge and EuroGas entered the Agreement, the Slovak Republic offered \$250,000 to purchase the estate’s interest in the Talc Mining Rights Claims by quitclaim deed.¹⁴

¹¹ Appellant’s App. at 8, 26.

¹² All future references to “Code,” “Section,” and “§” are to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise indicated.

¹³ *The Slovak Republic’s Combined Objection to the Chapter 7 Trustee’s (A) Motion to Approve Agreement, and (B) Notice of Intent to “Abandon” Property* (the “Objection to Compromise”), in Appellant’s App. at 32.

¹⁴ *In re Eurogas, Inc.*, 560 B.R. 574, 581 (Bankr. D. Utah 2016).

After conducting a three-day hearing, the bankruptcy court approved the Agreement, finding its terms, including withdrawal of Texas Euro Gas’ claim, resulted in a fifteen to twenty percent distribution on the claims of unsecured creditors.¹⁵ The bankruptcy court noted whether the Talc Mining Rights Claims were property of the bankruptcy estate or were previously abandoned was “of great interest to both [EuroGas] and the Slovak Republic.”¹⁶ The bankruptcy court also noted the Slovak Republic objected “not because it believe[d] it [would] be paid more as a creditor if the Agreement [was] rejected, but because it [stood] to benefit in the [Arbitration]” if the bankruptcy court did not approve the Agreement and Abandonment.¹⁷ The bankruptcy court considered the Slovak Republic’s argument that the Agreement was effectively a § 363 sale, but determined there was no advantage to creditors to applying a § 363 analysis. The bankruptcy court found Trustee Loveridge “compromised several issues that would require protracted litigation” and that “[a]voiding litigation may be the subject of a compromise or settlement.”¹⁸

¹⁵ *Id.* at 580.

¹⁶ *Id.* at 579.

¹⁷ *Id.* at 581. The bankruptcy court was also “aware that the matters in [the] bankruptcy case [were] important to the Slovak Republic and [EuroGas] not on their own account, but because the parties hope[d] to gain an

advantage in the [Arbitration].” *Id.* at 579.

¹⁸ *Id.* at 582 (citing *Rich Dad Operating Co., LLC v. Zubrod (In re Rich Glob., LLC)*, 652 Fed.Appx. 625, 630 (10th Cir. 2016)).

*3 Accordingly, the bankruptcy court reviewed the Agreement as a Federal Rule of Bankruptcy Procedure Rule 9019 settlement and applied the analysis set forth in *Kopexa*.¹⁹ The bankruptcy court’s analysis under the *Kopexa* factors weighed in favor of approving the Agreement. The bankruptcy court also authorized Trustee Loveridge to abandon any claim to the Talc Mining Rights Claims pursuant to § 554(a) as being burdensome and of inconsequential value to the estate. Specifically, the bankruptcy court found litigation to determine the bankruptcy estate’s interest in the Talc Mining Rights Claims would be costly and the Talc Mining Rights Claims were of inconsequential value to any parties outside of the Arbitration.²⁰ The bankruptcy court also relied on Trustee Loveridge’s business judgment for rejecting the Slovak Republic’s offer to purchase the Talc Mining Rights Claims for \$250,000 by quitclaim transfer.

¹⁹ *In re Kopexa Realty Venture Co.*, 213 B.R. 1020 (10th Cir. BAP 1997). All future references to “Rule” or “Rules” refer to the Federal Rules of Bankruptcy Procedure.

²⁰ *Eurogas*, 560 B.R. at 586.

Trustee Loveridge requested the bankruptcy court approve the abandonment *nunc pro tunc*, but the bankruptcy court did not specifically order *nunc pro tunc* relief because “[w]hen property is abandoned, it ‘reverts to the debtor and stands as if no bankruptcy petition was filed.’ ”²¹ The bankruptcy court concluded that the Agreement and Abandonment removed the dispute over title of the Talc Mining Rights Claims from the context of the bankruptcy case. Any further disputes as to the Talc Mining Rights Claims’ title would be resolved in the Arbitration. Accordingly, the bankruptcy court entered the *Order Granting Trustee’s Motion to Approve Agreement and Memorandum Decision* (collectively, the “Decision”), granting the Settlement Motion and approving the Abandonment. The Slovak Republic filed a timely notice of appeal of the Decision. EuroGas filed the *Motion to Dismiss Appeal* (the “Motion to Dismiss”),²² alleging the

Slovak Republic lacks standing to appeal, which we now consider.

²¹ *Id.* (quoting *In re Dewsnap*, 908 F.2d 588, 590 (10th Cir. 1990), *aff’d sub nom. Dewsnap v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992)).

²² BAPECF No. 16.

II. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to hear timely filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.²³ The Slovak Republic appeals an order approving a settlement agreement pursuant to Rule 9019, which is a final order of the bankruptcy court.²⁴ None of the parties elected to have this appeal heard by the United States District Court for the District of Utah.

²³ 28 U.S.C. § 158(a)(1), (b)(1), & (c)(1); Rule 8005; 10th Cir. BAP L.R. 8005–1.

²⁴ *Loyd v. Foxglove, Inc. (In re S. Med. Arts Cos.)*, 343 B.R. 250, 254 (10th Cir. BAP 2006).

[1] [2] [3] [4] While a determination as to the legal standard applied to an issue is typically reviewed *de novo*,²⁵ the Tenth Circuit recognizes that a bankruptcy court’s decision “[w]hether to impose formal [§ 363] sale procedures is ultimately a matter of discretion that depends on the dynamics of the particular situation.”²⁶ The bankruptcy court’s approval of a settlement agreement brought pursuant to Rule 9019 is also reviewed for abuse of discretion.²⁷ A bankruptcy court’s decision to authorize or disallow abandonment is reviewed for abuse of discretion.²⁸ Similarly, a bankruptcy court’s decision whether to enter an order *nunc pro tunc* will not be disturbed absent abuse of discretion.²⁹

²⁵ *Hadden v. Bowen*, 851 F.2d 1266, 1268 (10th Cir. 1988) (“The issue of whether the [trial] court relied on the correct legal standard ... is a matter of law which we review *de novo*.”).

²⁶ *Rich Dad Operating Co., LLC v. Zubrod (In re Rich Glob., LLC)*, 652 Fed.Appx. 625, 630 (10th Cir. 2016) (quoting *Goodwin v. Mickey Thompson Enter. Grp., Inc.*, 292 B.R. 415, 422 (9th Cir. BAP 2003)).

²⁷ *S. Med. Arts Cos.*, 343 B.R. at 261 (“The approval of a compromise is within the sound discretion of the bankruptcy court and is reviewed for an abuse of discretion.” (citing *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997))).

²⁸ See *In re Buerge*, Nos. KS-12-074, KS-12-077, KS-12-078, KS-13-022, KS-13-023, KS-13-024, KS-13-025, 2014 WL 1309694, at *19 (10th Cir. BAP Apr. 2, 2014) (finding bankruptcy court abused discretion in compelling abandonment under § 554(b)); see also *In re Schwarz Publ'g, Inc.*, 398 Fed.Appx. 321, 321-22 (9th Cir. 2010); *In re Johnston*, 49 F.3d 538, 540 (9th Cir. 1995) (citing *In re K.C. Mach. & Tool, Co.*, 816 F.2d 238, 244 (6th Cir. 1987)).

²⁹ *In re Land*, 943 F.2d 1265, 1265 (10th Cir. 1991) (order denying *nunc pro tunc* relief reviewed for abuse of discretion); *Malloy v. Wallace (In re Wallace)*, 298 B.R. 435, 439 (10th Cir. BAP 2003) (order granting *nunc pro tunc* relief reviewed for abuse of discretion), *aff'd* 99 Fed.Appx. 870 (10th Cir. 2004).

III. DISCUSSION

a. The Slovak Republic's Standing to Appeal

*4 In the Motion to Dismiss, EuroGas argues the Slovak Republic lacks standing to appeal the Decision. The Slovak Republic obtained standing as an unsecured creditor in the bankruptcy case by purchasing two unsecured claims.³⁰ In the Motion to Dismiss, EuroGas argues the Slovak Republic is not an aggrieved party because, as an unsecured creditor, the Slovak Republic stands to receive a greater return on its claim under the Agreement than it otherwise would. The Slovak Republic responds, arguing: (1) EuroGas waived its right to contest the Slovak Republic's standing by not objecting below; and (2) the Slovak Republic is an aggrieved party because the bankruptcy court's orders foreclosed a § 363 sale, which may have generated a greater distribution to creditors.

³⁰ The Slovak Republic purchased claims three and four,

each in the amount of \$240,181 from the original claimant O & F Proinvest AG, a Swiss corporation, and filed a notice of transfer of claim for both on August 19, 2016.

[5] [6] [7] [8] We begin with a review of standing. Constitutional standing is a threshold issue that may be raised at any time.³¹ Constitutional standing requires an injury in fact; a causal relationship between the injury in fact and the challenged conduct; and a likelihood that the injury will be redressed by the court's review.³² Where existence of a case or controversy is not an issue, courts may impose “a judicially-created set of principles that, like constitutional standing, places ‘limits on the class of persons who may invoke the courts’ decisional and remedial powers,’ ” known as prudential standing.³³ Generally, the “ ‘party invoking federal jurisdiction bears the burden of establishing’ standing.”³⁴

³¹ *In re Blagg*, No. NO-01-006, 2001 WL 725993, at *5 (10th Cir. BAP June 28, 2001) (citing *Bd. of Cty. Comm'rs v. W.H.I., Inc.*, 992 F.2d 1061, 1063 (10th Cir. 1993)).

³² *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 493 (10th Cir. 1998).

³³ *Bd. of Cty. Comm'rs of Sweetwater Cty. v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

³⁴ *Susan B. Anthony List v. Driehaus*, — U.S. —, 134 S.Ct. 2334, 2342, 189 L.Ed.2d 246 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-12, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)).

[9] “[A] party that has satisfied the requirements of constitutional standing may nonetheless be barred from invoking a federal court's jurisdiction.”³⁵ Prudential standing necessitates meeting three conditions a party must overcome before invoking federal jurisdiction: (1) “a plaintiff must assert his own rights, rather than those belonging to third parties;” (2) “the plaintiff's claim must not be a generalized grievance shared in substantially equal measure by all or a large class of citizens;” and (3) “a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory

provision or constitutional guarantee invoked in the suit.”³⁶

³⁵ *Geringer*, 297 F.3d at 1112 (citing *Bennett v. Spear*, 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)).

³⁶ *Id.* (internal quotations and citations omitted).

[10] [11] [12] [13] [14] The Tenth Circuit Court of Appeals places prudential standing limitations on bankruptcy appeals, recognizing that, “although the Bankruptcy Code ‘does not contain an explicit grant or limitation on appellate standing,’ only a ‘person aggrieved’ by a bankruptcy court’s order may appeal.”³⁷ The “person aggrieved” standard “is more stringent ... than the ‘case or controversy’ standing requirement ... because it is designed to limit appellate standing ‘in order to avoid endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order.’”³⁸ A “person aggrieved” is a person “whose rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court.”³⁹ “Accordingly, to qualify as a person aggrieved, [a party] would have to show that the bankruptcy court order at issue ‘diminish[ed] his] property, increase[ed] his] burdens, or impair[ed] his] rights.’”⁴⁰ “Appellants bear the burden to demonstrate standing.”⁴¹

³⁷ *In re Petroleum Prod. Mgmt., Inc.*, 282 B.R. 9, 13–14 (10th Cir. BAP 2002) (quoting *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1500 (10th Cir. 1994)); *Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989) (adopting the “person aggrieved” standard).

³⁸ *In re Kreutzer*, 249 Fed.Appx. 727, 729 (10th Cir. 2007) (quoting *Am. Ready Mix, Inc.*, 14 F.3d at 1500) (internal citations omitted).

³⁹ *Am. Ready Mix, Inc.*, 14 F.3d at 1500 (quoting *Holmes*, 881 F.2d at 940).

⁴⁰ *Kreutzer*, 249 Fed.Appx. at 729 (10th Cir. 2007) (quoting *Am. Ready Mix, Inc.*, 14 F.3d at 1500); *Am. Ready Mix, Inc.*, 14 F.3d at 1500 (“standard [] requires an appellant to show that he is a ‘person aggrieved’ by the challenged bankruptcy court order.”).

⁴¹ *In re Miner*, 229 B.R. 561, 565 (2d Cir. BAP 1999) (citing *Sch. Dist. of Lancaster v. Lake Asbestos of Quebec, Ltd.*, 921 F.2d 1330, 1332 (3d Cir. 1990)); *Spennhauer v. O’Donnell*, 261 F.3d 113, 118 (1st Cir. 2001) (citing numerous cases) (concluding the party asserting appellate jurisdiction bears the burden of proving standing).

*5 [15] [16] The Slovak Republic correctly points out prudential standing differs from constitutional standing in that the former is not jurisdictional and may be waived.⁴² However, Tenth Circuit authority provides the “‘person aggrieved’ test is meant to be a limitation on *appellate standing*.”⁴³ Furthermore, the Rules required Trustee Loveridge to provide all creditors with notice and opportunity to object to the Settlement Pleadings.⁴⁴ Accordingly, EuroGas had no basis to object to the Slovak Republic’s standing under the person aggrieved standard prior to the appeal. Therefore, EuroGas has not waived the standing issue.

⁴² *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1154 (10th Cir. 2013) (“Prudential standing doctrines are not jurisdictional: they may be forfeited or waived.”) (citing *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007)); see also *Niemi v. Lasshofer*, 770 F.3d 1331, 1345 (10th Cir. 2014) (quoting *Wilderness Soc. v. Kane Cty.*, 632 F.3d 1162, 1168 n.1 (10th Cir. 2011)).

⁴³ *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1500 (10th Cir. 1994) (emphasis added).

⁴⁴ Fed. R. Bankr. P. 2002(a)(3) requires all creditors receive twenty-one days notice of a hearing on approval of a compromise or settlement. Even if, as the Slovak Republic argues, the Agreement should have been reviewed as a sale under § 363, all creditors must receive twenty-one days notice. Fed. R. Bankr. P. 2002(a)(2).

[17] The Slovak Republic contends it is a person aggrieved based on its status as an unsecured creditor of the bankruptcy estate. The Slovak Republic argues had the bankruptcy court required a § 363 sale of the Talc Mining Rights Claims, the estate would have realized more for distribution to unsecured creditors. The Slovak Republic

also argues issues in the Arbitration diminish its property, increase its burdens, or otherwise impair its rights. However, the Slovak Republic abandoned this contention at oral argument.⁴⁵

⁴⁵ When questioned by the panel at oral argument as to the basis for standing, the Slovak Republic relied solely on its status as an unsecured creditor.

EuroGas counters, asserting while being an unsecured creditor gave the Slovak Republic standing to participate in the hearing on the Settlement Pleadings, it is not a person aggrieved for purposes of appellate standing because it benefited from the Decision. EuroGas argues but for the Agreement, there is virtually no payout on the Slovak Republic's unsecured claims because the \$113 Million Judgment receives the majority of the distribution to the class. However, under the Agreement, the distribution to unsecured creditors significantly increases upon withdrawal of the \$113 Million Judgment. Accordingly, the Slovak Republic is not harmed by the Agreement and has no standing as a person aggrieved. Even had the bankruptcy court required a sale of the Talc Mining Rights Claims, EuroGas urges, a sale to a third party would not have included the withdrawal of the \$113 Million Judgment, leaving the Slovak Republic with virtually no recovery on its unsecured claims.

Although the Slovak Republic argues its objection to the claim for the \$113 Million Judgment would result in the same increased distribution to unsecured creditors, this argument depends on a number of unknown outcomes. As this Court recognizes, where there are "multiple layers of intertwined contingencies that must occur in order for [an appellant] to arguably claim any pecuniary benefit from the appeal," the party's "interest in the appeal [is] too remote and indirect to confer standing."⁴⁶ The Slovak Republic's argument is contingent upon the bankruptcy court sustaining the objection to the \$113 Million Judgment claim, which may or may not occur.

⁴⁶ *In re Paige*, No. UT-08-062, 2010 WL 3699747, at *11 (10th Cir. BAP Sept. 15, 2010) (stating that financial stake would be had if party sought to overturn a judgment and confirm a more favorable plan of reorganization was too remote to support standing).

*6 Accordingly, we agree the Slovak Republic lacks standing to appeal the Decision. As an unsecured creditor, the Slovak Republic offers no explanation to suggest how the Decision diminishes its property, increases its burdens, or impairs its rights. Because the Agreement

results in a significant increase in the distribution to unsecured creditors, the only logical reason the Slovak Republic could have to appeal the Decision is to better its position in the Arbitration.⁴⁷ Such reasons are insufficient to confer standing to appeal the Decision and the Slovak Republic has not met its burden of establishing appellate jurisdiction.⁴⁸

⁴⁷ We note, on August 18, 2017, the Slovak Republic filed a copy of the *Award*, indicating the adjudicating body dismissed the Arbitration. BAP ECF No. 69.

⁴⁸ See *In re Ernie Haire Ford, Inc.*, 764 F.3d 1321, 1325–26 (11th Cir. 2014) ("[A] party is not aggrieved, for the purposes of appealing from a bankruptcy court order, when the only interest allegedly harmed by that order is the interest in avoiding liability from an adversary proceeding."); *In re LTV Steel Co.*, 560 F.3d 449, 453 (6th Cir. 2009) (citing numerous cases) ("we are aware of no court that has held that the burden of defending a lawsuit, however onerous or unpleasant, is the sort of direct and immediate harm that makes a party 'aggrieved' so as to confer standing in a bankruptcy appeal.").

b. The Merits of the Appeal

[18] Even if this Court determined the Slovak Republic had standing and considered the merits of the appeal, we cannot hold that the bankruptcy court abused its discretion in approving the Agreement and authorizing the Abandonment. First, the bankruptcy court considered whether the Agreement should be analyzed as a § 363 sale and determined, using its discretion, it would not benefit creditors to do so. Furthermore, the bankruptcy court stated, "[a] sale presupposes a property right that can be sold. If the Trustee were to undertake to sell the [Talc Mining Rights Claims], she would need to ascertain whether the bankruptcy estate owns" those claims.⁴⁹ "As [Trustee Loveridge] stated ... she was unable to determine whether or not the [Talc Mining Rights Claims] remained with the bankruptcy estate"⁵⁰ As determining the ownership of the Talc Mining Rights Claims "indicate[d] that formal sale procedures under § 363 would be a lengthy and litigious process, ... [i]t does not appear that there is any advantage to be gained for creditors by applying ... § 363 in lieu of treating [the] transaction under Rule 9019."⁵¹

⁴⁹ *In re Eurogas, Inc.*, 560 B.R. 574, 582 (Bankr. D. Utah 2016).

50 *Id.*

51 *Id.* (“[T]o the extent the Agreement is not a classic settlement, it is still within the purview of Rule 9019 as a compromise. The Trustee has compromised several issues that would require protracted litigation. Avoiding litigation may be the subject of a compromise or settlement.”) (citing *Rich Dad Operating Co., LLC v. Zubrod (In re Rich Glob., LLC)*, 652 Fed.Appx. 625, 629–30 (10th Cir. 2016)).

[19]Furthermore, the bankruptcy court properly applied the factors set forth in *Kopexa*,⁵² in determining the Agreement was fair and reasonable. *Kopexa* requires “(1) the chance of success on the litigation on the merits; (2) possible problems in collecting the judgment; (3) the expense and complexity of the litigation; and (4) the interest of the creditors.”⁵³

52 *In re Kopexa Realty Venture Co.*, 213 B.R. 1020 (10th Cir. BAP 1997).

53 *Loyd v. Foxglove, Inc. (In re S. Med. Arts Cos.)*, 343 B.R. 250, 256 (10th Cir. BAP 2006) (citing *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997)).

*7 [20]The bankruptcy court found the probability of success of litigation, the complexity and expense of litigation, and the interest of creditors all weighed in favor of approving the Agreement. The bankruptcy court considered the difficulty of collection a negligible factor because should the bankruptcy estate be determined the owner of the Talc Mining Rights Claims, Trustee Loveridge would likely liquidate the claims instead of enforcing a judgment. However, because no factor weighed against approving the Agreement and Trustee Loveridge “adequately explained the business reasons for entering into [the] Agreement,” the bankruptcy court approved the Agreement.⁵⁴

54 *In re Eurogas*, 560 B.R. 574, 585 (Bankr. D. Utah 2016).

[21]Finally, in considering the Abandonment, the

bankruptcy court correctly found pursuing litigation to determine ownership of the Talc Mining Claims would place a burden on an estate with no assets to fund such litigation. Additionally, the bankruptcy court did not err in finding the Talc Mining Rights Claims were

very valuable to the parties in the Arbitration [], but because they are not liquid claims, or easily administered, the [Talc Mining Rights Claims] are of inconsequential value to the bankruptcy estate outside of an arrangement with one of those two parties. The Trustee is trying to maximize the value to the estate with the Agreement with [EuroGas].⁵⁵

Accordingly, the bankruptcy court appropriately considered and relied on Trustee Loveridge’s business judgment in authorizing the Abandonment. As such, the bankruptcy court did not abuse its discretion.⁵⁶

55 *Id.*

56 Finding no Tenth Circuit authority, the Court notes other circuits and bankruptcy courts recognize when determining whether an asset is burdensome or of inconsequential value, the bankruptcy court must “find the trustee made: 1) a business judgment; 2) in good faith; 3) upon some reasonable basis; and 4) within the trustee’s scope of authority.” *In re Slack*, 290 B.R. 282, 284 (Bankr. D.N.J. 2003), *aff’d*, 112 Fed.Appx. 868 (3d Cir. 2004); *Collier on Bankruptcy*, 15th ed., rev. ¶ 554.02[4].

IV. CONCLUSION

The Slovak Republic appeals an order that creates no demonstrable harm to its status, but only increases dividends paid to unsecured creditors. Because the Slovak Republic does not establish it is a “person aggrieved,” other than by implicating the Arbitration, we must dismiss this appeal for appellant’s lack of standing. Accordingly, it is hereby ordered that this appeal is DISMISSED.

All Citations

--- B.R. ----, 2017 WL 5591459, 64 Bankr.Ct.Dec. 249

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875 F.3d 1297
United States Court of Appeals,
Tenth Circuit.

IN RE: SANDRIDGE ENERGY, INC. Shareholder
Derivative Litigation,
Paul Elliot, on behalf of the Paul Elliot IRA R/O,
derivatively on behalf of Sandridge Energy, Inc.;
Lisa Ezell, derivatively on behalf of SandRidge
Energy, Inc., Plaintiffs-Appellees,

v.

Tom L. Ward; Jim J. Brewer; Everett R. Dobson;
William A. Gilliland; Daniel W. Jordan; Roy T.
Oliver, Jr.; Jeffrey S. Serota; Special Litigation
Committee of Sandridge's Board of Directors,
Defendants-Appellees,
and
Sandridge Energy, Inc., Nominal Defendant-
Appellee,
and

TLW Land & Cattle, L.P.; WCT Resources, L.L.C.;
192 Investments, L.L.C., Defendants.
Dale Hefner, Objector-Appellant.

No. 16-6014

|
November 17, 2017

Synopsis

Background: Shareholder derivative suit was brought in diversity on behalf of corporation against its directors, alleging self-dealing, usurpation of corporate opportunities, and misappropriation. The United States District Court for the Western District of Oklahoma, No. 5:13-CV-00102-W, Lee R. West, J., denied objecting shareholder's motion for settlement-related discovery, approval of settlement agreement, and order regarding attorneys' fees. Objecting shareholder appealed.

Holdings: The Court of Appeals, Kelly, Circuit Judge, held that:

^[1] Court of Appeals could not provide effective relief for district court's alleged pre-petition abuse of discretion in approving settlement of derivative suit, and therefore appeal was moot;

^[2] Court of Appeals could not provide effective relief for district court's allegedly wrongful denial of request by

shareholder's as objector on behalf of corporation for additional settlement-related discovery and his challenge to award of attorneys' fees, and therefore appeal was moot;

^[3] shareholder's request for attorneys' fees that was made on basis that his attorneys conferred substantial benefit to corporation prepetition as part of settlement process in derivative action and they should be paid for that benefit was not moot;

^[4] district court's decision to not award attorneys' fees to shareholder's attorneys for their efforts in state-court derivative action was not clearly erroneous; and

^[5] district court did not abuse its discretion in concluding that objecting shareholder did not contribute to "collective good" of corporation, as required for his attorneys to be compensated from common fund.

Affirmed.

Appeal from the United States District Court for the Western District of Oklahoma, (D.C. No. 5:13-CV-00102-W)

Attorneys and Law Firms

George C. Aguilar, Robbins Arroyo LLP (Jay N. Razzouk, Robbins Arroyo, LLP, San Diego, California, and Charles F. Alden, III, Oklahoma City, Oklahoma, with him on the briefs), for Objector-Appellant.

Mark E. McKane, Kirkland & Ellis, LLP, San Francisco, California, and Reggie N. Whitten, Whitten Burrage, Oklahoma City, Oklahoma (Michael Burrage and Randa K. Reeves, Whitten Burrage, Oklahoma City, Oklahoma, Robert N. Kaplan and Jeffrey P. Campisi of Kaplan, Fox & Kilsheimer, LLP, New York, New York, with them on the brief), for Plaintiffs-Appellees.

Thomas B. Snyder, Crowe & Dunlevy, Oklahoma City, Oklahoma, Mark P. Gimbel and C. William Phillips of Covington & Burling, LLP, New York, New York, for Independent Directors.

Before KELLY, MURPHY, and MORITZ, Circuit Judges.

Opinion

KELLY, Circuit Judge.

Objector-Appellant Dale Hefner appeals from the district court's denial of his motion for settlement-related discovery, approval of the settlement agreement, and order regarding attorneys' fees. In re Sandridge Energy, Inc., No. CIV-13-102-W, 2015 WL 11899141 (W.D. Okla. Dec. 15, 2015); In re Sandridge Energy, Inc., No. CIV-13-102-W, 2015 WL 11921422 (W.D. Okla. Dec. 22, 2015). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

This case concerns the settlement agreement and attorneys' fees related to two separate shareholder derivative suits on behalf of SandRidge Energy Inc. ("SandRidge") against its directors. The first of those actions was filed in federal district court in January 2013. The federal derivative suit alleged self-dealing, usurpation of corporate opportunities, and misappropriation by Tom Ward, SandRidge's founding CEO, and entities affiliated with him. See 2 Aplt. App. 247–343. It also claimed that certain Sandridge officers and directors *1300 were complicit and breached their fiduciary duties. Id.

The second derivative suit was filed in Oklahoma state court in January 2013 by Mr. Hefner. 5 Aplt. App. 1310–58. The director-defendants moved the state court to stay the action pending a resolution in the federal case, or in the alternative to dismiss the suit entirely. Mr. Hefner objected, and the state court stayed the action but denied the motion to dismiss. 6 Aplt. App. 1417–18. After further briefing and a renewed motion to dismiss, the state court again denied the motion. Id. at 1487. In November 2014, the state court entered a stipulated and agreed to order granting SandRidge's motion to stay. Id. at 1492–93.

On October 9, 2015, the federal district court granted its preliminary approval of a partial settlement in the federal suit. 4 Aplt. App. 1017–19. On October 30, 2015, Mr. Hefner filed notice of his intent to appear at the settlement hearing, object to the settlement, and request additional settlement-related discovery. Id. at 1025–26. The federal plaintiffs filed a motion for final approval of the partial derivative settlement on November 25, 2015. Key terms of the proposed settlement included (1) that the settling defendants' insurers would pay \$38 million to SandRidge, "to the extent that funds remain after deducting certain Designated Litigation Expenses ... arising from a separate Securities Litigation," and (2) the institution of additional corporate governance measures to prevent future

occurrences of misconduct. Id. at 1047–48. Additionally, the plaintiffs requested an award of attorneys' fees and expenses totaling approximately \$13 million. Id. at 1069.

In response, Mr. Hefner (1) filed a contingent motion for attorneys' fees and reimbursement of expenses, (2) objected to the settlement, and (3) requested additional settlement-related discovery. In his request for attorneys' fees, Mr. Hefner contended that without his "successful litigation in the State Action, the Settlement would not have occurred—and certainly not on the same terms." 5 Aplt. App. 1266. He also argued that after the federal case initially was dismissed, he "helped turn the tide in [the federal] litigation, beating a motion to dismiss [in state court] on demand futility grounds" and then cooperated with the federal litigation by agreeing to temporarily stay his state-court action. Id. at 1266, 1269.

Regarding the proposed settlement, Mr. Hefner argued that the federal court lacked subject-matter jurisdiction; that the settlement was for the benefit of the attorneys and insurance companies, but not of SandRidge itself since the funds would first be used to pay attorneys, then to pay for separate litigation (which the insurance companies would otherwise pay for), and would only then—if there was anything left—accrue to SandRidge; that the request for \$13 million in attorneys' fees was too large, representing over 34% of the total settlement fund; and that the proposed agreement would unfairly settle unique claims brought by Mr. Hefner in the state-court action. 6 Aplt. App. 1572–90. In sum, Mr. Hefner contended that the benefit to SandRidge did not outweigh the value of continuing litigation and that the settlement should be rejected. Id. at 1592–93.

The district court denied Mr. Hefner's motion for additional discovery and, after a hearing on the other matters, entered a final order and judgment approving the proposed partial settlement and denying Mr. Hefner's request for attorneys' fees. 8 Aplt. App. 2062–68.

Mr. Hefner appealed to this court, challenging the federal court's jurisdiction to approve the settlement and arguing that the district court abused its discretion by *1301 (1) approving the settlement and (2) denying his motions for additional discovery and for attorneys' fees. Aplt. Br. at 8–9.

Thereafter, on May 16, 2016, SandRidge filed for Chapter 11 bankruptcy. We abated the appeal pending the bankruptcy proceedings. On November 14, 2016, SandRidge gave notice of the bankruptcy court's approval of the company's plan of reorganization and filed a contemporaneous motion to dismiss the appeal as moot.¹

SandRidge contends that (1) because the company's stock was cancelled as part of the bankruptcy reorganization, neither Mr. Hefner nor anyone else had standing to pursue a shareholder derivative claim; (2) the relevant shareholder derivative claims were released and discharged as part of the reorganization; and (3) the right to pursue derivative litigation vested in reorganized SandRidge. See Mot. to Dismiss at 1–2. In his response, Mr. Hefner notified the court that he was seeking clarification from the bankruptcy court regarding the effect of SandRidge's reorganization. Opp'n to Mot. to Dismiss at 1. He also argues that even though a plaintiff could no longer prosecute a derivative claim since SandRidge cancelled its stock, an objector is not subject to the continuous-ownership requirement. And finally, he contends that even if no further derivative action could be pursued, his claim for attorneys' fees was still live. Id. at 2.

¹ Plaintiffs in the underlying derivative suit joined the motion to dismiss.

We ordered appellate briefing resumed, reserving the motion to dismiss for the merits panel. On April 24, 2017, Mr. Hefner reported that the bankruptcy court denied his motion for clarification “so long as the issue ... remains pending before the Tenth Circuit Court of Appeals unless specifically requested to do so.” See Aplt. Status Report Regarding Bankruptcy Ct. Inquiry (Aug. 24, 2017).

Discussion

A. Jurisdiction

Mr. Hefner contends that the district court erred in exercising subject-matter jurisdiction over the federal derivative litigation because the underlying parties had not proven diversity of citizenship. Aplt. Br. at 10–14. According to Mr. Hefner, “Plaintiffs had to establish ... that not only are the entities members' citizenship diverse from that of Plaintiffs, but that their members' members, such as trustees, limited partners, and beneficiaries, are also diverse.” Aplt. Br. at 13.

The initial disclosure statements did not say what states these entities are citizens of, nor did they declare who the members' members are or of what states those members are citizens. Aplt. App. 145–50. Accordingly, we requested Plaintiffs to provide this additional information. It shows the citizenship of each of the defendant parties. See Aplee. Submission Regarding Defs.' Citizenship

(Aug. 9, 2017). The Ward entities, based on the citizenship of their members, are citizens of Oklahoma. Thus, diversity jurisdiction is proper under 28 U.S.C. § 1332.

B. Justiciability

Sandridge argues that Mr. Hefner no longer has standing to bring a claim because the claim has been mooted by subsequent events. We agree that Mr. Hefner's claims have been mooted except his claim for attorneys' fees.

^[1]As part of its approval of SandRidge's plan of reorganization, the bankruptcy court expressly approved the release by debtor SandRidge of any and all claims and suits, including any derivative actions it had against former or current company directors and officers. See Mot. *1302 to Dismiss Ex. 10, In re Sandridge, Dkt. No. 901, at 31–32 (Confirmation Order). This plan also extinguished all shares in pre-petition SandRidge. Id. at 98–99.

^[2]In ascertaining whether a case has become moot, the court considers whether subsequent events have deprived the plaintiff of standing. “Article III mootness is ‘the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).’ ” S. Utah Wilderness All. v. Smith, 110 F.3d 724, 727 (10th Cir. 1997). Put differently, while standing is considered at the time the action is brought, mootness involves the court asking whether standing exists as the case appears now.

According to SandRidge, the appeal is moot not only because Mr. Hefner himself no longer has standing to pursue a derivative action or objection but because no one else has standing to pursue such a claim either. Thus, “[i]f Mr. Hefner were somehow to prevail on this appeal, the settlement would be unwound and the case would be remanded, but after remand there would be no derivative plaintiffs with standing to litigate the suit and all of the claims against the prepetition directors and officers have been released and discharged in the bankruptcy.” Reply in Supp. of Mot. to Dismiss at 2. It would therefore be impossible for the district court to grant the relief that Mr. Hefner requests. Id.

Mr. Hefner responds that his lack of standing to pursue a derivative action does not mean that he lacks standing to object to the settlement. Opp. to Mot. to Dismiss at 8–10. This is ordinarily true. It is the derivative plaintiff who is subject to the continuous ownership requirement, while the objector “need only own stock in the corporation at

the time of the settlement hearing.” Rosenbaum v. MacAllister, 64 F.3d 1439, 1443 n.2 (10th Cir. 1995). As for the relief pursued, Mr. Hefner contends that while he is no longer able to pursue a derivative action, there are many claims still ripe for adjudication. “What matters now,” he contends, “is whether the District Court abused its discretion by approving the Settlement based on the record before it.” Opp. to Mot. to Dismiss at 18.

^[3]Nonetheless, ripeness on its own is not enough to establish justiciability. The question still remains as to what relief the court could offer. To be justiciable, the suit must remain “live” throughout the course of litigation such that there is a “legally cognizable interest in the outcome.” Murphy v. Hunt, 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) (quoting U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 396, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)). This includes the ability of a court to provide effective relief. Jordan v. Sosa, 654 F.3d 1012, 1023 (10th Cir. 2011).

This latter point is where Mr. Hefner’s claims fail. If Mr. Hefner were to succeed in showing that the district court abused its discretion in approving the settlement, this court could reverse the settlement judgment and remand for further action. On remand, the district court would then have to dismiss the derivative suit entirely because none of the plaintiffs have standing to pursue it—all their shares have been cancelled, and all their claims have become property of reorganized SandRidge. Thus, the relief initially requested—a settlement that is more favorable to pre-petition SandRidge—is impossible to grant, and Mr. Hefner’s revised request of a declaration that the district court erred would be nothing more than “the satisfaction of a declaration that a person was wronged.” Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1348 (10th Cir. 1994). This Article III does not permit. Id.

^[4] *1303 Because Mr. Hefner’s request for additional settlement-related discovery and his challenge to the award of plaintiffs’ attorneys’ fees were also brought as an objector on behalf of SandRidge, they are also moot for the same reasons as his objection to the approval of the settlement.

^[5]This leaves Mr. Hefner’s request for attorneys’ fees. Plaintiffs include this request with the others on appeal as moot, but this claim is unlike the others. Mr. Hefner’s argument is that his attorneys conferred a substantial benefit to SandRidge as part of the settlement process and that they should be paid for that benefit. This is a backward-looking claim for monetary compensation that does not depend on Mr. Hefner’s future ability to pursue a derivative claim on behalf of SandRidge. See Cooter &

Gell v. Hartmarx Corp., 496 U.S. 384, 396–97, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (listing examples of collateral issues, such as attorneys’ fees, that can be ruled on after the underlying action is no longer pending). For this reason, his claim for attorneys’ fees is not moot. We therefore consider the district court’s decision not to award Mr. Hefner’s attorneys’ fees.

C. Attorneys’ Fees

^[6]Mr. Hefner next argues that the district court incorrectly denied his request for his counsel’s attorneys’ fees. The district court concluded that Mr. Hefner conferred “no substantial benefit to SandRidge or its shareholders,” “that no action taken either by Hefner or by his counsel aided or advanced the prosecution of the Plaintiffs’ claims against the Settling Defendants or contributed to the negotiation of the Settlement,” “and that no objections to the Settlement lodged by Hefner or his counsel benefitted SandRidge or its shareholders or assisted the Court either in assessing the fairness, adequacy and reasonableness of the Settlement.” In re Sandridge Energy, Inc., No. CIV-13-102-W, 2015 WL 11921422, at *4 (W.D. Okla. Dec. 22, 2015). Mr. Hefner argues that these findings are clearly erroneous and are also based upon an incorrect legal assumption that counsel must be involved in the Plaintiffs’ federal action.

^[7] ^[8]Under the clearly erroneous standard, a district court’s factual findings will be upheld unless “on the entire evidence [we are] left with the definite and firm conviction that a mistake has been committed.” Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). The legal analysis providing the basis for the fee award is reviewed de novo. Aguinaga v. United Food and Commercial Workers Int’l Union, 993 F.2d 1480, 1481 (10th Cir. 1993).

Mr. Hefner’s argument is that the \$13 million the district court awarded from the common fund to Plaintiffs’ attorneys unjustly “compensat[es] Plaintiffs for value generated by Hefner and his counsel’s efforts.” Aplt. Br. at 49. Moreover, Mr. Hefner argues that the district court erred by confining its analysis to the benefit Mr. Hefner may have contributed in the federal-court action rather than to the company more generally. Id. at 54.

^[9]In this last point, Mr. Hefner is correct that objectors and other parties who contribute to the “collective good” of the corporation can still be compensated from the common fund for any benefit they confer to the other shareholders. See Gottlieb v. Barry, 43 F.3d 474, 488–89

(10th Cir. 1994). But the district court’s explanation for why it chose not to reward Mr. Hefner attorneys’ fees did not overlook this legal rule; instead, it simply concluded, as a factual matter, that “no substantial *1304 benefit to SandRidge or its shareholders has been conferred by Hefner or his counsel.” In re SandRidge Energy, Inc., 2015 WL 11921422, at *4. Mr. Hefner points to several actions that could have been construed as helpful to the shareholders—but his arguments hardly compel a finding that his efforts were causally linked to the settlement. Indeed, the district court found that it was the extensive efforts of Plaintiffs’ counsel, not Mr. Hefner’s, which moved the needle. The clearly erroneous standard is a high bar, and in this case, we are not left with a definite and firm conviction that the district committed a mistake.

[10] [11]Mr. Hefner also contends that the district court abused its discretion by not seriously considering Mr. Hefner’s objections given the record evidence. A district court abuses its discretion when its decision is “arbitrary, capricious or whimsical, or manifestly unreasonable.” Birch v. Polaris Indus., Inc., 812 F.3d 1238, 1247 (10th

Cir. 2015) (quoting Rocky Mountain Christian Church v. Bd. of Cty. Comm’rs, 613 F.3d 1229, 1239–40 (10th Cir. 2010)). The district court’s ruling does not rise to that level. The district court explained its rejection of Mr. Hefner’s position, noting that Mr. Hefner already had received a “mountain of discovery” and provided nothing other than conjecture as to why his objections would have benefited the shareholders. Accordingly, we find that the district court did not abuse its discretion.

We AFFIRM the district court’s judgment insofar as attorneys’ fees and DISMISS the balance of the appeal as moot. All pending motions are denied.

All Citations

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871 F.3d 1174

United States Court of Appeals,
Eleventh Circuit.

Sandra SLATER, Plaintiff-Appellant,

v.

UNITED STATES STEEL
CORPORATION, Defendant-Appellee.

No. 12-15548

|
(September 18, 2017)

Synopsis

Background: Former employee brought action against her former employer, alleging sex and race discrimination. After former employee filed Chapter 7 bankruptcy petition without listing discrimination action as unliquidated claim, the United States District Court for the Northern District of Alabama, [Karon Owen Bowdre, J., 2012 WL 4478981](#), dismissed action under judicial estoppel doctrine. Former employee appealed. The Court of Appeals determined that judicial estoppel doctrine barred former employee's claims after employee failed to disclose those claims in her Chapter 7 bankruptcy petition. The Court of Appeals, [820 F.3d 1193](#), affirmed. Court of Appeals granted en banc review.

[Holding:] The Court of Appeals, [Jill Pryor](#), Circuit Judge, held that district court had to consider all facts and circumstances of case to determine whether former employee by omitting civil claim in bankruptcy filing should be deemed to have intended to make mockery of judicial system, overruling [Barger v. City of Cartersville, 348 F.3d 1289](#) and [Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282](#).

Remanded.

[Ed Carnes](#), Chief Judge, filed concurring opinion.

***1176** Appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 2:09-cv-01732-KOB

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Before [ED CARNES](#), Chief Judge, [TJOFLAT, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JULIE CARNES](#), and [JILL PRYOR](#), Circuit Judges.*

ON PETITION FOR REHEARING

[JILL PRYOR](#), Circuit Judge:

When an individual files for bankruptcy, he must file sworn disclosures listing his debts and his assets, including any pending civil claims, and identifying any lawsuits he has filed against others. Occasionally, a plaintiff who has a pending civil lawsuit fails to list the claims or lawsuit in these disclosures. In omitting this information, the plaintiff effectively takes inconsistent positions in the two judicial proceedings by asserting in the civil lawsuit that he has a claim against the defendant while denying under oath in the bankruptcy proceeding that the claim exists.

The equitable doctrine of judicial estoppel is intended to protect courts against parties who seek to manipulate the judicial process by changing their legal positions to suit the exigencies of the moment. Today, we address how this doctrine should be applied when a plaintiff takes inconsistent positions by pursuing in district court a civil claim that he failed to disclose as an asset in his bankruptcy proceedings. We reaffirm our precedent that when presented with this scenario, a district court may

apply judicial estoppel to bar the plaintiff's civil claim if it finds that the plaintiff intended to make a mockery of the judicial system.

But what suffices for a district court to find that a plaintiff who did not disclose a civil lawsuit in bankruptcy filings intended to make a mockery of the judicial system? Our Court has endorsed a rule that the mere fact of the plaintiff's nondisclosure is sufficient, even if the plaintiff corrected his bankruptcy disclosures after the omission was called to his attention and the bankruptcy court allowed the correction without penalty. See *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002). We granted en banc review to reconsider this precedent.

We hold today that when determining whether a plaintiff who failed to disclose a civil lawsuit in bankruptcy filings intended to make a mockery of the judicial system, a district court should consider all the facts and circumstances of the case. The court should look to factors such as the *1177 plaintiff's level of sophistication, his explanation for the omission, whether he subsequently corrected the disclosures, and any action taken by the bankruptcy court concerning the nondisclosure. We acknowledge that in this scenario the plaintiff acted voluntarily, in the sense that he knew of his civil claim when completing the disclosure forms. But voluntariness alone does not necessarily establish a calculated attempt to undermine the judicial process. We therefore overrule the portions of *Burnes* and *Barger* that permit a district court to infer intent to misuse the courts without considering the individual plaintiff and the circumstances surrounding the nondisclosure.

Here, the district court applied judicial estoppel to bar plaintiff Sandra Slater's discrimination and retaliation claims in a lawsuit against her employer, U.S. Steel Corporation, because Slater failed to disclose these civil claims as assets in her bankruptcy. Relying on our precedent in *Burnes* and *Barger*, the district court inferred from Slater's nondisclosure alone that she intended to manipulate the judicial process. A panel of our Court affirmed, concluding that the district court did not abuse its discretion in applying judicial estoppel. Because we announce a new inquiry for evaluating intent to make a mockery of the judicial system, we remand to the panel so that it may decide whether the district court abused its discretion in light of this new standard.

I. Factual Background and Proceedings Below

Slater, a high school graduate, worked for U.S. Steel for more than 10 years performing general manual labor. Slater sued U.S. Steel for discrimination based on race and sex in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981, and for retaliating against her after she complained of race and sex discrimination, in violation of Title VII and § 1981. U.S. Steel moved for summary judgment on all of Slater's claims. The district court granted the motion in part and denied it in part. The court denied summary judgment on Slater's claims that she suffered discrimination in job assignments based on her sex and was fired in retaliation for complaining about racial discrimination. Despite withstanding summary judgment, Slater never had an opportunity to present these claims to a jury.

About a month after the district court's summary judgment ruling, Slater—represented by different counsel than in her discrimination case—filed a petition for Chapter 7 bankruptcy. She did not disclose her lawsuit against U.S. Steel in her bankruptcy petition or the schedules filed with her petition. When asked under penalty of perjury in Schedule B-Personal Property to identify any “contingent and unliquidated claims,” she answered “none.” Voluntary Pet. at 10, *In re Slater*, No. 11-02865 (Bankr. N.D. Ala. June 2, 2011), ECF No. 1. And when asked under penalty of perjury in her Statement of Financial Affairs to identify any “suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case,” she again answered “none.” *Id.* at 29 (emphasis omitted).

After Slater filed her disclosures, the bankruptcy trustee issued a Report of No Distribution, finding there was no property available for distribution from the estate over and above that exempted by law. In the absence of any objections to the report, 30 days later the estate became presumptively fully administered. See Fed. R. Bankr. P. 5009(a).

The next day, U.S. Steel again moved for summary judgment in the employment discrimination case, this time on the ground that because Slater failed to disclose her civil claims in the bankruptcy *1178 proceeding,

the doctrine of judicial estoppel should bar her from pursuing those claims. In response, Slater testified by declaration that she did not intentionally misrepresent facts to the bankruptcy court. She further explained that she misunderstood the question in the Statement of Financial Affairs regarding “suits and administrative proceedings to which the debtor is or was a party” as asking only about suits filed against her.

The next business day after U.S. Steel filed the motion, Slater amended her Statement of Financial Affairs and Schedule B to her bankruptcy petition to disclose her claims against U.S. Steel. The bankruptcy trustee then filed with the bankruptcy court a request to employ the lawyers who were representing Slater in her employment action to continue to pursue the claims against U.S. Steel on behalf of the estate. The bankruptcy court granted the motion.

The bankruptcy case proceeded: upon Slater's petition, the court converted the case from a Chapter 7 to a Chapter 13 proceeding, and Slater filed a proposed Chapter 13 plan, which the bankruptcy court confirmed. Later, though, when Slater failed to pay the trustee under the terms of the confirmed plan, the bankruptcy court dismissed her case, meaning her debts never were discharged in bankruptcy.

Slater's civil action fared no better. The district court granted U.S. Steel's motion for summary judgment, applying the doctrine of judicial estoppel to bar her claims. The court rejected Slater's arguments that her omission of the civil claims in the bankruptcy proceeding was inadvertent and that she never intended to thwart the judicial process. The court explained that under our circuit precedent, a failure to disclose is “ ‘inadvertent’ *only* when ... the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.” Order at 11 (emphasis added) (Doc. 89)¹ (quoting *Barger*, 348 F.3d at 1295-96).

The district court found that Slater knew about her civil claims, filed in 2009, when she completed the bankruptcy disclosures in 2011 and that she had a motive to conceal the claims “to defraud creditors into accepting her [bankruptcy] case as one involving no assets for distribution despite the real possibility with the impending trial of the discrimination case that she could soon be receiving a money settlement or a money judgment in her favor.” *Id.* at 12. Although Slater corrected her disclosures

immediately after U.S. Steel brought the omissions to light, the district court found this fact irrelevant because “waiting until after being caught to rectify the omission is too little, too late.” *Id.* Following *Burnes*, *Barger*, and their progeny, the court drew an inference that Slater intended to make a mockery of the judicial system based on its finding that she had knowledge of the undisclosed claims and a motive to conceal them.

Slater appealed. After oral argument, a panel of this Court affirmed the district court's grant of summary judgment to U.S. Steel. In a concurring opinion, Judge Tjoflat urged the Court to review en banc our precedent permitting the inference on which the district court relied, that a plaintiff who omitted a civil claim as an asset in bankruptcy filings necessarily intended to make a mockery of the judicial system. See *Slater v. U.S. Steel Corp.*, 820 F.3d 1193, 1235 (11th Cir.) (Tjoflat, J., concurring) (explaining that our precedent validating such an inference “guarantees the very mockery of justice the doctrine of judicial estoppel was designed to avoid”), *reh'g en banc granted, op. vacated*, *1179 820 F.3d 1193 (11th Cir. 2016). We agreed to rehear the case en banc and vacated the panel opinion.

II. Overview of Bankruptcy Principles

Before turning to judicial estoppel, we pause for an overview of the Chapter 7 and Chapter 13 bankruptcy procedures that allow debtors to discharge their financial obligations and receive a fresh start to explain how a debtor's pending civil claim is treated in bankruptcy. See *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (explaining that bankruptcy is designed to give “honest but unfortunate debtor[s]” the opportunity to “reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt” (internal quotation marks omitted)). For our purposes here, the main difference between a Chapter 7 and a Chapter 13 proceeding is that creditors are paid primarily with the debtor's prepetition assets in Chapter 7 and with his postpetition earnings in Chapter 13.

[1] “Chapter 7 allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets.” *Harris v. Viegelahn*, — U.S. —, 135 S.Ct. 1829, 1835, 191 L.Ed.2d 783

(2015). When a debtor files a Chapter 7 petition, his assets, subject to certain exemptions, are immediately transferred to a bankruptcy estate. 11 U.S.C. § 541(a)(1). The Chapter 7 trustee is responsible for selling the property in the estate and distributing the proceeds to creditors.² *Id.* §§ 704(a)(1), 726. Although a Chapter 7 debtor “must forfeit virtually all his prepetition property,” the bankruptcy laws give the debtor an immediate fresh start and a break from the financial past “by shielding from creditors his postpetition earnings and acquisitions.” *Harris*, 135 S.Ct. at 1835. The debtor may keep any wages earned or assets acquired after the bankruptcy filing. *Id.* (citing 11 U.S.C. § 541(a)(1)).

[2] In contrast, a debtor who proceeds under Chapter 13 may keep his prepetition property but must repay his creditors over time, generally from what he earns after filing bankruptcy. The Chapter 13 debtor proposes a plan to repay his debts over a three- or five-year period; the plan must be confirmed by the bankruptcy court. Payments under the plan “are usually made from a debtor’s ‘future earnings or other future income.’ ” *Id.* (quoting 11 U.S.C. 1322(a)(1)). In determining the sufficiency of the proposed plan payments, the bankruptcy court must consider the value of the debtor’s assets because the court may confirm the plan only if the present value of the proposed repayments is “not less than the amount that would be paid” to creditors if the debtor’s assets were liquidated under Chapter 7. *See* 11 U.S.C. § 1325(a)(4). If the bankruptcy court confirms the plan, the trustee generally collects a portion of the debtor’s wages through payroll deduction and then distributes the withheld wages to the creditors at the plan’s conclusion. *See Harris*, 135 S.Ct. at 1835. If the debtor completes his payments under the plan, his debts are discharged.³ *See id.*

When a debtor files for bankruptcy under Chapter 13, his assets are transferred to the bankruptcy estate. *See* *1180 11 U.S.C. § 1306(a). But after the bankruptcy plan is confirmed, the property of the estate returns to the debtor except as provided in the plan or order confirming the plan. *See id.* § 1327(b). A Chapter 13 debtor generally is permitted to retain his assets, such as his home or car. *See Harris*, 135 S.Ct. at 1835.

[3] Given these differences, when a debtor’s assets include a civil claim, the claim will be treated differently depending upon whether the bankruptcy is a Chapter 7 or a Chapter 13 proceeding. Because a Chapter 7 debtor forfeits his

prepetition assets to the estate, only the Chapter 7 trustee, not the debtor, has standing to pursue a civil legal claim unless the trustee abandons the asset, which then returns the claim to the possession and control of the debtor. *See Parker v. Wendy’s Int’l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004). But a Chapter 13 debtor retains standing to continue to pursue the civil claim. *See* 11 U.S.C. § 1303; Fed. R. Bankr. P. 6009 (“With or without court approval, the ... debtor in possession may prosecute ... any pending action or proceeding by ... the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.”). Thus, a Chapter 13 debtor may continue to control the lawsuit and the terms of any settlement. *See Crosby v. Monroe Cty.*, 394 F.3d 1328, 1331 n.2 (11th Cir. 2004). With these bankruptcy principles and distinctions in mind, we now turn to the doctrine of judicial estoppel.

III. Judicial Estoppel Analysis

[4] [5] The precise issue before us is how the doctrine of judicial estoppel should be applied when a plaintiff fails to identify a pending civil claim as an asset in a bankruptcy proceeding. To address this issue, we begin by reaffirming that a district court may apply judicial estoppel when a two-part test is satisfied: the plaintiff (1) took a position under oath in the bankruptcy proceeding that was inconsistent with the plaintiff’s pursuit of the civil lawsuit and (2) intended to make a mockery of the judicial system.⁴

We then discuss how a district court should apply the second prong. Our precedent has, in effect, treated the fact of the plaintiff’s omission as establishing the requisite intent. Today we clarify that the district court must consider all the facts and circumstances in determining whether the plaintiff acted with the intent to make a mockery of the judicial system.

A. To Invoke Judicial Estoppel in the Bankruptcy Scenario, District Courts Should Continue to Apply Our Two-Part Test.

[6] The equitable doctrine of judicial estoppel is intended to “prevent the perversion of the judicial process” and “protect [its] integrity ... by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire*, 532 U.S. at 749-50,

121 S.Ct. 1808 (citations and internal quotation marks omitted); see also 18 James Wm. Moore et al., *Moore's Federal Practice* ¶ 131.13[6] (3d ed. 2015) (explaining that doctrine of judicial estoppel is concerned with “the orderly administration of justice and regard for the dignity of court proceedings”). When a party does so, the doctrine of judicial estoppel allows a court to exercise its discretion to dismiss the party's claims. See *New Hampshire*, 532 U.S. at 750, 121 S.Ct. 1808. Stated simply, the doctrine of judicial estoppel *1181 rests on the principle that “absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.” *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (1981)).

[7] [8] [9] Our circuit employs a two-part test to guide district courts in applying judicial estoppel: whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were “calculated to make a mockery of the judicial system.” *Burnes*, 291 F.3d at 1285 (internal quotation marks omitted). Under this test, a district court considers both the plaintiff's actions—whether he made inconsistent statements—and his motive—whether he intended to make a mockery of the judicial system. Judicial estoppel should not be applied when the inconsistent positions were the result of “inadvertence[] or mistake” because judicial estoppel “looks towards cold manipulation and not an unthinking or confused blunder.” *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973).⁵

Before we formulated our two-part test in *Burnes*, the United States Supreme Court addressed the doctrine of judicial estoppel in *New Hampshire v. Maine*, which concerned a boundary dispute between the two states. Availing itself of the Supreme Court's original jurisdiction, New Hampshire sought a declaration that the low water mark of a river on Maine's shore was the boundary between the two states. 532 U.S. at 745, 747, 121 S.Ct. 1808. Maine moved to dismiss the case, arguing that judicial estoppel should bar New Hampshire's action because in previous litigation between the two states New Hampshire had agreed to a consent decree that set the boundary at the middle of the river's main channel of navigation. *Id.* at 748, 121 S.Ct. 1808. The Supreme Court

applied judicial estoppel to bar New Hampshire's later attempt to claim more land by arguing for a different boundary. *Id.* at 749, 121 S.Ct. 1808.

The Court announced a three-part test that “typically inform[s]” the decision whether to apply the judicial estoppel doctrine: (1) “a party's later position must be clearly inconsistent with its earlier position”; (2) the party had to “succeed[] in persuading a court to accept that party's earlier position, so that judicial acceptance of” the party's later position “would create the perception that either the first or the second court was misled”; and (3) the party “seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Id.* at 750-51, 121 S.Ct. 1808 (internal quotation marks omitted). Additionally, the Court recognized that judicial estoppel should not be applied “when a party's prior position was based on inadvertence or mistake.” *Id.* at 753, 121 S.Ct. 1808 (internal quotation marks omitted). Although the Court announced this three-part test, it emphasized that it was “not establish [ing] inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel.” *Id.* at 751, 121 S.Ct. 1808.⁶

*1182 Slater argues that we must abandon our test for applying judicial estoppel in favor of the *New Hampshire* test. In *New Hampshire*, though, the party seeking to apply judicial estoppel, Maine, was a party to the prior lawsuit in which New Hampshire had taken an inconsistent position. See *id.* at 745, 121 S.Ct. 1808. The Supreme Court was not presented with—and so did not address—the question of how judicial estoppel should be applied when the party seeking to invoke the doctrine was not a party to the other proceeding. Here, because the party seeking to invoke judicial estoppel, U.S. Steel, was not a party to the bankruptcy case and could not have been unfairly disadvantaged by any position Slater took in that case, we conclude that *New Hampshire* is inapplicable. Consistent with *New Hampshire's* recognition that its test was not exhaustive, we adhere to our two-part test in the scenario before us.⁷

B. Under Our Precedent, a Plaintiff Who Omitted a Civil Claim in a Bankruptcy Filing Is Deemed to Have Intended to Make a Mockery of the Judicial System.

Turning back to our two-part test for applying judicial estoppel, the first part is satisfied because Slater took

an inconsistent position under oath in her bankruptcy proceeding. We focus today on the second part: how a court should determine whether a plaintiff intended make a mockery of the judicial system.

In *Burnes* and *Barger*, we endorsed an inference that a plaintiff who failed to disclose a lawsuit in a Chapter 7 bankruptcy intended to manipulate the judicial system because the omission was not inadvertent. In effect, we treated the fact that the plaintiff could potentially benefit from the nondisclosure as sufficient to establish that the plaintiff, in fact, intended to deceive the court and manipulate the proceedings. And we subsequently extended that reasoning to cases involving Chapter 13 debtors as well.⁸

1. *Burnes v. Pemco Aeroplex, Inc.*

In *Burnes*, we held that a district court did not abuse its discretion in applying judicial estoppel to bar plaintiff Levi Billups's claims in a civil lawsuit when he failed to disclose those claims as assets in his bankruptcy filings. See 291 F.3d at 1286-88. After Billups filed for Chapter 13 bankruptcy, he sued his employer, Pemco, for racial discrimination, but never amended his bankruptcy disclosures to identify the lawsuit. When Billups later sought to convert the Chapter 13 petition into a Chapter 7, the bankruptcy court ordered him to update his schedules to reflect changes since the original filing. He nevertheless *1183 failed to report his pending lawsuit and then received a no-asset discharge of his debts under Chapter 7. After the bankruptcy was closed, Pemco moved for summary judgment based on judicial estoppel. *Id.* The district court granted the motion, and we affirmed. *Id.* at 1284, 1289.

In reviewing the district court's application of judicial estoppel, we applied our two-part test inquiring whether the debtor took an inconsistent position under oath in another proceeding and whether the inconsistency was calculated to make a mockery of the judicial system. *Id.* at 1285. Because it was beyond dispute that Billups had taken inconsistent positions about the existence of his civil claims, we characterized the issue on appeal as “one of intent.” *Id.* at 1286.

Billups argued that he lacked the requisite intent to mislead the court. Looking to decisions of other circuits,

we concluded that the district court permissibly drew an inference that Billups had engaged in intentional manipulation. See *id.* at 1287. Obviously Billups knew about his civil claims, which he was pursuing in a separate action. And an incentive existed to hide the lawsuit from his creditors because it was “unlikely he would have received the benefit of ... a no asset, complete discharge had his creditors, the trustee, or the bankruptcy court known of a lawsuit claiming millions of dollars in damages.” *Id.* at 1288. We permitted the inferential leap from Billups's potential motive to hide the lawsuit to the conclusion that he in fact acted with such a motive and thus intended to manipulate the proceedings.

Billups also argued that the doctrine of judicial estoppel should not be applied because he could reopen his bankruptcy case and amend his filings to disclose the lawsuit. We rejected this argument, explaining that a debtor should not be permitted to escape judicial estoppel simply by correcting his nondisclosure once it has been discovered. Because “[t]he success of our bankruptcy laws requires a debtor's full and honest disclosure,” we reasoned, a debtor cannot “back-up, re-open the bankruptcy case, and amend his bankruptcy filings” after his adversary raises judicial estoppel. *Id.* Allowing the debtor to proceed in these circumstances, we said, would “suggest[] that a debtor should consider disclosing potential assets only if he is caught concealing them,” which “would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure” of assets. *Id.*

2. *Barger v. City of Cartersville*

In *Barger*, a 2-1 decision, the panel majority followed *Burnes* in holding that a district court did not abuse its discretion when it found, based solely on the debtor's failure to disclose her civil claims in her bankruptcy proceedings, that she intended to make a mockery of the judicial system. See *Barger*, 348 F.3d at 1297. After *Barger* was demoted, she brought employment discrimination claims against her employer, the City of Cartersville, seeking money damages and reinstatement to her earlier position. While her lawsuit was pending, *Barger* filed for Chapter 7 bankruptcy but omitted her civil claims from her disclosures. *Id.* at 1291. *Barger* had told both her bankruptcy attorney and the trustee that she had a pending lawsuit against the City, in which she sought

reinstatement to her former position, but she had failed to mention that she also sought damages. *Id.* After Barger received a no-asset discharge of her debts, the City moved for summary judgment based on judicial estoppel. Barger then asked the bankruptcy court to reopen her case so that she could disclose her employment discrimination claims. *Id.* at 1291-92. After a hearing in which the City participated, the bankruptcy court permitted Barger to reopen and allowed the trustee to pursue the claims against *1184 the City, finding that Barger had neither intentionally concealed the discrimination claims nor sought to obtain an advantage for herself by failing to disclose them. *Id.* Nonetheless, the district court applied judicial estoppel to bar the claims. *Id.* at 1292.

The panel majority affirmed the district court's application of judicial estoppel and, following *Burnes*, conflated the inquiry into whether Barger had acted voluntarily with the inquiry into whether she intended to make a mockery of the judicial system. *See id.* at 1294. To determine whether Barger had the requisite intent, the panel majority considered whether her nondisclosure was "inadvertent" by looking to whether she knew about the undisclosed claims and had a motive to conceal them. *Id.* at 1295-96. As to motive, the panel majority recognized that a debtor who omitted such a claim would be able to "keep any proceeds for herself and not have them become part of the bankruptcy estate." *Id.* at 1296.

The dissent in *Barger* objected to the panel majority's analysis of Barger's intent to make a mockery of the judicial system. *Id.* at 1298 (Barkett, J., dissenting). The dissent argued that the majority had improperly treated the fact that Barger's omission was not "inadvertent" as sufficient to establish that she had intended to mislead the court. *See id.* (explaining that the "failure to meet the specific inadvertence criteria" does not "automatically impl[y] an intent to make a mockery of the judicial system" (internal quotation marks omitted)). The dissent urged that courts should look to "all of the circumstances of [the] particular case" to determine whether the debtor had the requisite intent. *Id.* at 1297-98 (internal quotation marks omitted).

3. Cases Post *Burnes* and *Barger*

Even though *Burnes* and *Barger* both involved Chapter 7 bankruptcies, we have extended their reasoning to cases

involving Chapter 13 debtors. *See De Leon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1292 (11th Cir. 2003) (holding that because Chapter 13 debtor "knew about his [civil] claim and possessed a motive to conceal it[,] ... we can infer from the record his intent to make a mockery of the judicial system" (internal quotation marks omitted)). We acknowledged that a Chapter 13 debtor would always have a potential motive to conceal a civil claim from creditors so as to "keep the proceeds for herself and den[y] the creditors a fair opportunity to claim what was rightfully theirs." *See Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1275-76 (11th Cir. 2010).

It is true that in two panel decisions after *Burnes* and *Barger* we applied judicial estoppel more narrowly, but these decisions cannot be reconciled with our prior precedent. First, in *Parker*, we reversed the district court's application of judicial estoppel to bar an employment discrimination claim that a debtor failed to disclose as an asset in his Chapter 7 bankruptcy petition. 365 F.3d at 1269. We said that judicial estoppel should not be applied in that case because when the debtor filed Chapter 7 bankruptcy, the trustee, as representative of the bankruptcy estate, became "the proper party in interest, and ... the only party with standing to prosecute causes of action belonging to the estate." *Id.* at 1272. We held that because the trustee was the real party in interest in the civil lawsuit, had never taken an inconsistent position under oath, and had not abandoned the discrimination claim, the district court abused its discretion in applying judicial estoppel. *Id.* As the panel in the case before us recognized, *Parker* cannot be reconciled with our decision in *Barger*, in which we upheld the application *1185 of judicial estoppel to bar civil claims that the Chapter 7 debtor failed to disclose, even though we acknowledged that the trustee was the real party in interest.

Second, in *Ajaka v. Brooksamerica Mortgage Corp.*, 453 F.3d 1339 (11th Cir. 2006), we looked beyond a Chapter 13 debtor's failure to disclose a civil lawsuit to determine whether the debtor actually intended to make a mockery of judicial proceedings. After filing a Chapter 13 petition, Ajaka filed a Truth in Lending Act claim against his mortgage lender. *Id.* at 1342. Ajaka directed his bankruptcy attorney to amend his bankruptcy schedules to disclose the lawsuit, but his attorney failed to do. *Id.* at 1343. Because Ajaka had failed to disclose his claim to the bankruptcy court, the lender moved for summary judgment based on judicial estoppel. Even though the

record showed that all the creditors were aware of Ajaka's civil claims against the lender before the lender raised judicial estoppel, the district court found that Ajaka intended to make a mockery of the judicial system. *Id.* We reversed and held that the district court abused its discretion in applying judicial estoppel when there was a question of material fact about whether Ajaka had an intention to conceal his civil claim from his creditors. We relied in part on the fact that he had subsequently amended his bankruptcy schedules. *Id.* at 1346.

Ajaka cannot be squared with *Burnes* and *Barger*, which looked solely to whether the debtor omitted a claim to determine the debtor's intent. Given the flaws in our reasoning in *Burnes* and *Barger* and the inconsistencies in our precedent, we now address how district courts should evaluate a debtor's intent.

C. Deciding Whether a Plaintiff Intended to Make a Mockery of the Judicial System Requires Review of the Totality of the Facts and Circumstances.

[10] We hold that to determine whether a plaintiff's inconsistent statements were calculated to make a mockery of the judicial system, a court should look to all the facts and circumstances of the particular case. When the plaintiff's inconsistent statement comes in the form of an omission in bankruptcy disclosures, the court may consider such factors as the plaintiff's level of sophistication, whether and under what circumstances the plaintiff corrected the disclosures, whether the plaintiff told his bankruptcy attorney about the civil claims before filing the bankruptcy disclosures, whether the trustee or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosures, whether the plaintiff identified other lawsuits to which he was party, and any findings or actions by the bankruptcy court after the omission was discovered.⁹ We overrule the portions of *Burnes* and *Barger* that permitted the inference that a plaintiff intended to make a mockery of the judicial system simply because he failed to disclose a civil claim.¹⁰

Three reasons lead us to reject the inference we accepted in *Burnes* and *Barger* in favor of a rule that a district court should look to all the circumstances of the case. First, such an inquiry ensures that judicial estoppel is applied only when a party acted with a sufficiently culpable *1186 mental state. Second, it allows a district court to consider any proceedings that occurred in the bankruptcy court

after the omission was discovered, arguably a better way to ensure that the integrity of the bankruptcy court is protected. Third, limiting judicial estoppel to those cases in which the facts and circumstances warrant it is more consistent with the equitable principles that undergird the doctrine. By rejecting a one-size-fits-all approach, we reduce the risk that the application of judicial estoppel will give the civil defendant a windfall at the expense of innocent creditors.

First, a district court should look to all the facts and circumstances of the case to decide whether a plaintiff intended to mislead the court because that question is separate from and not answered by whether the plaintiff voluntarily, as opposed to inadvertently, omitted assets. Our decisions in *Burnes* and *Barger* conflated the question of whether the plaintiff's omission was inadvertent with the separate question of whether the plaintiff actually intended to manipulate the judicial system to his advantage.

After all, a plaintiff may have failed to disclose a pending lawsuit because he did not understand the disclosure obligations. It is not difficult to imagine that some debtors, particularly those proceeding *pro se*,¹¹ may not realize that a pending lawsuit qualifies as a "contingent and unliquidated claim" that must be disclosed on a schedule of assets. Although the question asking for a list of "all suits and administrative proceedings to which the debtor is or was a party" seems more straightforward, as Slater's testimony shows, it nevertheless may be misunderstood.¹² So it makes sense that a district court should look beyond a plaintiff's omission in determining whether the plaintiff intended to misuse the judicial process.

Second, a broader inquiry allows a district court to consider any findings or other actions by the bankruptcy court that might help in determining whether the debtor purposely intended to mislead the court and creditors. We have justified applying judicial estoppel after a debtor omitted a claim from his bankruptcy disclosures as necessary to ensure full and honest disclosure to the bankruptcy courts and protect "the effective functioning of the federal bankruptcy system." *Burnes*, 291 F.3d at 1286 (internal quotation marks omitted). But we have overlooked that bankruptcy courts do not necessarily view such omissions as establishing a debtor's intent to mislead the bankruptcy court.

To the contrary, the Bankruptcy Code and Rules liberally permit debtors to amend their disclosures when an omission is discovered. Yes, the Bankruptcy Code requires debtors to disclose all their assets, including contingent and unliquidated claims. See 11 U.S.C. § 521(a)(1)(B) (requiring debtor to file a schedule of assets and liabilities). But Bankruptcy Rule 1009, which was proposed by the Supreme Court and adopted by Congress, permits a debtor to amend a schedule or statement “as a matter of course at any time before the case is closed.” Fed. R. Bankr. R. P. 1009(a). Further, the bankruptcy court retains broad discretion to reopen a closed case on a motion of the debtor or another party in interest “to administer” an asset that had not previously been *1187 scheduled. 11 U.S.C. § 350(b). It strikes us as inconsistent with these principles—which recognize that omissions occur and liberally allow amendment and correction of disclosures—to infer that a debtor who failed to disclose a lawsuit necessarily meant to manipulate the bankruptcy proceedings.

We see no good reason why, when determining whether a debtor intended to manipulate the judicial system, a district court should not consider the bankruptcy court's treatment of the nondisclosure. We reject the idea that encouraging a district court to blind itself to subsequent proceedings in the bankruptcy court, particularly the bankruptcy court's decision about whether to allow the debtor to amend his disclosures or reopen his bankruptcy case, better protects the bankruptcy system. Indeed, the bankruptcy court has tools of its own to punish a debtor who it determines purposefully tried to hide assets. For example, it may revoke the discharge or deny an exemption for the proceeds from the debtor's lawsuit, see *In re Barger*, 279 B.R. 900, 908 (Bankr. N.D. Ga. 2002); it may even fine or imprison a debtor for contempt or refer the matter for the United States Attorney's Office to consider prosecuting the debtor for perjury. See 18 U.S.C. §§ 401, 1621.¹³

Third, considering all the circumstances of the case is more consistent with the equitable principles that underlie the doctrine of judicial estoppel. “Equity eschews mechanical rules” and “depends on flexibility.” *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946).¹⁴ Requiring the district court to consider all facts and circumstances in evaluating the plaintiff's intent is the more flexible, less mechanical approach that

equity demands. In addition, this approach reduces the likelihood that an otherwise liable civil defendant will receive an unjustified windfall or that innocent creditors will be harmed.

[11] When a district court applies a judicial estoppel bar based on nondisclosure in a bankruptcy proceeding without determining that the plaintiff deliberately intended to mislead, the civil defendant avoids liability on an otherwise potentially meritorious civil claim while providing no corresponding benefit to the court system. As an equitable doctrine, judicial estoppel should apply only when the plaintiff's conduct is egregious enough that the situation “demand[s] equitable intervention.” *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). When a plaintiff intended no deception, judicial estoppel may not be applied. If a court applies judicial estoppel to bar the plaintiff's claim absent such intent, it awards the civil defendant an unjustified windfall.¹⁵ Just as equity *1188 frowns upon a plaintiff's pursuit of a claim that he intentionally concealed in bankruptcy proceedings, equity cannot condone a defendant's avoidance of liability through a doctrine premised upon intentional misconduct without establishing such misconduct. See *Coral Springs St. Sys, Inc. v. City of Sunrise*, 371 F.3d 1320, 1340-41 (11th Cir. 2004) (explaining that a court of equity must “promote and enforce justice, good faith, uprightness, fairness, and conscientiousness” from both plaintiff and defendant (internal quotation marks omitted)).

What is more in this circumstance, the application of judicial estoppel poses a potential risk of harm to innocent creditors. When a civil claim is dismissed on the basis of judicial estoppel, the asset becomes worthless—losing any potential to increase the value of the bankruptcy estate—which in turn harms creditors. It is easy to see why in Chapter 7 proceedings: the trustee is responsible for liquidating the assets in the estate and then distributing the proceeds to creditors. When the civil claim is dismissed, there can be no proceeds from a recovery or settlement for distribution to creditors. See 11 U.S.C. §§ 704(a)(1), 726.¹⁶

Although not as apparent for Chapter 13 proceedings, a risk remains that the dismissal will harm creditors. The amount of proceeds that creditors receive in a Chapter 13 bankruptcy is dictated by the confirmed plan, and a debtor's payments under the plan are generally based

upon the debtor's expected future earnings. See *Harris*, 135 S.Ct. at 1835. But a plan can be confirmed only if the payments to the creditors are either equal to or exceed what the creditors would have received in a Chapter 7 bankruptcy, meaning that the value of a civil claim is taken into account in formulating and reviewing the plan. See 11 U.S.C. § 1325(a)(4). If the debtor, trustee, creditors, and bankruptcy court know that a civil claim is likely to be dismissed based on judicial estoppel, they are likely to treat the claim as worthless, depriving the bankruptcy estate of what (absent judicial estoppel) might have been a valuable asset. Because the application of judicial estoppel may harm innocent creditors, equitable principles dictate that courts proceed with care and consider all the relevant circumstances.

In the face of these compelling reasons why district courts should consider the totality of the facts and circumstances of the case to determine whether a plaintiff intended to make a mockery of the judicial system, U.S. Steel urges us to adhere to *Burnes* and *Barger*. First, U.S. Steel argues *1189 that no change to our precedent is required because even when a district court finds that the plaintiff intended to manipulate the judicial system, the court remains “entirely free to find in particular circumstances that a debtor's omission was inadvertent.” Appellee's Br. at 3. But U.S. Steel overlooks that under our case law an omission of a claim is “inadvertent” *only* when a [debtor] either lacks knowledge of the undisclosed claim or has no motive for [its] concealment.” *Barger*, 348 F.3d at 1295 (emphasis added). No plaintiff who omitted civil claims from bankruptcy disclosures will be able to show that he acted inadvertently because, as we explained above, the plaintiff always will have knowledge of his pending civil claim and a potential motive to conceal it due to the very nature of bankruptcy. The Supreme Court has told us that judicial estoppel must not be applied to an inadvertent inconsistency, *New Hampshire*, 532 U.S. at 753, 121 S.Ct. 1808, yet under our precedent inadvertence places no meaningful limit on the doctrine's application.

[12] Second, U.S. Steel argues that by overruling *Burnes* and *Barger*, we will create a circuit split. In fact, a circuit split exists regardless. The approach we adopt today is consistent with the decisions of at least three other circuits, which have recognized that whether a plaintiff intended to make a mockery of the judicial system requires consideration of more than just whether the plaintiff failed to disclose a claim.¹⁷ Other circuits, consistent

with *Burnes* and *Barger*, have endorsed the inference that a plaintiff who omitted a claim necessarily intended to manipulate the judicial system.¹⁸ For the reasons we have already discussed, we find the analysis of the Sixth, Seventh, and Ninth Circuits to be more persuasive and conclude that theirs is the better approach.¹⁹

We thus overrule our prior precedent approving the inference that a plaintiff intended to make a mockery of the judicial system solely because he failed to disclose his civil claim in his bankruptcy. Instead, district courts should consider all the facts and circumstances of the case to determine whether the debtor had the requisite intent.

IV. Conclusion

Having identified the proper standard for determining when judicial estoppel may be applied, we remand this appeal to the panel to consider whether the district court abused its discretion in applying judicial estoppel and to resolve any other remaining issues.

REMANDED.

*1190 ED CARNES, Chief Judge, concurring:

I concur in the majority opinion for the Court, especially in light of footnote 12, which acknowledges that a district court is not required to accept the testimony of the plaintiff that her misstatements in the bankruptcy proceeding were not made with intent to mislead, even if that testimony is uncontradicted.

This is in keeping with the long-established law of this circuit. See, e.g., *Burston v. Caldwell*, 506 F.2d 24, 26 (5th Cir. 1975) (“The district court, of course, was not required to accept [the petitioner's] testimony, even if uncontradicted.”); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1570 (11th Cir. 1997) (noting that the district court as factfinder was free to reject an expert witness' testimony even if it was uncontradicted); *Murphy v. City of Flagler Beach*, 846 F.2d 1306, 1310 (11th Cir. 1988) (explaining that the factfinder “was not bound to accept the plaintiff's evidence ... even if it was not controverted”); see also *United States v. Samples*, 897 F.2d 193, 198 (5th Cir. 1990) (“The trier of fact need not credit any witness' testimony, even if unimpeached.”).

We have taken the principle even further than that. In criminal cases, “[w]e have long recognized that a statement by a defendant, if disbelieved by the jury, may be considered substantive evidence of the defendant’s guilt.” [United States v. Tobin](#), 676 F.3d 1264, 1287 (11th Cir. 2012) (quotation marks omitted), abrogated on other grounds by [United States v. Davila](#), 569 U.S. —, 133 S.Ct. 2139, 186 L.Ed.2d 139 (2013); [United States v. Martinez](#), 83 F.3d 371, 374 (11th Cir. 1996) (“But the jury was entitled to reject Martinez’s testimony and to consider it as substantive evidence of his guilt.”). And “this rule applies with special force,” we have stressed, “where the element to be proved is the defendant’s knowledge or intent.” [Martinez](#), 83 F.3d at 374–75; accord [United States v. Vazquez](#), 53 F.3d 1216, 1225 (11th Cir. 1995) (noting that the rule a factfinder, after observing a defendant testify, can infer that the opposite of her testimony is true “applies with special force where the elements to be proved for a conviction include highly subjective elements: for example, the defendant’s intent or knowledge”).

All of those decisions are particularly important in light of our holding today that judicial estoppel will bar a claim not disclosed by the plaintiff in her bankruptcy proceeding only if the omission was done with the intent to mislead. The intent behind an inaccurate or misleading statement or omission is a purely subjective fact that can seldom be proven by objective facts alone. People who have defrauded others through misleading bankruptcy schedules, which are signed under penalty of perjury, have

committed a crime. It is a small step from original perjury to cover-up perjury.

If district courts were required to accept a plaintiff’s testimony that she did not intend to defraud her creditors by omitting a claim from her bankruptcy schedules, judicial estoppel never would be applied in these circumstances. The possibility that the doctrine could apply to claims not disclosed in bankruptcy proceedings would be purely academic and serve no deterrent purpose. And if debtors were freed from any threat of judicial estoppel, the losers would be both honest creditors and the integrity of the judicial process, which means we all would lose.

That is why the one sentence contained in footnote 12 is so important. It means that in deciding whether a plaintiff intended to mislead when she omitted a claim from her bankruptcy schedules, or failed to update a schedule to include the claim, the district court is not required to accept the plaintiff’s denial of her intent. And that is true even if her denial is made under oath and not contradicted by other evidence. *1191 The district court has the authority and responsibility to find the facts and not to blindly accept testimony.

All Citations

871 F.3d 1174, 130 Fair Empl.Prac.Cas. (BNA) 727, 64 Bankr.Ct.Dec. 174, 27 Fla. L. Weekly Fed. C 190

Footnotes

- * Judge Hull recused herself and did not participate in these en banc proceedings. Judge Newsom joined the Court on August 4, 2017, and did not participate in these en banc proceedings.
- 1 Citations to “Doc.” refer to numbered docket entries in the district court record.
- 2 When all the debtor’s assets are exempt from the bankruptcy estate, meaning that no property is available for distribution to creditors, streamlined procedures may apply. See [Fed. R. Bankr. P. 2002\(e\)](#).
- 3 If the debtor fails to make payments due under a Chapter 13 plan, he may be forced to convert to a Chapter 7 proceeding or the court may dismiss his bankruptcy case entirely. See [11 U.S.C. § 1307\(a\)-\(c\)](#).
- 4 Because judicial estoppel is an equitable doctrine, we review the district court’s decision to apply the doctrine for abuse of discretion. See [New Hampshire v. Maine](#), 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); [Talavera v. Sch. Bd. of Palm Beach Cty.](#), 129 F.3d 1214, 1216 (11th Cir. 1997).
- 5 Decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981 are binding on this Court. See [Bonner v. City of Prichard](#), 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).
- 6 The Supreme Court concluded that all three parts of the test were satisfied: New Hampshire had taken inconsistent positions by changing its argument about the location of the boundary, it had succeeded in persuading the Supreme Court to accept its earlier position when the Court accepted the parties’ agreement about the location of the boundary and entered a consent decree, and it would gain an unfair advantage at Maine’s expense if permitted to seek to move

the boundary. See *New Hampshire*, 532 U.S. at 751-55, 121 S.Ct. 1808. And “New Hampshire’s position” could not “be regarded as a product of inadvertence or mistake.” *Id.* at 753, 121 S.Ct. 1808.

- 7 We note that other circuits have taken a similar approach in not rigidly adhering to the *New Hampshire* test (that is, considering different factors) when the party seeking to invoke judicial estoppel was not a party to the case in which the other party took an inconsistent position. See, e.g., *Stephenson v. Malloy*, 700 F.3d 265, 273 (6th Cir. 2012) (considering whether debtor who omitted lawsuit in bankruptcy disclosures had acted in bad faith); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 325 (3d Cir. 2003) (considering, as part of judicial estoppel test, whether a lesser sanction would have remedied the damage done by the litigant’s misconduct).
- 8 See *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1275-76 (11th Cir. 2010); *De Leon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1291-92 (11th Cir. 2003).
- 9 We emphasize that this list is not exhaustive; the district court is free to consider any fact or factor it deems relevant to the intent inquiry.
- 10 We do not overrule these cases entirely. Specifically, our decision today has no effect on the portion of *Burnes* holding that judicial estoppel did not apply to bar the debtor’s injunctive relief claims, 291 F.3d at 1288-89, or the portions of *Barger* addressing standing, estoppel, and the application of judicial estoppel to the debtor’s claim for injunctive relief, 348 F.3d at 1292-93, 1297.
- 11 In 2015, 9.2% of Chapter 7 and 8.5% of Chapter 13 petitions nationwide were filed by debtors proceeding *pro se*. Michael B. Joseph, *Consumer Pro Se Bankruptcy: Finding Hope in Hopelessness*, 35 Am. Bankr. Inst. J. 32, 32 (May 2016).
- 12 Of course, the district court may determine that a plaintiff’s testimony that he misunderstood the disclosure obligations is not credible.
- 13 U.S. Steel argues that judicial estoppel is also necessary to protect the integrity of district courts from plaintiffs who pursue civil claims that they implicitly admitted in their bankruptcy proceedings were worthless. It posits that a plaintiff may omit a civil claim from his bankruptcy disclosures because he knew it was worthless, yet attempt to commit a fraud on the district court by trying to persuade the court that the claim has value. But under the rule we adopt today, a district court may apply judicial estoppel if it decides that the plaintiff intended to manipulate the judicial process in either court; it simply must consider the totality of the facts and circumstances before making that determination.
- 14 See also *DelCostello v. Int’l Bros. of Teamsters*, 462 U.S. 151, 162, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) (explaining that principles of equity are hostile to “mechanical rules” (internal quotation marks omitted)); *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (explaining that whether a court should exercise its discretionary equitable powers should not depend on an “automatic rule”).
- 15 U.S. Steel contends that civil defendants receive no “pure windfall” if judicial estoppel is applied as the district court did here because they receive only the “incidental benefit” of escaping civil liability in exchange for providing the valuable service of “exposing abuses of the bankruptcy system.” Appellee’s Br. at 52-53 (internal quotation marks omitted). But only when the plaintiff intended to mislead is the defendant exposing an abuse of the system. In a similar vein, U.S. Steel argues that unless courts apply judicial estoppel consistent with our existing precedent, civil defendants will have no incentive to uncover omissions of civil lawsuits in bankruptcy filings, and such omissions will go undetected. Not so. Civil defendants like U.S. Steel will still have an incentive to research and discover whether the plaintiff failed to disclose a civil claim because the court may apply judicial estoppel if the facts and circumstances of the case show that the plaintiff had the requisite intent to deceive. In addition, the plaintiff’s nondisclosure may provide fodder for cross examination and impeachment in the civil suit.
- 16 As we observed above, our holding in *Parker* that judicial estoppel should not apply against a Chapter 7 trustee conflicted with *Barger*. Because we overrule that portion of *Barger*, *Parker* no longer conflicts with prior panel precedent, and so there is no question about its continued viability.
- 17 See *Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542, 548 (7th Cir. 2014) (reversing application of judicial estoppel because the civil defendant “needed to show more than an initial nondisclosure on a bankruptcy schedule”); *Ah Quin v. Cty. of Kauai Dep’t. of Transp.*, 733 F.3d 267, 276 (9th Cir. 2013) (rejecting a “presumption of deceit” where “the plaintiff-debtor has reopened the bankruptcy proceedings and has corrected the initial filing error”); *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 899 (6th Cir. 2004) (reversing district court’s application of judicial estoppel where plaintiffs omitted the claim because defendant “provide[d] no additional evidence that Plaintiffs demonstrated fraudulent intentions towards the court”).
- 18 See, e.g., *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1157-60 (10th Cir. 2007) (“Where a debtor has both knowledge of the claims and a motive to conceal them, courts routinely, albeit at times *sub silentio*, infer deliberate manipulations.”);

In re Superior Crewboats, Inc., 374 F.3d 330, 335-36 (5th Cir. 2004) (concluding that judicial estoppel applied because plaintiffs knowingly omitted civil claim from bankruptcy disclosures).

19 U.S. Steel also argues that *stare decisis* requires us to adhere to our precedent, but the en banc court may overrule panel decisions. See *McKinney v. Pate*, 20 F.3d 1550, 1565 n.21 (11th Cir. 1994) (en banc).