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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001260-MR

NATHAN JEFFRIES — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN HORNE, SENIOR JUDGE
ACTION NO. 05-CI-02356

RALPH CHAFFIN;
COMPUTERPHOBIA, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

KELLER, JUDGE: Appellant, Nathan Jeffries (Jeffries), appeals from the Boone Circuit Court's summary judgment. On appeal, Jeffries argues that summary judgment should not have been granted, as the doctrine of judicial estoppel was improperly applied to the case herein. We affirm.

FACTS

Jeffries and Ralph Chaffin (Chaffin) started a business together, "Computer Phobia, LLC" (Phobia).[1] Jeffries owned a 51% interest in Phobia and Chaffin had the remaining 49% interest. According to Chaffin, the two began discussing closing the business in January of 2005. In March of 2005, Jeffries began exploring the possibility of filing for bankruptcy protection.

In late August or early September of 2005, Jeffries discovered that his business cell phone service had been discontinued and that Chaffin had changed the locks on the doors to Phobia. Shortly thereafter, Jeffries received an eviction notice for alleged non-payment of rent. Chaffin then sent Jeffries a letter on September 16, 2005, notifying him of his resignation from the company.

After leaving Phobia, Chaffin opened his own computer store, "No Ware Gaming and Computers, LLC." This store was located at the same site as Phobia had been, used Phobia's telephone number and equipment, employed one of Phobia's employees, and serviced many of Phobia's clients.

On September 28, 2005, Jeffries filed for bankruptcy protection and listed Phobia as having no market value. On December 21, 2005, Jeffries filed suit in Boone Circuit Court against Chaffin alleging: 1) breach of contract; 2) fraud; 3) willful destruction of business; and 4) breach of fiduciary duty. Chaffin then filed a counter-claim alleging: 1) breach of contract; 2) breach of implied good faith and fair dealing; 3) fraud in the inducement; 4) negligent misrepresentation; 5) breach of fiduciary duty; and

[1] Appellant spelled the business "Computerphobia" in his brief while the Appellee spelled it "Computer Phobia." To simplify abbreviation we have adopted the latter.

6) tortious interference with a business. Chaffin also asked the circuit court for judicial dissolution of Phobia. We note that Jeffries neither listed this lawsuit in his initial petition for bankruptcy nor sought to amend that petition to include his lawsuit against Chaffin as a potential asset. On January 31, 2006, the bankruptcy court confirmed Jeffries's bankruptcy and discharged Jeffries.

On February 27, 2006, Chaffin filed a motion for summary judgment with the circuit court. In his motion, Chaffin argued that Jeffries was judicially estopped from pursuing a civil suit involving Phobia because he had failed to notify the bankruptcy court of this potential asset and because he had assigned Phobia no market value. In his response, Jeffries argued that the plaintiffs in the case law cited by Chaffin acted intentionally and/or in bad faith. Jeffries stated that his failure to notify the bankruptcy court was simply a mistake, and he noted that there was no evidence that he acted intentionally or in bad faith. Therefore, Jeffries asserted that the cited case law was not dispositive.

On April 12, 2006, the circuit court granted Chaffin's motion for summary judgment on the basis of judicial estoppel. On June 8, 2006, the circuit court then denied Jeffries' motion to reconsider its earlier summary judgment. It is from this order that Jeffries now appeals.

ANALYSIS

On appeal, Jeffries contends that the circuit court erred in granting summary judgment. The standard of review for summary judgment is, "whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party

was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. National Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor. *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

> The judicial estoppel doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. [Citations omitted.]
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> . . .
>
> The 'prior success' requirement does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits . . . judicial acceptance means only that the first court has adopted the position urged by the party . . . .

Colston Investment Co. v. Home Supply Co., 74 S.W.3d 759, 763 (Ky.App. 2001).

The circuit court based its decision on the judicial estoppel argument Chaffin raised. In support of his motion before the circuit court and in support of his argument on appeal, Chaffin cited to *Lewis v. Weyerhaeuser*, 141 Fed. Appx. 420, 2005 Fed.App. 0564N (6th Cir. 2005). Lewis was discharged by Weyerhaeuser when she failed to return to work after taking maternity leave. Following her discharge by Weyerhaeuser, Lewis and her husband filed a joint petition for bankruptcy. One month after her discharge in bankruptcy, Lewis filed a discrimination suit against Weyerhaeuser. Although Lewis admitted that she was contemplating filing suit against Weyerhaeuser when she filed for bankruptcy protection, Lewis did not list the suit as a potential asset on her bankruptcy forms. Furthermore, Lewis did not list income she had received from

Weyerhaeuser on her bankruptcy forms. Weyerhaeuser filed a motion for summary judgment arguing that Lewis was judicially estopped from filing a discrimination claim when she failed to list that claim as a potential asset in her bankruptcy proceeding. The Federal District Court granted Weyerhaeuser's motion and the Sixth Circuit Court of Appeals affirmed.

In affirming, the Sixth Circuit noted that the Bankruptcy Code requires a debtor to list all assets, and that wages and a potential cause of action are assets. The Court then noted that Lewis's discrimination suit was contrary to her bankruptcy petition and that the bankruptcy court had adopted Lewis's position that she did not have any potential causes of action. As to Lewis's claim that her failure to disclose the discrimination suit was made in good faith, the Court noted that mistake or inadvertence will excuse a prior inconsistency. However, the Court held that Lewis did not establish that her failure to notify the bankruptcy court of her discrimination claim and wages was a mistake or inadvertent. The Court noted the timing of the filing of the discrimination action – one month after the conclusion of the bankruptcy proceeding – and Lewis's admission that she discussed the potential claim with a paralegal in her bankruptcy attorney's office as evidence that Lewis clearly knew of the claim and her failure to list it in the bankruptcy proceedings was not a mistake or inadvertent.

Jeffries, like Lewis, argues that his failure to notify the bankruptcy court of his suit against Chaffin was inadvertent and/or a mistake. Furthermore, Jeffries argues that the Court in *Lewis* focused as much, if not more, attention on her failure to disclose the income from Weyerhaeuser as on Lewis's failure to disclose the potential lawsuit.

Finally, Jeffries argues that *Lewis* should not be dispositive because it was designated "not recommended for full text publication."

As to the last argument, while the holding in *Lewis* is not binding precedent, its reasoning is persuasive. Applying that reasoning to this case, it is clear that the circuit court's dismissal of Jeffries's suit was correct. Unlike Lewis, who did not initiate her discrimination action until after the conclusion of the bankruptcy proceedings, Jeffries filed suit against Chaffin more than a month before the conclusion of his bankruptcy proceeding. Like Lewis, who failed to disclose her wages from Weyerhaeuser, Jeffries also failed to fully disclose the value of an asset in his bankruptcy forms when he stated that Phobia had no value. In his lawsuit against Chaffin, Jeffries stated that Chaffin had made it impossible to use assets from Phobia to reduce debts owed by Phobia. Therefore, Jeffries took a position in the lawsuit - that Phobia had assets worth something - that was the opposite from the position he took in the bankruptcy proceedings - that Phobia had no value. The Sixth Circuit could not find any reason to excuse Lewis's failure to notify the bankruptcy court of a potential lawsuit and her wages from Weyerhaeuser, and we discern even less reason to excuse Jeffries's failure to notify the bankruptcy court of an actual lawsuit and of the value of Phobia.

In support of his position that his failure to list this lawsuit as an asset in the bankruptcy proceedings was a mistake or inadvertent, Jeffries cites *Browning v. Levy,* 283 F.3d 761 (6th Cir. 2002). We believe that Jeffries's reliance on *Browning* is misplaced. The Court in *Browning* did find that a debtor's failure to disclose a lawsuit could be excused due to inadvertence, if the debtor lacked actual knowledge of the

factual basis for the undisclosed claims and the debtor had no motive for concealment. *Browning,* 283 F.3d at 776. The Court found that the debtor in *Browning* had knowledge of the factual basis for the undisclosed claims; however, the Court also found that the debtor had no motive for concealment because any amount recovered in the undisclosed claims would pass through to the creditors; it would not remain in the debtor's hands.

As with the debtor in *Browning*, there is no doubt that Jeffries had actual knowledge of the factual basis for the undisclosed claims, because he filed suit before the conclusion of the bankruptcy proceedings. However, unlike the debtor in *Browning*, Jeffries had a motive for concealing his claim against Chaffin, minimizing his assets. Therefore, unlike the debtor in *Browning,* Jeffries's failure to disclose his claim against Chaffin cannot be excused as a mistake or inadvertent.

Because Jeffries knew of this lawsuit and failed to disclose it during the bankruptcy proceedings and because Jeffries's failure to disclose cannot be excused as a mistake or inadvertent, the trial court properly entered a summary judgment and dismissed this action.

CONCLUSION

For the foregoing reasons, we affirm the summary judgment of the Boone Circuit Court.

ALL CONCUR.

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