UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALLY STERN-HAMILTON,

Plaintiff,

v.

Case No. 11-CV-00717
Hon. Robert J. Jonker

MASON COUNTY DISTRICT LIBRARY;
ROBERT DICKSON, in his individual and
official capacity; and MARILYN BANNON,
in her individual and official capacity,

Defendants.

DEFENDANTS' RULE 12(B)(6) MOTION TO DISMISS COMPLAINT

Mason County District Library ("Library"), Robert Dickson and Marilyn Bannon (jointly, "Library Defendants") state as follows for their Rule 12(b)(6) Motion to Dismiss Complaint:

1. Sally Stern-Hamilton contends that the Library Defendants violated Ms. Stern-Hamilton's rights under the First Amendment when they terminated her employment from the Library for writing a book that demeaned, mocked and humiliated library patrons and supporters.

2. However, Ms. Stern-Hamilton failed to list the pending claims on her chapter 7 bankruptcy schedules.

3. As set forth more fully in the accompanying Memorandum of Law, the claims must be dismissed because (a) she is judicially estopped from asserting claims she denied existed in her bankruptcy schedule; and (b) she lacks standing to assert the claims.

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4. Pursuant to Local Rule 7.1(d), Defendants sought concurrence from Plaintiff for the relief sought. Plaintiff opposes this motion.

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WHEREFORE, the Library Defendants pray for judgment in their favor and against Plaintiff and for their costs in defending this action.

Respectfully submitted,

MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.

/s/ Kathleen H. Klaus
HARVEY R. HELLER (P27351)
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Dated: August 31, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2011, I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: all counsel of record.

/s/ Kathleen H. Klaus
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Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF RULE 12(B)(6) MOTION TO DISMISS (ORAL ARGUMENT REQUESTED)

Sally Stern-Hamilton (a.k.a. Sally Miketa Stern) filed suit against the Mason County District Library ("Library"), Robert Dickson and Marilyn Bannon (jointly, "Library Defendants") contending that the Library Defendants violated Ms. Stern-Hamilton's rights under the First Amendment when they terminated her employment from the Library for writing a book that demeaned, mocked and humiliated library patrons and supporters. Ms. Stern-Hamilton's book expressed particular contempt for the Library's mentally and physically disabled patrons and advocated laws barring certain classes of people from having children. In other words, there is nothing remotely in the "public interest" in Ms. Stern-Hamilton's book and the First Amendment did not prohibit the Library from firing Ms. Stern-Hamilton in order to protect its most vulnerable users from an employee who has demonstrated such vitriolic contempt for them and their families. *See e.g., City of San Diego v. Roe,* 543 U.S. 77, 80 (2004).

The Court does not need to reach these issues, however, because Ms. Stern-Hamilton is judicially estopped from bringing these claims. She filed a chapter 7 bankruptcy case on August 9, 2009 and failed to list the pending claims as assets on her bankruptcy schedules. She obtained a discharge of tens of thousands of dollars in credit card debt and her bankruptcy case is closed. This constitutes a binding admission on her part that she has no claims against the Library Defendants. The claims must be dismissed, with prejudice, accordingly.

A. Facts Alleged in the Complaint and Public Record.

Ms. Stern-Hamilton was employed by the Library from April 20, 1994 until July 25, 2008 when the Library fired Ms. Hamilton for publishing a book. *See* Complaint at ¶¶ 10; 33; 35. Mr. Dickson is the Director of the Library. Ms. Bannon is the President of the Library Board. *See* Complaint at ¶¶ 3; 4. Mr. Dickson and Ms. Bannon met with Ms. Stern-Hamilton on July 23, 2008, prior to terminating her employment. *See* Complaint at ¶ 34.

On August 6, 2009, Ms. Stern-Hamilton filed a petition for bankruptcy under chapter 7 of Title 11, in the United States Bankruptcy Court for the Western District of Michigan, case number 09-10588. *See* Voluntary Petition, attached as Exhibit A. Ms. Stern-Hamilton did not list any of the pending claims as an asset on her schedules, although she declared under penalty of perjury that the schedules were "true and correct." *See* Exhibit A at page 6 of 46 and at Schedule B (page 22- 24 of 46). Ms. Stern-Hamilton obtained a discharge on December 15, 2009 and her bankruptcy case was closed on February 9, 2010. *See* Exhibits B and C. Ms. Stern-Hamilton did not attempt to amend her schedules to include the pending claims, nor did she seek to abandon them or otherwise provide her creditors with notice of these claims. *See* Exhibit C.

B. Argument.

1. Standard on Motion to Dismiss.

Rule 12(b)(6) requires the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. In ruling on a motion for failure to state a claim, the court "need not accept as true legal conclusions or unwarranted factual inferences" and "legal conclusions masquerading as factual allegations will not suffice" to state a claim. *Edison v State of Tenn,* 510 F.3d 631, 634 (6th Cir. 2007). Further, in deciding a motion to dismiss brought under Rule 12(b)(6), the court may "consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice." *New England Health Care Employees Pension Fund v Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003), citing *Jackson v City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), abrogated on other grounds, *Swierkiewicz v Sorema N.A.*, 534 U.S. 506 (2002). Taking judicial notice of materials filed with a court in other legal proceedings (like Ms. Stern-Hamilton's bankruptcy pleadings) does not convert a motion to dismiss into a motion for summary judgment. *Jackson,* 194 F.3d. at 745.

2. Ms. Stern-Hamilton is judicially estopped from asserting her claims.

"The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position 'either as a preliminary matter or as part of a final disposition.'" *Browning v. Levy,* 283 F.3d 761, 775 (6th Cir. 2002), citing *Teledyne Indus., Inc. v. NLRB,* 911 F.2d 1214, 1218 (6th Cir. 1990). Under the well-established law of this circuit, a discharged debtor (like Ms. Stern-Hamilton) who did not make a good faith effort to disclose a cause of action (like the pending claims) is judicially estopped from pursuing that cause of action

unless her failure to disclose was "inadvertent." *Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 895 (6th Cir. 2004).[1] "Inadvertence" is limited to the case where the debtor was not aware of the facts giving rise to the claim or the debtor had no motive for concealing the claim. *Browning,* 283 F.3d at 776. *See also, Eubanks,* 385 F.3d at 898. Ms. Stern-Hamilton cannot satisfy either exception to judicial estoppel.

First, a debtor's failure to disclose is not inadvertent if the debtor has "enough information to suggest that [she] may have a possible cause of action." *In re Coastal Plains,* 179 F.3d 197, 208 (5th Cir. 1999) (emphasis added). In her Complaint, Ms. Stern-Hamilton alleges she had knowledge of the facts giving rise to her claims in 2008. Specifically, she knew she was fired and the basis for her termination in July of 2008, over a year prior to filing her bankruptcy case. *See* Complaint at ¶¶ 33 - 35. These are the only facts relevant to her pending claim.

Moreover, Ms. Stern-Hamilton had motive for concealing the pending causes of action. She wanted to reap the financial benefits of her claim (dubious as they may be) without having to have to pay her considerable credit card debt. "It is always in a bankruptcy petitioner's interest to minimize income and assets. This is because damages recovered from a disclosed suit become property of the estate in bankruptcy, and any damages received will be used to satisfy the debts." *Maxwell v. MGM Grand Detroit, LLC,* unpublished decision of the United States District Court for the Eastern District of Michigan, issued July 16, 2007 (Case No. 03-73134), a copy of which is attached as Exhibit D, citing, *Lewis v. Weyerhaeuser Co.,* 141 Fed.App. 420, 426 (6th Cir.

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[1] For purposes of applying judicial estoppel, a bankruptcy court is presumed to have "adopted" the statements made in the debtor's schedules, if the court grants a debtor a discharge. *Reynolds v. Comm'r,* 861 F.2d 469, 474 (6th Cir. 1988); *Stallings v Hussman Corp*, 447 F.3d 1041, 1048 (8th Cir 2006); *In re Johnson,* 345 B.R. 816, 822 (Bankr. W.D. Mich 2006). Further, a party who pursues a cause of action that she failed to list on her bankruptcy schedules is asserting a position contrary to one asserted in a prior proceeding, under oath. *Browning,* 283 F.3d at 775. Thus, both elements of the judicial estoppel defense are established in the circumstances presented.

2005). Simply put, if Ms. Stern-Hamilton had disclosed the pending claims, the bankruptcy trustee had the authority to adjudicate those claims and use any proceeds to satisfy Ms. Stern-Hamilton's creditors. By not scheduling the claim, Ms. Stern-Hamilton hoped to keep any proceeds for herself. Thus, as a matter of law, Ms. Stern-Hamilton's failure to list her claims against the Library Defendants on her bankruptcy schedules was not "inadvertent."

Finally, Ms. Stern-Hamilton cannot claim to have acted in "good faith" to cure her failure to disclose the claim. The docket from her bankruptcy case does not indicate any effort on her part to notify the bankruptcy trustee or any of her creditors that she had an asset that may be used to satisfy her debts. *See* Exhibit C. Absent evidence of these efforts, her claim is barred. *C.f., Eubanks* and *Lewis, supra.*

3. Plaintiff lacks standing to bring the pending claims.

When Ms. Stern-Hamilton filed her chapter 7 petition, all of her property, including the pending causes of action, became property of her bankruptcy estate and her bankruptcy trustee acquired exclusive standing to assert the causes of action for the benefit of the bankruptcy estate. 11 U.S.C. § 541(a)(1); *In re Van Dresser Corp.,* 128 F.3d 945, 947 (6th Cir. 1997); *Bauer v. Commerce Union Bank,* 859 F.2d 438, 441 (6th Cir. 1988), *cer. den.* 489 U.S. 1079 (1989). Because Ms. Stern-Hamilton failed to list the claims as an assert on her schedules, they did not revert back to her upon the closing of her case and remain property of her estate. *See e.g. Rankin v. Lavan (In re Rankin),* Unpublished decision of the United States Court of Appeals for the Sixth Circuit, issued August 23, 2011 (Case No. 09-1087) ("As a putative asset, the Rankins' suit against the Title Defendants was not part of their bankruptcy schedule and, therefore, remains part of the bankruptcy estate"), a copy of which is attached as Exhibit E ; *Jeffrey v. Desmond,* 70 F.3d 183, 186 n.3 (1st Cir. 1995); *Vreudenhill v. Navister Int'l Transp. Corp.,* 950 F.2d 524, 526

(8th Cir. 1991). In other words, Ms. Stern-Hamilton lacks standing to bring the pending claims, and they must be dismissed.

C. Conclusion.

"The integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding." *In re Coastal Plains,* 179 F.3d at 208. This is precisely what Ms. Stern-Hamilton is attempting to do in this case. The doctrine of judicial estoppel is designed to stop her from gaming of the system and compels a dismissal of her case, with prejudice.

Respectfully submitted,

MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.

/s/ Kathleen H. Klaus
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