UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES W. BOYD,
TRUSTEE IN BANKRUPTCY FOR THE
ESTATE OF SALLY STERN-HAMILTON,

Plaintiff,

Case No. 1:11-cv-00717

v.

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.

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MOTION FOR SUBSTITUTION OF BANKRUPTCY TRUSTEE AS PLAINTIFF/REAL PARTY-IN-INTEREST

Now Comes JAMES W. BOYD, Bankruptcy Trustee for the Estate of Sally Stern-Hamilton, by and through his attorneys, NACHT, ROUMEL, SALVATORE, BLANCHARD & WALKER, P.C., who moves in support of his Motion for Substitution of Bankruptcy Trustee as Plaintiff/Real Party-In-Interest pursuant to Fed. R. Civ. P. 17(a). In support of his motion, Trustee states as follows:

History of Case

1. The instant case was commenced on July 13, 2011, upon the filing by the named Plaintiff Sally Stern-Hamilton against Defendants Mason County District Library, Robert Dickson, and Marilyn Bannon in this Court.

2. Following service of the Summons and Complaint, Defendants filed a Motion to Dismiss Complaint alleging that the Plaintiff Sally Stern-Hamilton was without authority to commence and prosecute the instant Complaint based upon the filing of her of a voluntary petition in bankruptcy in 2009.

3. This Court entered an Order denying Defendants' Motion to Dismiss as premature on September 2, 2011 (D/E #14).

4. On September 16, 2011,, the Court entered an Order Setting Case Schedule, including the deadline of October 15, 2011 to file opening briefs. (D/E #19).

History of Related Bankruptcy Proceedings

5. On September 4, 2009, the Plaintiff Sally Stern-Hamilton filed her Voluntary Petition under Chapter 7 of the Bankruptcy Code in Bankruptcy No. 09-10588 in the U.S. Bankruptcy Court for the Western District of Michigan.

6. Shortly following the filing of the Voluntary Petition, the undersigned James W. Boyd was appointed Chapter 7 Bankruptcy Trustee.

7. Following the filing by the Trustee of his report of No Distributions, the Bankruptcy Court entered its Final Decree and closed the bankruptcy case on December 15, 2009.

8. Defense has raised the issue of Plaintiff's standing to sue, based on the Debtor's failure to reveal the existence of the Plaintiff's claims against Defendants Mason County District

Library, Robert Dickson, and Marilyn Bannon on her original 2009 Debtor's Schedules of Assets and Liabilities and her Statement of Financial Affairs and her.

9. Upon receiving notice of the omissions in the 2009 filing from defense counsel in the instant case, Trustee Boyd was contacted by counsel for Sally Stern-Hamilton, advising of the existence of the previously unrevealed cause of actions against Defendants Mason County District Library, Robert Dickson, and Marilyn Bannon.

10. Upon learning of the existence of the Debtor's claim which is the gravamen of the case at bar, Trustee Boyd filed a motion to reopen bankruptcy case on September 2, 2011.

11. On September 8, 2011, the Bankruptcy Court entered its Order granting the Trustee's motion to re-open bankruptcy case and authorized withdrawal of the Trustee's Report of No Distribution. (Exhibit A).

The Instant Cause of Action is Property of the Bankruptcy Estate and the Trustee is Authorized by Law to Prosecute the Same

12. Pursuant to 11 U.S.C. §541, the cause of action described in the Complaint is the property of the bankruptcy estate.

13. As noted above, Trustee Boyd learned of the existence of the instant cause of action only in August 2011. Since that time, Trustee Boyd has had the bankruptcy case re-opened, withdrew his report of no distribution, and Application to Employ David M. Blanchard as Special Counsel.

14. Pursuant to the provisions of 11 U.S.C. §323, Trustee Boyd is the representative of the bankruptcy estate and has the capacity to sue and be sued in the name of the bankruptcy estate. In that capacity, Trustee Boyd represents the interests of the entire body of unsecured creditors of Ms. Stern-Hamilton; a group which suffered unpaid losses in her bankruptcy proceeding.

15. Substitution of the Trustee as the real party plaintiff in interest is contemplated and required under Fed. R. Civ. P. 17.

16. In the instant case, Trustee Boyd seeks exactly that relief contemplated in Federal Rules 17(a) and 25(c).

> "(1) Designation in General. An action must be prosecuted in the name of the real party in interest..
> …
> (3) Joinder of the Real Party in Interest. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitituion, the action proceeds as if it had been originally commenced by the real party in interest"

Fed. R. Civ. P. 17(a)(Emphasis Added).

Substitution of the Trustee as Party Plaintiff Will Work No Prejudice Upon the Defendants and is in the Best Interest of Justice

17. Substitution of Trustee Boyd as the party plaintiff in these proceedings will work no prejudice upon Defendants. Indeed, Defendants has had timely notice of Ms. Stern-Hamilton's cause of action and has participated actively in the litigation to date.

18. By way of contrast to the manifest lack of any prejudice to the Defendants, there would be considerable injury to bankruptcy creditors if Trustee Boyd is not allowed to substitute in as real party-in-interest plaintiff in this action.

Wherefore, Bankruptcy Trustee James W. Boyd respectfully request that this Court:

1. ORDER that James W. Boyd, Bankruptcy Trustee for the Estate of Sally Stern-Hamilton be substituted herein as the party plaintiff in the place and stead of the originally named Plaintiff Sally Stern-Hamilton;

2. ORDER that James W. Boyd, Bankruptcy Trustee for the Estate of Sally Stern-Hamilton be permitted to file an Amended Complaint;

3. ORDER such other and further relief as the nature of this case and the intersts of justice may require.

Respectfully submitted,
NACHT, ROUMEL, SALVATORE,
BLANCHARD & WALKER, P.C.

/s/ David M. Blanchard
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Dated: October 14, 2011

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BRIEF IN SUPPORT OF MOTION FOR SUBSTITUTION OF BANKRUPTCY TRUSTEE AS PLAINTIFF/REAL PARTY-IN-INTEREST

INTRODUCTION

The issue before this Court is whether this suit can proceed where Plaintiff, Sally Stern-Hamilton, is not the real party in interest. Federal Rule of Civil Procedure 17(a), and all cases interpreting it, provide for a reasonable opportunity to substitute the real party in interest and allow for that substitution to relate back to the original date of filing. Because Ms. Stern-Hamilton has Constitutional standing, this Court has maintained jurisdiction and should now

enter an order allowing the substitution of the bankruptcy trustee as the real party in interest in this case.

BACKGROUND

Plaintiff Sally Stern-Hamilton filed a complaint alleging First Amendment Retaliation in connection with her termination by Defendant Mason County District Library, Robert Dickson, and Marilyn Bannon. Ms. Stern-Hamilton was terminated on July 23, 2008 after fourteen years' employment with the library. She brought this suit on July 11, 2011, within the three-year statute of limitations for a § 1983 action in this state. However, between her termination and the filing of the suit, Ms. Stern-Hamilton filed for and was discharged from bankruptcy in the Western District of Michigan.

Defendant filed a motion to dismiss under Rule 12(b)(6) alleging that Ms. Stern-Hamilton was judicially estopped from proceeding with her claims. The Court denied the motion, holding that factual development was required to decide the estoppel issue. Plaintiff moves this Court to order the substitution of the bankruptcy trustee as the real party in interest.

Since Ms. Stern-Hamilton's bankruptcy arose after the cause of action in this case arose, this suit should be prosecuted on behalf of Plaintiff's creditors, as represented by the trustee. When Defense counsel notified Plaintiff counsel of the bankruptcy proceeding, Ms. Stern-Hamilton immediately made arrangements to reopen her bankruptcy proceedings. The trustee has now received permission to pursue this claim for the benefit of the estate and now moves to be substituted as the real party in interest in this case. This procedure is exactly what was recommended by the Sixth Circuit and is consistent with bankruptcy law to protect the interests of Plaintiff's creditors. Therefore, Plaintiff respectfully requests that this Court allow the

substitution of the trustee as the real party in interests in order to pursue this claim on behalf of the estate.

DISCUSSION

Because Ms. Stern-Hamilton filed for bankruptcy after her termination by Defendants, the real party in interest in these proceedings is the bankruptcy estate. The trustee seeks to substitute in a the real party in interest in this case under Federal Rule of Civil Procedure 17(a). This substitution relates back to the date of filing, which was within the three-year statute of limitations for a § 1983 claim alleging first amendment retaliation. Plaintiff is aware of no case law holding that diligent efforts to substitute the bankruptcy estate as the real party in interest should be denied. Therefore, this Court should permit the substitution of the trustee and let the trustee continue to pursue the claim on behalf of Ms. Stern-Hamilton's estate.

I. Rule 17(a) Allows For Amendment for the Real Party in Interest and Relation Back

As a preliminary matter, Plaintiff agrees that she is not the real party in interest in this case. According to Federal Rule of Civil Procedure 17(a), an action must be litigated by the real party in interest. In this case, Ms. Stern-Hamilton is not the real party in interest because this claim is owned by the bankruptcy estate and has not been abandoned. "Property of a debtor's estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the case.'" *In re Van Dresser Corp.*, 128 F.3d 945, 947 (6th Cir. 1997) (quoting 11 U.S.C. § 541(a)(1)). "A debtor's appointed trustee has the exclusive right to assert the debtor's claim." *Id*. Therefore, Ms. Stern-Hamilton cannot personally pursue this suit, and Plaintiff seeks to substitute the trustee as the real party in interest and allow the trustee to pursue Plaintiff's employment claim.

A. The Trustee Should Allow to Substitute in as the Real Party in Interest

The Federal Rules of Civil Procedure specifically provide that a court should not dismiss a claim without allowing a reasonable time to add the real party in interest. Specifically, Rule 17(a)(3) states: "The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." The Sixth Circuit has instructed lower courts confronted with this situation to allow the plaintiff a reasonable opportunity to substitute the trustee. *See Knight v. New Farmers Nat'l Bank*, No. 90-6071, 1991 U.S. App. LEXIS 24819 (6th Cir. 1991)(Unpublished)(Exhibit B). In *Knight*, the district court dismissed the suit when it determined that the plaintiffs were not the real parties in interest because the causes of action were property of the bankruptcy estate. The Sixth Circuit reversed, holding that "the district court did not afford plaintiffs any time to substitute the trustee after determining that the trustee was the real party in interest. We believe the district court should first consider ratification or substitution by the trustee prior to dismissing plaintiffs' case." *Id*. at *6.

This suggested path has been followed throughout the district courts. Most recently, in *Piper v. Dollar Gen. Corp.*, No. 3:11-554, 2011 U.S. DIST LEXIS 112071 (M.D. Tenn. 2011)(Unpublished)(Exhibit C), the court faced a very similar situation to this case. Plaintiff filed her claim when the claim properly belonged to the bankruptcy estate. Defendant brought a motion alleging Plaintiff's claim was barred by judicial estoppel.[1] The court found the individual plaintiff estopped but held that "the appropriate way forward is to stay this action for a brief period to allow the Trustee, on behalf of the estate, to be substituted for the plaintiff in this case." *Id*. at *20. *See also.*, *Charboneau v. Jordan*, No. 07-12929-BC, 2009 U.S. Dist. LEXIS

[1] Unlike this case, Defendant brought the judicial estoppel argument under a summary judgment motion.

71682 (E.D. Mich. 2009)(Unpublished)(Exhibit D)(staying action for 60 days to allow plaintiff to go through the bankruptcy court to determine if a trustee has an interest in pursuing the claims.); *Rodriguez v. Mustang Manufacturing*, No. 07-cv-13828, 2008 U.S. Dist. LEXIS 50098 (E.D. Mich. 2008)(Unpublished)(Exhibit E)(citing *Knight* but finding that plaintiff's delay in responding to Defendant's Rule 17 motion allowed for dismissal).

Plaintiff acknowledges that while an opportunity to substitute the trustee is provided, the cases are consistent that if Defendant raises the issue, Plaintiff must at some point take affirmative steps to substitute the bankruptcy trustee. For instance, in *Rodriguez*, the district court dismissed the case where, among other factors, the plaintiff took no action in the month following the defendant's objection that he was not the real party in interest. The district court noted that allowing time to reopen at this point would take months of delay.[2] *See also*, *Dare v. Citibank*, No. 1-06-165, 2007 US Dist. LEXIS 42278 (S.D. Ohio February 1, 2007)(Unpublished)(Exhibit F)(dismissing suit under Rule 17 where after a reasonable time, "the trustee has not attempted to substitute herself as the real party in interest").

Here, however, Plaintiff has moved expeditiously since the issue was raised by Defendant. Plaintiff has already successfully moved to reopen her bankruptcy, and now the trustee has been empowered to pursue this action. Therefore, Ms. Stern-Hamilton and the Trustee have complied with Rule 17(a)(3) by attempting to substitute the real party in interest in a "reasonable time."

[2]*Rodriguez* does hint at a more limited approach to Rule 17(a)(3) and notes that, as here, the suit was filed years after the bankruptcy. However, the court also specifically notes that Rule 17(a)(3) is not jurisdictional, and unlike the plaintiff in that case, here, Plaintiff has moved with all deliberate speed to reopen the bankruptcy and substitute the estate once the defense was raised.

B. The Trustee's Substitution Relates Back to the Date Ms. Stern-Hamilton Filed Her Claim.

Rule 17 holds that if substitution of the real party in interest is permitted, that substitution relates back to the time of filing. Rule 17(a)(3) specifically states that: "After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest." Courts have unanimously held that this substitution relates back to the original date of filing, which in this case was within the applicable three-year statute of limitations. Under Rule 17(a)(3), no problem is presented by the fact that the claim actually belonged to the trustee when Ms. Stern-Hamilton filed the court. Once a court allows joinder or substitution of the real party in interest, "their clams automatically related back to the original filing of the action." *Scheufler v. General Host Corp.*, 126 F.3d 1261, 1271 (10th Cir. 1997).

In *Corbin v. Blankenburg*, 39 F.3d 650, 654 (6th Cir. 1995) (en banc), the Court held that substitution under Rule 17(a)(3) "relates back to the original time when the original party had standing to sue" and that "no other conclusion is possible" given the language of the rule. *Corbin* involved a suit by an ERISA trustee. The claim was properly brought by a trustee who at some point ceased to be the trustee authorized to represent the plan. At that point, "the plaintiff in this case ceased to be a real party in interest . . . and thus had no standing to prosecute the action after that date." Nonetheless, relation back was appropriate once a new trustee substituted into the action under Rule 17(a).

Therefore, since substitution under Rule 17(a)(3) is appropriate, the case proceeds as if the trustee originally commenced the suit in a timely fashion. While an action could not be commenced as of this date, Ms. Stern-Hamilton properly filed her complaint within the applicable three-year statute of limitations.

II. This Court Has Jurisdiction to Consider this Case

As stated above, Plaintiff should be allowed to substitute the trustee as the real party in interest under Rule 17(a)(3). Plaintiff is aware that "this provision must be read with the limitation that a federal district court must, at a minimum arguably have subject matter jurisdiction over the original claims." *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528, 531 (6th Cir. 2002). This court has subject-matter jurisdiction over the case, and Ms. Stern-Hamilton had sufficient Constitutional standing to file the claim within the appropriate statute of limitations.

"In order for a federal court to exercise jurisdiction over a matter, the party seeking relief must have standing to sue. Standing has both constitutional and prudential dimensions. The constitutional requirements for standing emanate from Art. III, § 2, of the U.S. Constitution, which grants federal courts jurisdiction over 'cases' and 'controversies.'" *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996). The question therefore is whether Ms. Stern-Hamilton had constitutional standing when she asserted her claim. Ms. Stern-Hamilton must show both an "injury in fact" and causation between the injury and the conduct of which she complains. *Id.*

That test is easily established here, where Ms. Stern-Hamilton was personally injured by the termination of her employment, and her complaint alleges that the termination itself was unlawful. The lawsuit was filed by Ms. Stern-Hamilton inside the relevant statute of limitations under 42 U.S.C. § 1983. Ms. Stern-Hamilton certainly has an interest in the lawsuit. Even if her creditors are entitled to some portion of the recovery, these creditors include debts that are not discharged in bankruptcy. Furthermore, Ms. Stern-Hamilton is entitled to any amount received over and above the amount of her debts. Therefore, Ms. Stern-Hamilton has constitutional standing.

The only reason Ms. Stern-Hamilton cannot pursue a claim on her own behalf is the salutary decision of Congress to pass bankruptcy legislation that calls for all causes of action that accrued at the time of filing to go to the bankruptcy estate. Thus, Ms. Stern-Hamilton does not have statutory standing to pursue the claim (just as she would not if Congress had not passed a statute akin to § 1983). However, where the deficiency is not Constitutional, Rule 17(a) applies. "A Rule 17(a) substitution of plaintiffs should be liberally allowed when the change is merely formal and in no way alters the original complaint's factual allegations as to the events or the participants." *Zurich*, 297 F.3d at 535 (Gillman, J. concurring) (quoting *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997)).

Moreover, a real party in interest defense can be waived, demonstrating that unlike Constitutional standing, it is not jurisdictional. *See, e.g., Sch. Bd. of Avoyelles Parish v. United States DOI*, 647 F.3d 570, 577-78 (5th Cir. 2011) (noting that the Rule 17(a)(1) requirement is prudential and finding that defendant had waived the issue); *Anderson v. Old Nat'l Bankcorp*, 675 F. Supp. 2d 701, (W.D. Ky. 2009) (holding Rule 17(a) defense was waived and citing cases from the Second, Eighth, Tenth, and Eleventh Circuits). Since Defendant could waive this issue, this Court could have allowed Ms. Stern-Hamilton to pursue this matter on her own behalf all the way through trial, even if it knew about the bankruptcy issue. For instance, in *Steger v. Electric Co.*, 318 F.3d 1066, 1080 (11th Cir. 2003), the defendant actually opposed the joinder of the trustee. Plaintiff filed for bankruptcy while her employment claim was pending and moved to join the trustee shortly before trial. The Eleventh Circuit affirmed the district court's decision to allow the plaintiff to try the case on her own behalf.

For these reasons, this Court retains jurisdiction over the case. Ms. Stern-Hamilton had constitutional standing to bring her claim, and any deficiency for her not being the real party in interest is eliminated by the plain language of Rule 17(a)(3).

CONCLUSION

Plaintiff's claim belongs to the bankruptcy estate. Therefore, the trustee should substitute in as the real party in interest. Rule 17 and the unanimous case law interpreting the rule allow the plaintiff a reasonable time to make the necessary substitution. In this case, Plaintiff has diligently taken the necessary steps to reopen her bankruptcy proceeding and have the trustee receive permission from the bankruptcy court to pursue this action on behalf of the estate. Under Rule 17(a)(3), the substitution of the trustee relates back to the date of filing. Finally, Plaintiff had sufficient standing to bring this suit, meaning this Court has and still maintains jurisdiction over the action.

Respectfully submitted,
NACHT, ROUMEL, SALVATORE,
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Dated: October 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2011, my paralegal, Natalie M. Walter, electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Kathleen J. Klaus, Esq.

Respectfully submitted,
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BLANCHARD & WALKER, P.C.

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