

Exhibit F



Analysis
As of: Oct 14, 2011

MARK A. DARE, Plaintiff vs CITIBANK, (South Dakota) N. A., et. al., Defendants

Case No. C-1-06-165

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
OHIO, WESTERN DIVISION**

2007 U.S. Dist. LEXIS 42278

February 21, 2007, Decided

PRIOR HISTORY: Dare v. Citibank N A, 2006 U.S. Dist. LEXIS 55281 (S.D. Ohio, Aug. 9, 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: In an action against defendants, a credit card company and others, the court directed plaintiff, a debtor who had filed bankruptcy, to seek ratification by, or substitution of, the bankruptcy trustee within thirty days. The court advised the debtor that failure to comply with the order might result in a recommendation of dismissal for lack of standing and judicial estoppel. The matter was referred to a magistrate for a report and recommendation.

OVERVIEW: The debtor failed to respond to the order. Accordingly, the magistrate held that the debtor failed to establish that he sought ratification by, or substitution of, the bankruptcy trustee. Defendants filed notice, which indicated that the debtor had amended a bankruptcy schedule to include the action against defendants. A trustee's report stated only that the action against defendants was subject to dismissal. The magistrate held that, pursuant to 11 U.S.C.S. § 541(a)(1), a pre-petition cause of action was the property of the bankruptcy estate, and the trustee had exclusive standing to pursue that cause of action. The magistrate concluded that the debtor lacked standing to pursue the action against defendants. The magistrate held that once an asset became part of the estate, the debtor's rights in the asset were extinguished unless the asset was abandoned back to the debtor. The trustee had not attempted to substitute herself as the real party in interest in the action and had not indicated any

intent to abandon the action under 11 U.S.C.S. § 554. Thus, the magistrate concluded that dismissal was warranted for lack of standing and for failure to abide by a court order.

OUTCOME: The magistrate recommended that the court dismiss the debtor's complaint. The magistrate recommended that the court certify that an appeal of the court's dismissal order was not taken in good faith and that the court deny the debtor leave to appeal in forma pauperis.

CORE TERMS: bankruptcy trustee, bankruptcy estate, cause of action, recommendation, ratification, substitution, present action, real party in interest, commencement, pauperis, abide, forma

LexisNexis(R) Headnotes

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute

[HN1] District courts have the inherent power to dismiss civil actions for want of prosecution to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. Failure of a party to respond to an order of the court warrants invocation of a district court's inherent power. Fed. R. Civ. P. 41(b).

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles

**Bankruptcy Law > Estate Property > Content
Civil Procedure > Justiciability > Standing > General
Overview**

[HN2]A pre-petition cause of action is the property of a bankruptcy estate, and a bankruptcy trustee has exclusive standing to pursue said cause of action. 11 U.S.C.S. § 541(a)(1).

**Bankruptcy Law > Case Administration > Commencement > Involuntary Cases > General Overview
Bankruptcy Law > Case Administration > Commencement > Joint Cases > General Overview
Bankruptcy Law > Case Administration > Commencement > Voluntary Cases > General Overview
Bankruptcy Law > Estate Property > Content**
[HN3]See 11 U.S.C.S. § 541(a)(1).

**Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles
Civil Procedure > Justiciability > Standing > General
Overview**

[HN4]A bankruptcy trustee, as representative of a bankruptcy estate, is the proper party with exclusive standing to prosecute causes of actions belonging to the estate.

Bankruptcy Law > Estate Property > Abandonment > General Overview

[HN5]Once an asset becomes part of a bankruptcy estate, all rights held by the debtor in the asset are extinguished unless the asset is abandoned back to the debtor. 11 U.S.C.S. § 554.

COUNSEL: [*1] Mark A Dare, Plaintiff, Pro se, West Chester, OH.

For Citibank N A, South Dakota, Defendant: Thomas Louis Rosenberg, Roetzel & Andress, Columbus, OH.

For Javitch Block & Rathbone, Matthew S Kunkle, Jane and John Doe, One Up, Defendants: Michael J Chapman, LEAD ATTORNEY, Javitch Block & Rathbone LLP, Cincinnati, OH; Michael D Slodov, LEAD ATTORNEY, Javitch Block & Rathbone LLP, Cleveland, OH.

JUDGES: Timothy S. Hogan, United States Magistrate Judge. Dlott, J.

OPINION BY: Timothy S. Hogan

OPINION

REPORT & RECOMMENDATION

On January 18, 2007, the Court ordered Plaintiff to seek ratification by, or substitution of, the bankruptcy trustee within thirty days. See Knigh t v. New Farmers Nat'l Bank, No. 90-6071, 1991 U.S. App. LEXIS 24819, 1991 WL 207056 at *2 (6th Cir. Oct. 15, 1991). Plaintiff was advised that failure to comply with this Order may result in a recommendation of dismissal based on lack of standing as well as judicial estoppel.

[HN1]District courts have the inherent power to dismiss civil actions for want of prosecution to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R., 370 U.S. 626, 630-31, 82 S. Ct. 1386, 8 L. Ed. 2d 734.(1962). Failure of [*2] a party to respond to an order of the court warrants invocation of the Court's inherent power. See FED. R. CIV. P. 41(b). Plaintiff, in failing to respond to the Court's order, has failed to establish that he has sought ratification by, or substitution of, the bankruptcy trustee. Defendants have filed with the Court a Notice indicating that Plaintiff has amended his bankruptcy's schedule B to include the present litigation. (Doc. 33). Defendants have also filed a Notice indicating that the bankruptcy trustee's report filed on February 9, 2007, indicates her awareness of the present action but states only that the "Federal action in Schedule B is subject to dismissal." (Doc. 34, Ex. A).

It is well established that [HN2]a pre-petition cause of action is the property of the bankruptcy estate, and the trustee has exclusive standing to pursue said cause of action. See 11 U.S.C. § 541(a)(1); see also Barger v. City of Cartersville, 348 F.3d 1289, 1291 (11th Cir. 2003). Section 541 of the Bankruptcy Code provides, in pertinent part, that,

[HN3](a) The commencement of a case under section [*3] 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a)(1). Thus, [HN4]a trustee, as representative of the bankruptcy estate, is the proper party with exclusive standing to prosecute causes of actions belonging to the estate. Barger, 348 F.3d at 1292. Accordingly, Plaintiff lacks standing to pursue the present action.

[HN5]Once an asset becomes part of the bankruptcy estate, all rights held by the debtor in the asset are extin-

guished unless the asset is abandoned back to the debtor, 11 U.S.C. § 554. In the present case, the trustee has not attempted to substitute herself as the real party in interest in this action, nor has she indicated any intent to abandon the action pursuant to 11 U.S.C. § 554. Having allowed a reasonable amount of time for the ratification by, or substitution of, the real party in interest, pursuant to Rule 17(a) of the Federal Rules of Civil Procedure [*4], the Court finds that Plaintiff's action should be dismissed based on lack of standing, see *Knight v. New Farmers National Bank*, No. 90-6071, 1991 U.S. App. LEXIS 24819, 1991 WL 207056 at *2 (6th Cir. Oct. 15, 1991), as well as failure to abide by a Court order.

IT IS THEREFORE RECOMMENDED THAT:

1. Plaintiff's Complaint be DISMISSED based on lack of standing and failure to abide by a Court order; and

3. This Case be TERMINATED on the Court's Docket.

3. The Court should certify pursuant to 28 U.S.C. § 1915(a) that an appeal of its Order dismissing the action is not taken in good faith and that Plaintiff be denied leave to appeal in forma pauperis. Plaintiff would remain free to apply to proceed in forma pauperis in the Court of

Appeals. *Coppedge v. United States*, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

Date: 2/21/07

Timothy S. Hogan

United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING THE FILING OF OBJECTIONS TO THIS R&R

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to this Report & Recommendation ("R&R") within **TEN (10) DAYS** [*5] after being served with a copy thereof. That period may be extended further by the Court on timely motion by either side for an extension of time. All objections shall specify the portion(s) of the R&R objected to, and shall be accompanied by a memorandum of law in support of the objections. A party shall respond to an opponent's objections within **TEN DAYS** after being served with a copy of those objections. Failure to make objections in accordance with this procedure may forfeit rights on appeal. See *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

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