

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

JERRY BRACK,)	
)	
)	
)	
Plaintiff,)	
)	
v.)	Case No. 01-2997 DV
)	
)	
SHONEY’S, INC. d/b/a)	
CAPTAIN D’S #3126,)	
)	
)	
Defendant.)	
)	

**ORDER DENYING DEFENDANT’S
MOTION TO AMEND ANSWER**

Before the Court is the motion of Defendant, Shoney’s Incorporated d/b/a Captain D’s #3126, to amend its answer to the complaint of Plaintiff, Jerry Brack. Defendant’s motion to amend the answer seeks leave of the Court to add affirmative defenses based upon judicial estoppel and the after acquired evidence doctrine. For the foregoing reasons, Defendant’s motion to amend the answer is denied.

I. PROCEDURAL BACKGROUND

On December 12, 2001, Plaintiff filed a complaint alleging color discrimination,¹ hostile work environment, breach of contract, intentional infliction of emotional distress, and outrageous conduct. Defendant filed an answer to the complaint on February 25, 2002. The parties were

¹ Color discrimination is the terminology used by Plaintiff in the Complaint and Amended Complaint. In fact, the claim is one for race discrimination pursuant to Title VII.

permitted to amend the pleadings without leave of court before April 30, 2002. See Rule 16(b)Scheduling Order. Defendant filed a motion to amend its answer on November 27, 2002.

In support of the motion to amend, Defendant asserts that Fed. R. Civ. P. 15 provides that leave to amend shall be freely given when justice so requires, and in this case, Defendant discovered facts during discovery that support affirmative defenses on the basis of judicial estoppel and the after acquired evidence doctrine. Defendant further maintains that 1) the amendment to the complaint is not sought for a dilatory purpose, 2) Plaintiff will suffer no prejudice, and 3) the amendment is not futile.

Plaintiff responded to Defendant's motion to amend, asserting that the doctrines of judicial estoppel and after acquired evidence are inapplicable to this case. Pl.'s Resp. To Def.'s Mot. To Amend Answer. Plaintiff additionally requested that the Court enter an order finding that Defendant's motion to amend with respect to the after acquired evidence doctrine violates Fed. R. Civ. P. 11, and consequently Defendant should be sanctioned. Id.

With the Court's permission, Defendant replied to Plaintiff's response to Defendant's motion to amend the answer. See Reply To Pl.'s Resp. To Def.'s Mot. To Amend Answer And Affirmative Defense. In Defendant's reply, Defendant withdrew its motion to amend its answer with respect to the after acquired evidence defense because Plaintiff's counsel stipulated that Plaintiff is not seeking damages for front pay. Accordingly, this Court will only consider whether leave to amend the answer should be granted with respect to the affirmative defense of judicial estoppel.²

²Plaintiff argues that Defendant is not seeking in good faith to amend its answer to include an affirmative defense of after acquired evidence. Pl.'s Resp. To Def.'s Mot. To Amend. Given that Defendant has withdrawn the motion to amend with respect to the after acquired evidence affirmative defense, the Court finds that Plaintiff's request for Rule 11 sanctions is moot.

Furthermore, Rule 11(c)(1)(A) states

II. ANALYSIS

Rule 15 of the Federal Rules of Civil Procedure provides that “a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). Leave to amend a responsive pleading may be granted when the amendment does not serve a dilatory purpose, the opposing side will not suffer undue prejudice, and the amendment will not prove futile. Foman v. Davis, 371 U.S. 178, 182-83, 83 S.Ct. 227, 9 L. Ed. 2d 222 (1962). Furthermore, the Supreme Court held that courts should liberally grant parties leave to amend. Id. Defendant seeks to amend the answer to assert that

[p]laintiff is estopped and barred from pursuing his claims on the basis of judicial estoppel because the positions asserted by Plaintiff before the bankruptcy court and this Court are inconsistent.

Mem. In Support Of Def.’s Mot. To Amend Answer.

The judicial estoppel doctrine preserves “the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.” Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990); see also Reynolds v. Comm’r of Internal Revenue, 861 F.2d 469, 472 (6th Cir. 1988). A court should apply the doctrine if 1) the present position is “clearly inconsistent” with the earlier position, 2) the party persuaded a tribunal to accept one position, so that judicial acceptance of the inconsistent position in a later proceeding creates the perception that

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Fed. R. Civ. P. 11. Plaintiff did not file a separate motion nor did he provide Defendant notice or an opportunity to withdraw or correct the defense or motion before seeking sanctions from the Court.

either tribunal was misled, and 3) the party advancing the inconsistent position would derive an unfair advantage on the opposing party. New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001).

Judicial estoppel should not bar an action when the conduct leading to the inconsistent positions is a mistake or inadvertence. Browning v. Levy, 283 F.3d 761, 776 (6th Cir. 2002). Two circumstances exist under which a debtor's failure to disclose a cause of action in a bankruptcy proceeding may be deemed inadvertent for purposes of the application of judicial estoppel. Id. A failure to disclose a cause of action may be found to be inadvertent where the debtor 1) lacks knowledge of the factual basis of the undisclosed claims, or 2) has no motive for concealment. Id.

To establish that Plaintiff's position in this case is clearly inconsistent with his position in an earlier bankruptcy proceeding, Defendant contends that in the earlier bankruptcy proceeding, Plaintiff denied being a party to an administrative proceeding despite having filed an Equal Employment Opportunity Commission ("EEOC") Charge two weeks prior to the initiation of the bankruptcy proceeding. Plaintiff filed EEOC Charge Number 250A11118 on June 28, 2001, and a Petition for Chapter 13 bankruptcy on July 9, 2001. The bankruptcy court entered an order on July 11, 2001, approving Plaintiff's wage earner plan based on the statements Plaintiff filed with the court. Furthermore, Plaintiff filed additional EEOC Charges on June 28, 2001, July 12, 2001, and July 31, 2001. Plaintiff admits in his deposition testimony that he never amended his Statement of Financial Affairs or Bankruptcy Petition to identify the EEOC Charges against Defendant.

Defendant asserts that Plaintiff's allegations in the Complaint and Amended Complaint in the instant action that he filed charges of employment discrimination with the EEOC cannot be reconciled with Plaintiff's earlier position in the bankruptcy proceeding. As such, Defendant maintains that Plaintiff's present position is "clearly inconsistent" with his earlier position. The

Court finds that Defendant has sufficiently alleged that Plaintiff's positions in the bankruptcy proceeding and in this action may be clearly inconsistent.

Defendant next asserts that the second factor necessary for the application of judicial estoppel is met because Plaintiff persuaded the bankruptcy court to accept Plaintiff's contention that Plaintiff had no administrative proceedings. Should this Court, therefore, accept Plaintiff's assertions in the Complaint and Amended Complaint that he filed four EEOC Charges, the perception will be created that the bankruptcy court was misled. The Court finds that Defendant's argument could establish that Plaintiff persuaded the bankruptcy court to accept Plaintiff's assertion that he was not involved in any administrative proceedings because the bankruptcy court approved Plaintiff's Chapter 13 Petition on July 11, 2001, based on the statements Plaintiff filed with the bankruptcy court. Therefore, Plaintiff's position in the Complaint and Amended Complaint that he filed EEOC Charges could be perceived as misleading either this Court or the bankruptcy court. However, even if perceived as misleading, because a Chapter 13 petition initiates a reorganization and since the filing of the charge did not result in income, the failure to list the administrative filing had no impact on the bankruptcy confirmation. Thus, the court finds that equity would warrant causing Plaintiff to amend his bankruptcy petition if the petition had not previously been dismissed.

Finally, with respect to the factors for determining the applicability of judicial estoppel, Defendant contends that if Plaintiff is permitted presently to assert the existence of an EEOC Charge, Plaintiff will be unduly advantaged. The timely filing of an EEOC complaint is a prerequisite to a Title VII suit. See EEOC v. Wilson Metal Casket Co., 24 F.3d 836, 839 (6th Cir. 1994). Contrarily, because Plaintiff did timely file an administrative complaint, to foreclose the instant case would be unduly prejudicial, especially where the situation could be remedied by amending the bankruptcy petition if the petition had not already been dismissed. Certainly, if this Court permits Plaintiff to

take an inconsistent position from the one advanced in the bankruptcy court, Plaintiff would be able to satisfy the jurisdictional prerequisite to an employment discrimination action. The Court finds that Plaintiff would not derive an unfair advantage if allowed to assert the existence of EEOC Charges against Defendant because Plaintiff clearly complied with the statute. To accept Defendant's position and foreclose this action would result in Defendant gaining an unfair advantage.

Plaintiff argues, however, that even if the Court assumes that Plaintiff was aware that the filing of an EEOC Charge constituted an administrative proceeding which should have been disclosed in the bankruptcy petition, the Plaintiff's failure to disclose to the bankruptcy court an EEOC Charge should not bar Plaintiff from proceeding under Title VII, 42 U.S.C. § 1981, and various state law claims. The Court interprets Plaintiff's argument to assert that Plaintiff may have inadvertently failed to disclose the EEOC Charge in the bankruptcy petition.

First, the Court observes that schedules, pleadings, and other documents filed in Court must be accurate. In commencing an action under 11 U.S.C. § 301, a debtor has an affirmative duty to disclose all of his or her assets. 11 U.S.C. § 521. In fact the 11 U.S.C. § 541 bankruptcy estate consists of:

- 1) all legal or equitable interests of the debtor in property at the commencement of the case,
- 2) all interests of the debtor in community property,
- 3) any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of title 11,
- 4) any interest in property preserved for the benefit of or ordered transferred to the estate under section 501(c) or 551 of title 11,
- 5) any interest in property that would have been property of the estate if such had been an interest of the debtor on the date of the filing of the petition, and the debtor acquires or becomes entitled to acquire within 180 days after filing,
- 6) proceeds from property of the estate, and

7) any interest in property that the estate acquires after commencement of the case.

Under a Chapter 13 plan of reorganization, all of debtor's disposable income is committed to paying creditors according to the confirmed plan. The purpose of having administrative matters listed is to allow the court to evaluate the debtor's true estate. The debtor does not secure a discharge until the end of the Chapter 13 case. In fact, even where a debtor has received a discharge, when fraud is alleged, the discharge can be set aside and the estate reopened to administer the assets.

In the case at bar, Defendant suggests that merely by failing to assert the existence of the administrative filing, Plaintiff has asserted inconsistent positions. Plaintiff contends, however, that it is a case of inadvertence. In examining the effect of Plaintiff's actions, the Court finds that the failure to list the asset had no material effect on the bankruptcy proceeding because the administrative charges had no liquidated monetary value. It did not represent a present asset, it did not produce an income stream, nor did it affect the size of the section 541 bankruptcy estate. Furthermore, assuming that this case is tried and Plaintiff prevails, the case has no effect on the bankruptcy estate because the bankruptcy case was dismissed shortly after Plaintiff filed the bankruptcy petition.

Based on the foregoing reasons, the Court finds that permitting Defendant to amend the answer to assert judicial estoppel would serve no meaningful purpose under the particular facts and circumstances of this case. Accordingly, the motion to amend the answer to assert judicial estoppel is DENIED.

IT IS SO ORDERED this _____ day of _____ 2003.

BERNICE BOUIE DONALD
UNITED STATE DISTRICT JUDGE