IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: JALISHA VANDIVER, Debtor **No. 5:03-bk-74116**
Ch. 7

ORDER

Before the Court is the chapter 7 trustee's Objection to Claim of Exemptions filed on April 10, 2008. The Court held a hearing on the objection on May 14, 2008, and took the matter under advisement. For the reasons set forth below, the Court overrules the trustee's objection and sustains Vandiver's claim of exemptions.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(B). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

History

On June 18, 2003, the debtor, Jalisha Vandiver, through her attorney, Melissa A. McManus, filed a chapter 7 petition for relief and bankruptcy schedules. Schedule B provides a space on line 20 for debtors to list "[o]ther contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims"; the debtor listed none. Jill R. Jacoway was appointed chapter 7 trustee in the debtor's case, and the first meeting of the creditors was scheduled for and held on July 31, 2003. On August 1, 2003, the trustee filed a Report of No Distribution. Vandiver received her discharge on September 30, 2003, and the case was closed on October 6, 2003.

EOD 5/30/2008
by D Tafoya

On March 19, 2007, McManus filed a motion to reopen Vandiver's bankruptcy case,

> to allow the debtor to amend her schedules to reflect the cause of action pursuant to Title IX of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e, et seq., and 42 U.S.C. sec. 1983, Arkansas Civil Rights Act, and common law which arose between August of 2002 and February 2003 and any other amendments which may be necessary.

(Mot. Reopen Case ¶ 5.) According to testimony at the hearing on May 14, 2008, Vandiver filed a sexual harassment lawsuit in the United States District Court for the Eastern District of Arkansas on October 21, 2003, against Vernon Smith and the Little Rock School District. The trustee testified she was not given notice that the district court case was filed until an attorney for Vandiver called her in March 2007. The attorney advised the trustee that the Little Rock School District had filed a motion for summary judgment in the district court case on the basis that Vandiver's claim was not disclosed in her 2003 bankruptcy.

On April 16, 2007, the Court entered its order reopening Vandiver's case. On May 14, 2007, on the debtor's behalf, McManus amended Schedule B to disclose a "sexual harrassment [sic] claim against the Little Rock School district et. al. The lawsuit has been filed and the value is contingent on the outcome of the trial." The amendment valued the asset at zero dollars, and claimed no exemption in the cause of action. On March 28, 2008, Vandiver, on her own behalf,[1] amended schedules B and C to value the cause of action at $600,000.00 and claim $10,325.00 of the cause of action as exempt under 11 U.S.C. § 522(d)(5) and $30,000.00 of the cause of action as exempt under § 522(d)(11)(D). On April 10, 2008, the trustee filed an objection to the debtor's claim of exemptions based on the failure of Vandiver to disclose the claim in her original schedules and at the 341(a) meeting in 2003; the trustee did not object to the amounts the

[1] On March 11, 2008, McManus filed a Motion to Withdraw as Counsel. On April 10, 2008, an order was entered approving the motion; since McManus's withdrawal, Vandiver has remained pro se.

debtor claimed as exempt. The Court held a hearing on the objection on May 14, 2008. The trustee argued that because Vandiver did not disclose her claim in 2003, she cannot now amend her schedules to claim the lawsuit exempt. Vandiver's position was that she did not know that her allegations concerning conduct that occurred before she filed bankruptcy constituted an asset, and as soon as she learned that she had a claim that should have been disclosed, she reopened the bankruptcy case and amended her schedules.

Findings of Fact and Conclusions of Law

Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Vandiver's interest in the cause of action that arose pre-petition became property of her bankruptcy estate upon filing. *Id*.; *Lopez v. Specialty Rests. Corp.* (*In re Lopez*), 283 B.R. 22, 28 (B.A.P. 9th Cir. 2002). Debtors may exempt certain property from their estate either under the federal exemptions or under state or other applicable exemption laws. 11 U.S.C. § 522(b). Generally, exemptions may be liberally amended under Federal Rule of Bankruptcy Procedure 1009(a), but there are two exceptions. Either bad faith on the part of the debtor or prejudice to the creditors can obviate the general rule that allows debtors to liberally amend their exemptions. *Ladd v. Ries* (*In re Ladd*), 450 F.3d 751, 755 (8th Cir. 2006); *Kaelin v. Basset* (*In re Kaelin*), 308 F.3d 885, 888-89 (8th Cir. 2002).

The issue in this case is whether Vandiver acted in bad faith regarding the non-disclosure of her pre-petition claim in her 2003 bankruptcy. The question of whether Vandiver acted in bad faith is determined by examining the totality of the circumstances. *Kaelin*, 308 F.3d at 889. A debtor who has attempted to hide an asset has acted in bad faith. *Id.* at 890. An intentional concealment of assets may be inferred from the circumstances, including non-disclosures that were the result of a reckless disregard for the truth of the information provided. *In re Bauer*, 291 B.R. 127, 130 (Bankr. D. Minn. 2003), *aff'd*, 298 B.R. 353 (B.A.P. 8th Cir. 2003). In this case, the trustee, as the objecting party, has the burden of proving by a preponderance of the evidence that Vandiver concealed the cause

of action or otherwise acted in bad faith, which would prevent Vandiver from claiming the cause of action as exempt. Fed. R. Bankr. P. 4003(c); *Bauer v. Iannacone* (*In re Bauer*), 298 B.R. 353, 356 (B.A.P. 8th Cir. 2003).

As proof that Vandiver concealed the pre-petition claim, the trustee relies on the following: (1) Vandiver did not list the claim in her bankruptcy schedules in 2003, (2) Vandiver did not disclose the claim at the 341(a) meeting or within a reasonable time,[2] (3) a lawsuit based on the pre-petition claim was filed in district court fifteen days after Vandiver received her discharge, and (4) the trustee was not informed of the lawsuit until almost three and a half years after Vandiver received a discharge. At the hearing, the debtor testified that she did not list her claim as an asset of her bankruptcy estate because she did not know that it was an asset; in her words, she did not know that her "degradation and humiliation at the hands of Vernon Smith constituted an asset." Her recollection of the 341(a) meeting was limited to the courtroom, a tape recorder on a table, and being informed she was under oath. Vandiver stated that two weeks before the meeting, she had defended and was cleared of terroristic threatening charges "against the man that sexually harassed [her]," that she remembered being very scared of saying the wrong thing at the 341(a) meeting and putting her freedom at risk again, and, for these reasons, she would not have lied under oath.

Vandiver testified that she told her bankruptcy attorney, McManus, "everything that happened to her," but at no time did McManus advise her that she could sue, that such a violation of her rights would constitute a cause of action, or that she needed to disclose

[2] Neither Vandiver or the trustee could specifically recall whether Vandiver was asked whether she had any claim, cause of action, or right to sue at the 341(a) meeting, or whether Vandiver denied having any. However, the trustee testified that, based on her experience as trustee since 1979, she believes she asked Vandiver whether she had any claim, cause of action, or right to sue; that Vandiver told her she did not have any; and that she asked Vandiver to promise to tell her if she found that she did have a claim, cause of action, or right to sue. Based on the trustee's habit and routine, this Court believes that she most likely asked those questions of the debtor.

the information about her sexual harassment allegations on her bankruptcy petition.[3] Vandiver also claimed that she did not conceal her bankruptcy from the district court or her attorney in district court, Gus Allen. She stated that when Allen took her case, he was aware of her bankruptcy, but did not ask if she listed the potential lawsuit as an asset or advise her to reopen her bankruptcy case. The debtor testified that as soon as she was made aware that her lawsuit was an asset that should have been disclosed, she took steps to reopen her bankruptcy case.

The debtor also introduced evidence that supported her testimony: an affidavit disclosing her financial means, which she filed pro se in the United States District Court for the Eastern District of Arkansas on November 26, 2003, in an effort to seek appointment of counsel. On page three of the affidavit, Vandiver stated that "[p]laintiff filed bankruptcy (chapter 7) in United States Bankruptcy Court in June 2003. Plaintiff was granted a discharge under section 727 of title 11, United States Bankruptcy Code on September 30, 2003." She attached a copy of the discharge order from her bankruptcy case. She testified that the affidavit was made part of the case file, was on the docket in district court, and that Allen had access to those records.

However, the affidavit also shows that Vandiver solicited an attorney on July 16, 2003, and he advised her to "file her complaint with the Equal Employment Opportunity Commission . . . ." In fact, the affidavit reflects that between July 16, before the 341(a) meeting, and November 14, after her discharge, Vandiver contacted several attorneys seeking representation in district court. The affidavit also references a "Notice of Right to Sue" that Vandiver received in early August, after the 341(a) meeting.

A finding of bad faith requires some "positive, concerted intent to delay, frustrate, or

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[3] Although it is certainly possible, it is hard to believe that the debtor did not disclose to her bankruptcy attorney the details of her claim that presumably led to the terroristic threatening charge. But, for whatever reason, her attorney did not list the claim as an asset.

prevent the bankruptcy estate from realizing on the value of the subject assets. A mere passage of time between the original and amended claims of exemption, standing alone, does not support an inference of such intent." *In re Reiland*, 382 B.R. 779, 784 (Bankr. D. Minn. 2008). Further, bad faith requires "concealment of an asset or an exemption of which the creditors have no knowledge and thus no opportunity to investigate. It requires something more than a mistaken failure to list an asset or to claim an exemption. . . . [T]here must be some form of deception." *McFatter v. Cage*, 204 B.R. 503, 508 (S.D. Tex. 1996).

In the light of the totality of the evidence presented at trial, the facts do not prove by a preponderance of the evidence that Vandiver acted in bad faith by taking any positive steps to conceal the lawsuit or frustrate her creditors. Although Vandiver did take steps to pursue representation regarding her allegations of sexual harassment during her bankruptcy and after her bankruptcy discharge, she did so openly, which is particularly evidenced by the affidavit that she filed shortly after her discharge. The affidavit disclosed her bankruptcy case, her contact with attorneys, and her Right to Sue letter. *Cf. Bauer*, 298 B.R. at 357 (finding the debtors' actions inconsistent with good faith where the debtors listed the value of their home at $80,000.00, but increased insurance coverage on the home to $276,000.00 the month before filing, and less than two months after the filing, the debtors turned down an offer to purchase their house "as is" for $150,000.00 because they believed the value to be higher).

This Court finds Vandiver's testimony credible and her explanation that she did not know her claim or lawsuit was an asset of her bankruptcy estate reasonable based on the nature of the asset--an intangible, contingent, unliquidated claim based on actions that took place before the bankruptcy was filed and for which no lawsuit had been filed.[4] *Cf. In re Evinger*, 354 B.R. 850, 855 (Bankr. W.D. Ark. 2006) (finding bad faith where the debtors

[4] The lawsuit was filed on October 21, 2003, fifteen days after the debtor's discharge.

concealed assets that were “plain, ordinary, and typical, and they fit well within the descriptive captions in the schedules. There was nothing so esoteric or unusual that would suggest a valid inadvertent omission obviating bad faith.”). If she did not understand at the time of filing that she had a claim, routine questions asked at a single 341(a) meeting would not necessarily cause such understanding. Several things are said and requested at a 341(a) meeting. It is reasonable that not all of those things would be completely understood by a layperson or, if understood, subsequently remembered. The debtor would simply proceed to act without the knowledge that she had a claim that should be scheduled.

Once the lawsuit was filed, Vandiver arguably should have remembered the trustee asking her to promise to contact her if she acquired a right to sue; however, there is uncontroverted testimony that Vandiver’s bankruptcy attorney and her district court attorney were aware of both her bankruptcy filing and her sexual harassment claim; this Court finds Vandiver credible on this testimony. If neither of her attorneys advised her to disclose the claim, or indicated that the lawsuit should have been disclosed, it is reasonable that Vandiver would not have been aware that she had an asset she was required to disclose. Clients are responsible for the actions of their attorneys. *Evinger*, 354 B.R. at 855 (stating that such responsibility is "fundamental to the concept of representation in an adversarial system" and that debtors dissatisfied with their counsel had "recourse to proceedings not currently before this Court"). However, clients rely on their counsel to guide them through the bankruptcy process and to make them aware of provisions of the bankruptcy code that may be inconceivable to a layperson, such as the fact that perceived personal wrongs are actually assets of their bankruptcy estate that belong to the chapter 7 bankruptcy trustee upon filing. Vandiver testified that she took steps to reopen the case and disclose the asset upon learning she should have done so in her original schedules. *See Kaelin*, 308 F.3d at 889-90 (reversing a B.A.P. finding of bad faith where, although the debtor amended his schedules to exempt a legal malpractice claim two years after the bankruptcy filing, the evidence showed that "upon learning of the potential claim, [the debtor] promptly sought to amend his schedules and moved to

exempt the asset").

Vandiver did not disclose an asset of her bankruptcy estate on her schedules or to the trustee until almost three and a half years after her discharge. This was a mistake that made her original schedules inaccurate and her answers at the 341(a) meeting incorrect. But Vandiver's failure to disclose this particular kind of asset under the circumstances in this case does not evidence bad faith. *See Doan v. Hudgins* (*In re Doan*), 672 F.2d 831, 833-34 (11th Cir. 1982) (reversing a finding of bad faith where the evidence showed that debtor's concealment of a tax refund was not intentional or fraudulent). To hold otherwise would leave little room for error or honest misunderstanding and consume the general rule that allows debtors to liberally amend their exemptions. Accordingly, the trustee's objection to Vandiver's exemptions is overruled.

Further, because there was no objection to the property the debtor claimed as exempt on any basis other than bad faith, Vandiver is entitled to exempt the amounts as claimed on her amended exemptions filed March 28, 2008. 11 U.S.C. § 522(*l*); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); Fed. R. Bankr. Proc. 4003(b). For these reasons, Vandiver's claimed exemptions are allowed.

IT IS SO ORDERED.

May 30, 2008
DATE

Ben Barry
BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: Jalisha Vandiver, pro se debtor
John T. Lee, attorney for chapter 7 trustee
Jill R. Jacoway, chapter 7 trustee
U.S. Trustee
All creditors and interested parties