

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JOHN E. BUTERBAUGH and
CARRIE BUTERBAUGH,

Plaintiffs,

vs.

Case No. 2012-4691-CH

SELENE FINANCIAL, LP, JPMORGAN
MORTGAGE ACQUISITION CORP.,
AS TRUSTEE FOR THE UNKNOWN
TRUST, and UNKNOWN TRUST,

Defendants.

OPINION AND ORDER

Defendants Selene Finance LP and JPMorgan Mortgage Acquisition Corporation (“Defendants”) have filed a joint motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiffs have filed a response and request that the motion be denied. In addition, Plaintiffs have moved for leave to amend their complaint.

Factual and Procedural History

On June 15, 2007, Plaintiffs executed a mortgage against property commonly known as 54731 Apache Lane, Shelby Twp, MI 48315 (“Subject Property”) in favor of MERS, as nominee for One Mortgage Company, LLC. The Mortgage was recorded on July 9, 2007. On December 3, 2008 the mortgage was assigned by MERS, on behalf of One Mortgage Company, LLC to HSBC Bank USA, N.A. (“HSBC”).

On March 30, 2012, Plaintiff filed for Chapter 13 bankruptcy. In their Chapter 13 plan, Plaintiffs stated that they will not be making any payments on the note and that as a result they would surrender the Subject Property.

On June 20, 2012, the Mortgage was assigned/recorded by HSBC to Defendant JP Morgan Mortgage Acquisition Corp. (“Defendant JP Morgan”). On June 29, 2012, Plaintiffs’ Chapter 13 Plan was approved.

On August 3, 2012, foreclosure proceedings were initiated against the Subject Property pursuant to MCL 600.3201 et seq. Pursuant to MCL 600.3205a, an initial letter was mailed to Plaintiffs informing them of their right to a mediation meeting. However, Plaintiffs failed to make a request for mediation or a modification. Foreclosure notices were published in Macomb County Legal News on September 11th, 18th, and 25th, as well as on October 2, 2012. The foreclosure notice was also posted at Subject Property.

On October 18, 2012, Plaintiffs filed their complaint in this matter. On December 14, 2012, a Sheriff’s Sale was conducted, with Defendant JP Morgan the winning bidder. On February 13, 2013, Plaintiffs voluntarily dismissed their Chapter 13 bankruptcy. On June 13, 2013, the redemption period expired, with no party redeeming.

On January 10, 2014, Defendants filed their instant motion for summary disposition. Plaintiffs have filed a response opposing the motion. In addition, on January 29, 2014, Plaintiffs filed a motion for leave to file an amended complaint. The Court will address each motion in turn.

1) Defendants’ Motion For Summary Disposition

Standards of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that

the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

In support of their motion, Defendants contend that they are entitled to summary disposition because Plaintiffs' entire complaint is barred by judicial estoppel. Specifically, Defendants contend that Plaintiffs' claims are based on whether the foreclosure was valid and that such claims are barred by judicial estoppel because Plaintiffs failed to list any of these claims in their bankruptcy plan or schedules and stated that they were surrendering the Subject Property.

Judicial estoppel has recently been explained *Spohn v Van Dyke Public Schools*, 296 Mich App 470 822 NW2d 239 (2012), where the Court stated:

Judicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. This doctrine is utilized in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship. . . . Under the "prior success model" of judicial estoppel, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. In accordance with this model of judicial

estoppel, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent. The prior success model, however, does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits.

More specifically, in the context of bankruptcy proceedings, the federal courts have indicated that to support a finding of judicial estoppel, [a reviewing court] must find that: (1) [the plaintiff] assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) [the plaintiff's] omission did not result from mistake or inadvertence. In determining whether [the plaintiff's] conduct resulted from mistake or inadvertence, [the reviewing] court considers whether: (1) [the plaintiff] lacked knowledge of the factual basis of the undisclosed claims; (2) [the plaintiff] had a motive for concealment; and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, [the reviewing court] will look, in particular, at [the plaintiff's] "attempts" to advise the bankruptcy court of [the plaintiff's] omitted claim.

Id. at 480-81.

"[T]o establish the first requirement for the imposition of judicial estoppel, it must be shown that the plaintiff[s] 'assumed a position that was contrary to the one that [they] asserted under oath in the bankruptcy proceedings.'" *Id.* at 481, citing *White v Wyndham Vacation Ownership, Inc*, 617 F3d 472, 476 (CA 6, 2010). In this case, it is undisputed that Plaintiffs did not include any of their potential claims on their bankruptcy petition, did not file an amended petition to list the possible causes of action while the bankruptcy remained pending, and asserted that they were surrendering the Subject Property. The failure to disclose the potential claims violated the bankruptcy code. *Spohn, supra*, at 481, 11 USC 101, *et seq.* Specifically, the Court in *Spohn* held:

It is routinely recognized that a potential cause of action constitutes an asset that must be included under 11 USC § 521(a)(1)(B)(i). In delineating this obligation, the federal courts have stated:

The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information ... prior to confirmation to suggest that it may have a possible cause of action, then that is a known cause of action such that it must be disclosed. *Any claim with potential must be disclosed*, even if it is contingent, dependent, or conditional. *In re Coastal Plains, Inc.*, 179 F3d 197, 208 (CA 5, 1999) (citations and quotation marks omitted).

Further, “[t]he duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action’.” *Id.* The disclosure obligations of debtors are considered to be essential to the bankruptcy process:

The rationale for ... decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that 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. The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete.

In this case, there is no dispute that Plaintiffs failed to include any of their instant claims on their bankruptcy petition, failed to amend their petition, and represented that they would be surrendering the Subject Property. As a result, Plaintiffs assumed multiple positions in the bankruptcy proceeding that were contrary to their positions in this case. Accordingly, the first requirement for judicial estoppel is met.

To establish the second element of judicial estoppel, the asserting party must show that the bankruptcy court adopted the contrary position either as a preliminary matter or as a part of the final disposition. *Spohn, supra*, at 483. Confirmation of a plan which fails to include the claims at issue is sufficient to satisfy the second element. *Id.* In this case, Plaintiffs’ bankruptcy plan, which did not include the claims at issue and was based, in part, on their representation that

they were surrendering the Subject Property, was confirmed. Consequently, the second element has been met.

The third element requires a showing that Plaintiffs' omission did not result from mistake or inadvertence. *Id.* This element requires the Court to consider (1) whether plaintiffs lacked knowledge of the factual basis of the undisclosed claims, (2) whether they had a motive for concealment and (3) the evidence indicates an absence of good faith.

In this case, the foreclosure proceedings were initiated in August 2012 and their bankruptcy remained pending until February 2013. Moreover, Plaintiffs initiated this matter in October 2012, while their bankruptcy petition was pending. Because all of Plaintiffs' claims relate to the validity of the foreclosure and were filed while the bankruptcy proceedings were ongoing, they cannot in good faith dispute that they were aware of the knowledge of the factual basis of the undisclosed claims or that they intended not to surrender the Subject Property.

With respect to concealment, "a presumption regarding a motive to conceal exists because '[i]t is always in a Chapter 13 petitioner's interest to minimize income and assets' in order to secure payment directly rather than to the debtor's estate." *Id.* at 485, citing *White, supra*, at 478-79. In this case, Plaintiffs' failure to disclose their possible claims suggests a motive for concealment.

With regards to bad faith, there is no dispute that Plaintiffs did not inform the bankruptcy court of the potential claims against Defendants or make any attempts to amend their petition. As such, these facts support that Plaintiffs were acting in bad faith. *Spohn, supra*, at 487.

In this case, the Court is satisfied that for the reasons discussed above the elements of establishing judicial estoppel have been met. Accordingly, Plaintiffs' claims are barred and Defendants' are entitled to summary disposition.

2) Plaintiffs' motion for leave to amend

MCR 2.118(A)(2) provides that leave to amend a pleading shall be freely given when justice so requires. A motion to amend ordinarily should be granted, unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of amendment. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Delay alone does not justify denying a motion to amend, but a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Franchino v Franchino*, 263 Mich App 172, 191; 687 NW2d 620 (2004).

In this case, the Court is convinced that Plaintiffs' proposed amendment would be futile. The claims in Plaintiffs' amended complaint all relate to the same foreclosure proceedings and mortgage as the claims in their original complaint. Accordingly, Plaintiffs' amended claims are also barred by judicial estoppel for the same reasons discussed above. Consequently, Plaintiffs' motion for leave to amend must be denied.

Conclusion

For the reasons discussed above, Defendants' motion for summary disposition is GRANTED. Plaintiffs' claims are DISMISSED. Further, Plaintiffs' motion for leave to amend is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: February 5, 2014

JCF/sr

Cc: *via e-mail only*

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