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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALEX MONTALVO,

Plaintiff,

-against-

ASSET ACCEPTANCE LLC,

Defendant.

09-CV-3948 (ARR) (JO)

NOT FOR PRINT OR ELECTRONIC PUBLICATION

OPINION & ORDER

ROSS, United States District Judge:

Plaintiff Alex Montalvo brought this action pursuant to the Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. § 1692d, alleging that defendant Asset Acceptance LLC, a debt collector, impermissibly harassed him by calling him repeatedly without leaving a message or giving meaningful disclosure of its identity. Now before the court is defendant's motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Defendant argues that plaintiff is barred from prosecuting this action because he did not disclose it as an asset in bankruptcy. For the reasons explained below, the court agrees.[1]

I. BACKGROUND

Defendant is in the business of acquiring and collecting defaulted debt. See Declaration of Kenneth Proctor, dated March 23, 2011 ("Proctor Decl.") ¶ 3. In the spring of 2009, it purchased from American Express a defaulted credit card account owned by plaintiff. Id. ¶ 4. Defendant subsequently placed a number of telephone calls to plaintiff, the quantity and character of which are matters of dispute between the parties. On September 14, 2009, plaintiff filed the complaint in the instant action, alleging that defendant's conduct violated the FDCPA.

[1] Defendant also argues that plaintiff cannot establish the elements of his FDCPA claim. Because the court finds that plaintiff is barred from asserting this claim, it does not reach the merits.

On March 10, 2010, plaintiff filed a pro se petition for relief under Chapter 7 of the United States Bankruptcy Code. Declaration of Alex J. Montalvo, dated July 16, 2010 ("Montalvo Decl.") ¶¶ 15-16; Declaration of Thomas R. Dominczyk, dated March 23, 2011 ("Dominczky Decl.") Ex. C; see also Deposition of Alex Monalvo, March 3, 2010 ("Montalvo Dep.") at 64-65. Neither in the petition nor at any subsequent point did plaintiff disclose the existence of his FDCPA claims to the bankruptcy court. Montalvo Decl. ¶ 17; Dominczyk Ex. C. In the "Statement of Financial Affairs" portion of the petition, plaintiff was directed to list "all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case." Dominczyk Decl. Ex. C (emphasis omitted). Plaintiff listed certain collection suits against him but failed to list this FDCPA action against defendant. Id. He states that he was unaware that this action was an asset requiring inclusion in the bankruptcy proceeding. Montalvo Decl. ¶¶ 15-18. On May 13, 2010, the Chapter 7 trustee in the bankruptcy proceeding entered a report of no distribution, in which he indicated that no assets had been abandoned. Dominczyk Ex. D. On June 15, 2010, the bankruptcy court granted plaintiff a discharge. Id. Ex. E.

II. DISCUSSION

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986). "'While genuineness runs to whether disputed factual issues can reasonably be resolved in favor of either

party . . . materiality runs to whether the dispute matters, i.e., whether it concerns facts that can affect the outcome under the applicable substantive law.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996) (internal quotation marks omitted)). In determining whether there is a genuine issue of material fact, "the district court is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." Weyant v. Okst, 101 F.3d 845, 854 (2d Cir. 1996) (citing Anderson, 477 U.S. at 255).

B. Standing

When a debtor files for bankruptcy protection, his assets, including legal and equitable interests, become property of the bankruptcy estate. 11 U.S.C. § 541(a)(1); Rosenshein v. Kleban, 918 F. Supp. 98, 102 (S.D.N.Y. 1996); Ibok v. Siac-Sector Inc., No. 05-CV-6584, 2011 U.S. Dist. LEXIS 7312, at *9 (S.D.N.Y. Jan. 27, 2011) (Report and Recommendation), adopted, 2011 U.S. Dist. LEXIS 27301 (S.D.N.Y. Mar. 14, 2011). "[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541," including "causes of action owned by the debtor." Chartschlaa v. Nationwide Mut. Ins. Co., 538 F.3d 116, 122 (2d Cir. 2008) (internal quotation marks and citations omitted).

> Given the wide scope of § 541, the debtor's obligation to disclose all his interests at the commencement of a case is equally broad. Because full disclosure by debtors is essential to the proper functioning of the bankruptcy system, the Bankruptcy Code severely penalizes debtors who fail to disclose assets: While properly scheduled estate property that has not been administered by the trustee normally returns to the debtor when the bankruptcy court closes the case, undisclosed assets automatically remain property of the estate after the case is closed. A debtor may not conceal assets and then, upon termination of the bankruptcy case, utilize the assets for [his] own benefit.

Id. (internal quotations marks and citations omitted). As a result, even after discharge of the bankruptcy estate, the debtor lacks standing to pursue a claim he failed to disclose. Coffaro v. Crespo, 721 F. Supp. 2d 141, 148 (E.D.N.Y. 2010); Rosenshein, 918 F. Supp. at 103; Ibok, U.S. Dist. LEXIS 7312, at *11.

Plaintiff did not disclose his FDCPA claim to the bankruptcy court, and the trustee did not abandon this claim. See 11 U.S.C. § 554(d) (unscheduled property not subject to presumption of abandonment). He therefore lacks standing to prosecute this action. See Tuttle v. Equifax Check Servs., Inc., No. 96-CV-948, 1997 U.S. Dist. LEXIS 21886, at *5 (holding that plaintiff lacked standing to assert an FDCPA claim not disclosed in bankruptcy petition).

C. Judicial Estoppel

Plaintiff's FDCPA claim is also barred by the doctrine of judicial estoppel. Judicial estoppel is an equitable doctrine, invoked at the discretion of the court, to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001). Although this doctrine is not reducible to "inflexible prerequisites or an exhaustive formula," certain factors generally inform a court's decision whether to apply judicial estoppel. Id. at 751. First, for the doctrine to apply, a party's later position must be irreconcilable with its earlier position. Id. at 750; Simon v. Safelite Glass Corp., 128 F.3d 68, 72-73 (2d Cir. 1997). Second, the party's earlier position must have been adopted by the tribunal to which it was advanced. Uzdavines v. Weeks Marine, Inc., 418 F.3d 138, 148 (2d Cir. 2005); see New Hampshire, 532 U.S. at 750-51. "A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." New Hampshire, 532 U.S. at 751. Finally, judicial estoppel may be inappropriate when a party's

prior representation was based on inadvertent error or good faith mistake Id. at 753; Simon, 128 F.3d at 73.

"In the bankruptcy context, judicial estoppel is commonly invoked in order 'to prevent a party who failed to disclose a claim from asserting that claim after emerging from bankruptcy.'" Coffaro, 721 F. Supp. 2d at 145 (quoting Negron v. Weiss, No. 06-CV-1288, 2006 U.S. Dist. LEXIS 69906, at *8-9 (E.D.N.Y. Sept. 7, 2006)). Judicial estoppel is "particularly appropriate" in this context because "the integrity of the bankruptcy system depends on a full and honest disclosure by debtors of all of their assets." Galin v. IRS, 563 F. Supp. 2d 332, 338-39 (D. Conn. 2008) (internal quotation marks and citations omitted).

Here, plaintiff's FDCPA claim is irreconcilable with his representation to the bankruptcy court that he had no such asset, and the bankruptcy court accepted plaintiff's representation when it discharged his debts. See id. at 339 ("A bankruptcy court is considered to have adopted a party's assertion in a bankruptcy proceeding when it confirms a plan in which creditors release claims against the debtor."); Coffaro, 721 F. Supp. 2d at 146. Plaintiff argues that judicial estoppel should not bar his claim because, absent estoppel, he will gain no unfair advantage and defendant will suffer no unfair detriment. The court disagrees. Absent estoppel, plaintiff would succeed in preserving for his own benefit a claim that might have been available to creditors in the bankruptcy case. See Kee v. Evergreen Prof'l Recoveries, Inc., No. 09-CV-5130, 2009 U.S. Dist. LEXIS 73841, at *8-9 (W.D. Wash. 2009) (dismissing FDCPA claim on basis of judicial estoppel); see also Tuttle, 1997 U.S. Dist. LEXIS 21886, at *6 (same). Furthermore, "because the doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants, judicial estoppel may be appropriate regardless of whether the opposing party will be prejudiced in its absence." Galin, 563 F. Supp. 2d at 340.

Plaintiff also argues that he should not be estopped because his omission of this FDCPA claim from the bankruptcy petition was inadvertent rather than knowing and intentional. The Second Circuit has not specifically addressed whether judicial estoppel is appropriate in a case involving a good faith failure to disclose assets in a bankruptcy proceeding. Coffaro, 721 F. Supp. 2d at 146. Several district courts in this circuit have addressed this question, however, looking to the reasoned authority of other circuit courts for guidance. These courts have each concluded that "failure to disclose assets will only be deemed inadvertent or due to mistake when either the debtor had no knowledge of the claims or no motive to conceal the claims." Coffaro, 721 F. Supp. 2d at 146; Galin, 563 F. Supp. 2d at 340; Ibok, 2011 U.S. Dist. LEXIS 7312, at *22; see also Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1157-58 (10th Cir. 2007) (collecting cases); but cf. Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 363-64 (3d Cir. 1996) (refusing, in the totality of the circumstances, to infer that plaintiff's omission of assets was deliberate). This court adopts the reasoning of its sister courts.

Drawing all inferences in favor of plaintiff and crediting his statement that he was unaware that this action constituted as asset which must be disclosed to the bankruptcy court, the court finds that his omission cannot be deemed inadvertent. It is undisputed that plaintiff knew of his FDCPA claim, having brought this action before filing his bankruptcy petition. His failure to disclose it is not excused by his pro se status in the bankruptcy proceeding. "The law is clear that legal advice and ignorance of the law are not defenses to judicial estoppel." Galin, 563 F. Supp. 2d at 341; see also Negron, 2006 U.S. Dist. LEXIS 69906, at *14; Cannon-Stokes v. Potter, 453 F.3d 446, 449 (invoking judicial estoppel because "a debtor in bankruptcy is bound by her own representations, no matter why they were made"). Plaintiff also had a motive to

conceal his claim from the bankruptcy court: to avoid its allocation to his creditors. See Coffaro, 721 F. Supp. 2d at 147. He is therefore judicially estopped from asserting it in this action.

III. CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is granted. The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

/s/(ARR)

Allyne R. Ross
United States District Judge

Dated: March 25, 2011
Brooklyn, New York