

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
PETER J. SPECKMAN, JR.,	§	Case No. 04-42172
	§	(Chapter 13)
Debtor.	§	
_____	§	
	§	
PETER J. SPECKMAN, JR.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 05-4086
	§	
FLAGSTAR BANK, F.S.B. and	§	
NORTEX MORTGAGE,	§	
	§	
Defendants.	§	

**MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANTS' MOTION TO DISMISS**

This matter is before the Court on the “Motion to Dismiss” filed by Flagstar Bank, F.S.B. (“Flagstar”) and Nortex Mortgage (“Nortex,” together with Flagstar, the “Defendants”). In the Motion, the Defendants seek the dismissal of this adversary proceeding based on the Debtor’s failure to disclose his claims against them in his bankruptcy schedules. The Court conducted a hearing on the Defendants’ Motion to Dismiss on November 19, 2007 and, at the conclusion of the hearing, granted the Motion for the reasons stated on the record and in this Memorandum Opinion.

FACTS

The Debtor filed a pro se petition for relief under Chapter 13 of the Bankruptcy Code on May 4, 2004. The case was converted to Chapter 7 on March 9, 2005. The Debtor received a discharge on June 17, 2005, and his case was administratively closed.

The only real property listed in the Debtor's "Schedule A – Real Property" was a residence located at 3329 Singletree Trail in Plano, Texas. The Debtor claimed this property as his exempt homestead under Texas law in his "Schedule C- Property Claimed as Exempt." The Debtor listed a market value of \$184,000 for his home, and he listed Flagstar as holding a purchase money lien on his home in the amount of \$131,500.

In his "Schedule B – Personal Property," the Debtor was instructed to list "all personal property of any kind." One of the listed categories of personal property was "other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." The Debtor responded that he had no property in this category in both his original Schedule B and an amended Schedule B filed on September 10, 2004.

Flagstar filed proof of a secured claim against the Debtor in the principal amount of \$161,452.68, which included \$34,329.81 in arrears. The Debtor objected to Flagstar's calculation of the alleged arrearage and proposed paying Flagstar a reduced amount in his Chapter 13 plan, as amended. On November 3, 2004, the Debtor withdrew his objection to Flagstar's claim.

After filing for bankruptcy, the Debtor defaulted on his mortgage payments. Flagstar filed motions seeking relief from the automatic stay and the co-debtor stay based on the payment defaults. Flagstar, the Debtor, and the Debtor's spouse subsequently reached an agreement providing for a cure of the payment arrears, among other things. The Court entered an "Agreed Order Conditioning the Automatic Stay Pursuant to 11 U.S.C. §362" and an "Agreed Order Conditioning the Co-Debtor Stay Pursuant to 11 U.S.C. §1301" (collectively, the "Agreed Orders") on February 10, 2005.

On March 9, 2005, the Debtor filed a notice with the Court of his voluntary conversion of his bankruptcy case from Chapter 13 to Chapter 7. The Debtor stated in the notice that “circumstances have changed for Debtor since the filing of this case that make it highly improbable that debtor can effect a Chapter 13 Plan that can be approved without objection.” The Debtor additionally stated that he was converting his case because he “has a number of disputed unsecured debts for which he wishes to seek a discharge under a Chapter 7 proceeding.”

Less than three months after the Court approved the Agreed Orders, the Debtor initiated this adversary proceeding against Flagstar. In his complaint, which was filed on May 2, 2005, the Debtor alleges that there were a number of errors on his credit report when he was negotiating the purchase of his home in or around 1998. He alleges that Nortex, as Flagstar’s agent, agreed (1) that Flagstar would loan him the funds necessary to purchase his home at an initial interest rate of 11.5% and (2) that Flagstar would re-negotiate the interest rate to then-current market terms if the Debtor made timely payments for twelve months and corrected the errors on his credit report with Experian. The Debtor further alleges that Flagstar and Nortex failed to honor the latter portion of this agreement by renegotiating the interest rate on his home mortgage. Thus, the Debtor claims that he was fraudulently induced to enter into the loan and that Flagstar has been unjustly enriched. He seeks the return of all “excess interest” paid to Flagstar, to strip Flagstar’s lien from his home, and to recover damages from Flagstar for alleged violations of the Texas Deceptive Trade Practices Act.

At the hearing on the Defendants’ Motion to Dismiss, the Debtor admitted that he knew he held claims against the Defendants when he filed his bankruptcy schedules, but

asserted that he did not consider these claims an asset since he was primarily seeking to reform his mortgage. The Debtor, through his counsel, represented that he initiated this adversary proceeding when the Defendants refused to settle. In his opposition to the Motion to Dismiss, the Debtor argued that he has not hidden his claims against the Defendants and that his “dispute with Flagstar was brought up at practically every hearing . . . and was stated as the reason why neither debtor could propose a viable plan.”

DISCUSSION

The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. *See United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993); *In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004). “The purpose of the doctrine is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the courts to suit the exigencies of self interest.” *Superior Crewboats*, 374 F.3d at 334 (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999)). In the Fifth Circuit, three requirements must be satisfied before a party can be estopped: (1) the party’s current position must be clearly inconsistent with his previous position; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent. *Id.* at 335. *See also, e.g., In re West Delta Oil Co., Inc.*, 66 Fed.Appx. 524 (5th Cir. 2003). “Because the doctrine is intended to protect the judicial system, rather than the litigants, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary.” *Coastal Plains*, 179 F.3d at 205.

The Court finds that the circumstances of this case satisfy each requirement necessary for the application of judicial estoppel. First, the Debtor’s positions in the

main bankruptcy case and in the present adversary proceeding are clearly inconsistent. “[T]he Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including *contingent and unliquidated claims*.” *Coastal Plains, Inc.*, 179 F.3d at 208 (emphasis in original). *See also* 11 U.S.C. §521(1). Schedule B specifically required the Debtor to disclose “contingent and unliquidated claims of every nature.” Although the Debtor now admits that he was aware of the claims he now asserts against the Defendants when he filed for bankruptcy relief, he omitted any mention of such claims in his bankruptcy schedules. This omission was “tantamount to a representation that no such claim[s] existed.” *See Superior Crewboats*, 374 F.3d at 335, and the Debtor’s inconsistency satisfies the first requirement for the application of judicial estoppel.

Second, the Court accepted the Debtor’s position that he had no unliquidated claims. Acceptance is evident when “the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.” *Coastal Plains, Inc.*, 179 F.3d at 206 (quoting *Reynolds v. Comm’r of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988)). Here, the issuance of the Debtor’s discharge by this Court on June 17, 2005 evidences the Court’s acceptance of his position.

Third and finally, the Debtor’s non-disclosure of his claims against the Defendants was not inadvertent. In a bankruptcy case, a debtor’s failure to disclose “contingent and unliquidated claims” is “‘inadvertent’ only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.” *Coastal Plains, Inc.*, 179 F.3d at 210. Here, when the Debtor filed his bankruptcy schedules, he had both knowledge of his current claims and a motive for

concealing them. All of the facts and events upon which the Debtor bases his claims took place in or around 1998, more than five years before the Debtor filed for bankruptcy. Additionally, the Debtor had the required motivation to conceal his claims because concealing them would allow him to secure a discharge of his debts while retaining the full benefit of any recovery on his claims.

Although the Debtor asserted at the dismissal hearing that he believed his claims against the Defendants had no value, his complaint seeks a substantial money judgment, among other things, against the Defendants. Moreover, even if the claims were worthless, the Debtor was required to disclose his claims against the Defendants in his Schedule B so that creditors and the Chapter 7 trustee could investigate their value.¹ The record, however, reflects that the Debtor did not disclose his claims against the Defendants to his creditors, the bankruptcy trustee or this Court prior to initiating this adversary proceeding – he made no mention of his claims in his objection to Flagstar’s claim, in his opposition to Flagstar’s motions for relief from the stay, or in his notice of conversion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant’s Motion to Dismiss shall be, and hereby is, **GRANTED**.

¹ The 1991 Advisory Committee Notes to the Form 6 Schedules (Schedules A-J) explain that “[t]he schedules require a complete listing of assets and liabilities *but leave many of the details to investigation by the trustee.*” 11 U.S.C.A. Official Bankr. Form 6, advisory committee's notes (emphasis added). A Chapter 7 trustee is the Chapter 7 estate's sole representative, see, e.g., *Miller v. Shallowford Community Hosp., Inc.*, 767 F.2d 1556, 1559 (11th Cir.1985), and a Chapter 7 debtor therefore may not unilaterally prosecute a claim that belongs to the estate.