

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:) CHAPTER 7
)
EMANUEL LOFTON,) CASE NO. 09-77895 - MHM
)
Debtor.)

ORDER REOPENING CASE

Debtor filed a motion to reopen this case August 13, 2010 (Doc. No. 33) (the "Motion"). Debtor, *pro se*, filed a petition initiating this Chapter 7 case July 9, 2009, as a no-asset case. Discharge was entered and the case closed June 28, 2010. Debtor failed to list a dispossessory action against him filed prepetition by Harbor Management, Inc. and Wyntrope Forest Apartments (the "Landlord")¹ and also failed to list the counterclaim asserted by Debtor against the Landlord in that Civil Action, No. 2009CV5367FF, filed April 13, 2009 in the Magistrate Court of Clayton County (the "Lawsuit"). Debtor now seeks to reopen this case to amend the Schedules to fully disclose the Lawsuit as both an asset (the counterclaim) and a liability in the estate.

Debtor's counterclaim in the Lawsuit alleged that a dirty air filter in the apartment he leased from Landlord caused him to develop eczema, a skin rash, and claimed \$60,000 in damages (the "Counterclaim"). As a result of the amount of damages alleged in the Counterclaim, the Magistrate Court of Clayton County transferred the Lawsuit to the State Court of Clayton County, where it is currently pending.

¹ Landlord was, however, listed as a creditor on Schedule F.

On July 16, 2010, Landlord filed a motion in the Lawsuit in the State Court of Clayton County seeking summary judgment as to Debtor's Counterclaim. That motion is based on Georgia law that holds a debtor is judicially estopped from asserting an action such as the Counterclaim if the debtor failed to disclose such action as an asset in this case. *Zahabiun v. Automotive Finance Corp.*, 281 Ga.App. 55, 56, 635 S.E.2d 342 (2006). *See also Wolfork v. Tackett*, 273 Ga. 328, 540 S.E.2d 611 (2001).

When Landlord's motion for summary judgment was filed, Debtor filed this Motion. Debtor retained the attorney representing him in the Lawsuit to represent him in connection with this Motion. Landlord filed an Objection to the Motion.

Debtor alleged in his Motion that he did not secure the service of an attorney to assist him with his bankruptcy case. Debtor asserts that he concluded the Lawsuit and this bankruptcy case were unrelated and omitted the information about the Lawsuit from his bankruptcy Schedules.² Debtor seeks to reopen this case now to amend the Schedules to fully disclose and to proceed with the Lawsuit.

Pursuant to 11 U.S.C. §350(b), a case may be reopened "to administer assets, to accord relief to the debtor, or for other cause." A decision to reopen a case pursuant to §350(b) is within the discretion of the bankruptcy court. *In re Blossom*, 57 B.R. 285 (Bankr. N.D. Ohio 1986). The court has a duty, however, to reopen whenever a party in interest shows that the bankruptcy estate has not been fully administered. *In re Upshur*, 317 B.R. 446 (Bank. N.D. Ga 2004). The proper focus is on the benefit to the creditors, so that if the unlisted and unadministered asset has any value, the case should be reopened for the benefit of creditors. *Id.*

² Section 521(a) and Bankruptcy Rule 1007(b) require a debtor to file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs (the "Schedules").

The undisclosed Counterclaim is property of the estate even after the Chapter 7 bankruptcy case is closed. *See* 11 U.S.C. §§541 and 554. Property that is not correctly scheduled remains property of the estate until administered or abandoned by the trustee. *Upshur*, 317 B.R. 446; *In re Lopez*, 283 B.R. 22 (9th Cir. BAP 2002).

When a bankruptcy case is filed, virtually all of the debtor's assets vest in the estate thus created. 11 U.S.C. §541(a)(1); *Parker v. Wendy's International, Inc.*, 365 F.3d 1268, 1272 (11th Cir., 2004).³ Property of the estate includes causes of actions owned by a debtor at the commencement of a case. A trustee is the only party in interest with standing to prosecute causes of action belonging to the estate. 11 U.S.C. § 323; *Parker*, at 1272. Under 11 U.S.C. §554, once an asset becomes part of the estate, a debtor's rights in the asset are extinguished unless the asset is abandoned. *Parker*, at 1272. When the bankruptcy case is closed, an asset that is not listed in the Schedules remains property of the estate. *Parker, supra.* at 1272.

Thus, as to the omitted Counterclaim, Trustee is the real party in interest. This case must be reopened to permit Trustee to deal with the property of the estate. Trustee will decide whether the Counterclaim has any value or benefit to the creditors, and whether to prosecute, settle, or abandon the Counterclaim; or any other course of action he may deem to be in the best interest of the creditors. Accordingly, it is hereby

ORDERED that this case is reopened and the Chapter 7 Trustee is reappointed to permit Trustee to administer the Counterclaim. It is further

³ Exempt property under §522 does not become property of the estate. An unlisted asset, of course, could not have been listed as exempt. A debtor may be denied an exemption in a previously undisclosed asset. *In re Keith*, 336 BR 746 (Bankr. W.D. Ky. 2006); *Doan v. Hudgins*, 672 F.2d 831 (11th Cir.1982); *In re Yonikus*, 996 F.2d 866 (7th Cir.1993); *Henkel v. Green*, B.R. 628 (Bankr. M.D. Fla.2001); *In re St. Angelo*, 189 B.R. 24 (Bankr.D.R.I. 1995); *In re Lundy* 216 B.R. 609 (Bankr. E.D. Mich. 1998). *See also, In re Williams*, 197 B.R. 398 (Bankr. M.D. Ga.1996); *In re Snow*, B.R. 598 (Bankr.E.D.Cal.,1982).

ORDERED that, except as to Lawsuit, the reopening of this case imposes no automatic stay pursuant to §362 of the Bankruptcy Code.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this Order upon Debtor, Debtor's attorney, attorney for Landlord, the Chapter 7 Trustee, the U.S. Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the 8th day of November, 2010.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

Draft Order Prepared And Consented To By:

By: /s/
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ORDER CONSENTED TO BY:

By: _____ /s/

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(signed with express permission by Brent M. Eden)

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