IT IS ORDERED as set forth below:

Date: September 1, 2016

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 12-68400-WLH
	)	
ELLEN CURIEL,	)	CHAPTER 7
a/k/a Ellen Francis,	)	
	)	JUDGE WENDY L. HAGENAU
Debtor.	)	
	)	

ORDER DENYING MOTION TO REOPEN CASE

The Motion of Debtor Ellen Strauss f/k/a Ellen Curiel to Reopen Case [Docket No. 19] came before the Court for hearing on August 30, 2016. John K. Rezac appeared on behalf of the Debtor. The Motion was opposed by Eddie Francis, and Penny Furr appeared on his behalf. After considering the testimony received and the evidence in the case, for the reasons stated on the record which the Court explains further in this opinion, the Motion is DENIED.

FACTS

Ellen Curiel filed a Chapter 7 bankruptcy petition, *pro se*, on July 25, 2012. Her case was deemed a no asset case by the Chapter 7 Trustee, and she was discharged on November 5, 2012.

Ms. Curiel's ex-husband is Eddie Francis. They were divorced in 2004. In November 2015, Ms. Curiel filed a petition for contempt in the Superior Court of Fulton County seeking to hold Mr. Francis in contempt for failing to pay required alimony, child support and other items going back to 2004. In response, Mr. Francis filed a bankruptcy petition on March 21, 2016. (Case No. 16-55053). Ms. Curiel promptly filed a motion to have the Francis case dismissed or converted, and she filed a proof of claim in the Francis case itemizing her claim against Mr. Francis beginning in 2004. At a hearing held on her motion to dismiss or convert the Francis case, Ms. Curiel testified that Mr. Francis' failure to pay her child support and alimony led her to file bankruptcy in 2012. The Court then reviewed Ms. Curiel's bankruptcy case and noted that no claims against Mr. Francis were disclosed in her schedules. The Court notified all parties of this fact. Ms. Curiel's Motion to reopen her bankruptcy case then followed.

At the hearing on the Motion to Reopen, Ms. Curiel testified she holds a law degree, has previously practiced mergers and acquisitions law at Jones Day, and has been a teacher. Ms. Curiel acknowledged that she personally completed the schedules which she filed in her bankruptcy case, including Schedule B. She acknowledged that in answer to question 17 on Schedule B to state "the alimony, maintenance, support and property settlements to which the debtor is or may be entitled", she stated "none". Ms. Curiel also testified that, notwithstanding the answer to Schedule B under oath, she in fact had a claim against Mr. Francis for back alimony, maintenance, support and other property settlements of $295,437 plus potentially another $49,000 or more owed to her in property settlements. She testified she did not know why she did not disclose the claim. The Debtor argued that, even if the claim had been scheduled, she would have been entitled to exempt virtually the entire claim under O.C.G.A. § 44-13-100 as payments for alimony and child support. The only claim which the Debtor argued may not be exemptible related to an obligation of Mr. Francis to make deposits into her

retirement account and the like and that she believed the likelihood of recovery on that claim was uncertain.

LAW

Reopening a bankruptcy case is governed by 11 U.S.C. § 350, which provides that a case may be reopened "to administer assets, to accord relief to the debtor, or for other cause." The bankruptcy court has broad discretion to determine whether cause exists to grant a motion to reopen. In re Rochester, 308 B.R. 596, 600 (Bankr. N.D. Ga. 2004). "When considering whether to reopen a bankruptcy case in the context of an undisclosed cause of action, courts have considered the following three interests: 1) the benefit to the debtor; 2) the prejudice or detriment to the defendant in the pending litigation; and 3) the benefit to the debtor's creditors." Id. at 601. Moreover, courts look to "whether the debtor intentionally failed to disclose the asset." Id. at 604. Generally, when the motion to reopen is for the purpose of adding an asset, the most important consideration is the benefit to the creditors. Id. at 601. But even if the creditors may benefit from a reopening of the case, the intent of the debtor remains a factor which is to be considered by the court in deciding whether to reopen the case. Id. at 605; Riggins v. Ambrose, 500 B.R. 190, 195 (N.D. Ga. 2013). The Eleventh Circuit has "issued a stern warning to bankruptcy petitioners who failed to disclose a potential legal claim as an asset by barring a debtor's … claim because he failed to disclose the potential … lawsuit in his bankruptcy filing." Id. at 194 (citing Burnes v. Pemco Arrowplex, Inc., 291 F.3d 1282, 1289 (11th Cir. 2002)).

Based on Ms. Curiel's testimony and the evidence in the record, reopening the case would benefit the Debtor because it would allow her to pursue Mr. Francis individually for recovery and exempt virtually the entire claim. If the case is not reopened, Ms. Curiel does not have standing to pursue the pre-petition claim. That is because the claim became property of the

bankruptcy estate when the petition was filed, 11 U.S.C. § 541(a)(1), and the Trustee is the only party with standing to prosecute causes of action belonging to the estate, 11 U.S.C. § 323. When a bankruptcy case is closed, property of the estate that is not administered or abandoned under Section 554 remains property of the estate. 11 U.S.C. § 554. Thus a claim not listed on the schedules remains in the estate. Parker v. Wendy's Int'l, Inc., 365 F.3d 1268 (2004); Upshur, 317 B.R. at 452-53.

The Court finds, on the other hand, there is minimal if any benefit to the creditors of Ms. Curiel for the case to be reopened. Under the Debtor's own testimony and position, there would be little if any funds made available to the estate for distribution to creditors. Moreover, the Court notes that the case has been closed for four years, that no bar date was set prior to the closing of the case because it was a no-asset case, and that, based on the Court's experience, the likelihood of any creditor filing a proof of claim at this late date is very small.

Mr. Francis argues that he would be prejudiced if the case were reopened such that Ms. Curiel could pursue the pre-petition claim against him. Ms. Curiel did not file any action to collect on this pre-petition claim until the fall of 2015, and Mr. Francis argues that he had no idea she asserted such a claim until that time. Had she been truthful in disclosing the claim in 2012, he would have had an opportunity to address the issue much sooner. The Court concludes there is some prejudice to Mr. Francis due to Ms. Curiel's delay in disclosing the claim.

Finally, the Court must evaluate Ms. Curiel's intent and good or bad faith in failing to disclose the claim. Ms. Curiel had no explanation for why she did not answer the question on Schedule B truthfully and did not disclose the over $295,000 claim against Mr. Francis. The Court notes the Debtor testified at the hearing on this Motion as well as in Mr. Francis' bankruptcy case that it was Mr. Francis' failure to pay alimony and child support that led her to file bankruptcy. She therefore was aware of the existence of the sizeable claim at the time she

filed bankruptcy. Moreover, Ms. Curiel is a well-educated person, educated as a lawyer, and is capable of reading and understanding question 17 on Schedule B. Further, question 17 is not full of legal jargon or mystical terms that a *pro se* debtor would not understand. The question asks whether the debtor is or may be entitled to alimony, maintenance, support or property settlements. Ms. Curiel most certainly knew she claimed entitlement to such relief but did not answer that question truthfully. Based on the foregoing, the Court concludes Ms. Curiel's failure to disclose the claim against Mr. Francis was not in good faith.

Given the remote chance of benefit to the creditors and Ms. Curiel's lack of good faith in failing to disclose the claim, the Court finds it would be inappropriate to allow the case to be reopened to disclose the claim now that Ms. Curiel wishes to pursue it.[1] As the Eleventh Circuit said, "allowing [a debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them." Burnes, 291 F.3d at 1287. This sort of perverse incentive undermines the goals of a bankruptcy proceeding, which requires "the full and honest disclosure of the debtor concerning any potential assets that could increase the value of the estate for the creditors." Id. at 1288-89. See also Riggins v. Ambrose, 500 B.R. at 196. It is therefore ORDERED that the Motion to Reopen is DENIED.

END OF ORDER

[1] In other cases, courts have reopened the bankruptcy case to allow an undisclosed claim to be scheduled even when the debtor acted in bad faith, but crafted solutions such that the debtor could not benefit from his/her bad faith actions. See Upshur, 317 B.R. at 453; In re Ambrose, 2014 WL 1477399 (Bankr. N.D. Ga. April 11, 2014). Such an approach is not available to the Court here. The U.S. Supreme Court in Law v. Siegel, 134 Sup.Ct. 1188 (2014) ruled that the bankruptcy court may not deny an exemption as a result of a debtor's bad faith. Thus, if the Court were to reopen the case, it would have no alternative but to allow the Debtor to fully exempt the proceeds of the claim.

DISTRIBUTION LIST

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