United States ex rel. Bias
v. Tangipahoa Par. Sch. Bd.

United States Court of Appeals for the Fifth Circuit

March 22, 2019, Filed

No. 17-30982

Counsel: RONALD BIAS, Plaintiff - Appellant, Pro se, Baton Rouge, LA.

For TANGIPAHOA PARISH SCHOOL BOARD, Defendant - Appellee: Danielle Ann Boudreaux, Robert L. Hammonds, Hammonds, Sills, Adkins & Guice, L.L.P., Baton Rouge, LA.

For NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER, Amicus Curiaes: Tara Ann Twomey, Attorney, National Consumer Bankruptcy Rights Center, San Jose, CA.

Judges: Before STEWART, Chief Judge, KING and OWEN, Circuit Judges.

Opinion

PER CURIAM:*

The opinion previously filed in this case, *United States ex rel. Ronald v. Tangipahoa Par. Sch. Board*, ___ F. App'x ___, 2018 U.S. App. LEXIS 34289, 2018 WL

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

6431033 (5th Cir. Dec. 5, 2018), is WITHDRAWN. The following opinion is SUBSTITUTED therefor:

Ronald Bias filed a petition for Chapter 13 bankruptcy in May 2008. After the bankruptcy court confirmed his plan, but before he received a discharge, Bias filed this suit under the False Claims Act. He did not disclose this litigation to the bankruptcy court. The Tangipahoa Parish School Board moved for judgment on the pleadings, arguing that Bias's claim was barred by judicial estoppel. The district court granted the motion and Bias appealed. We AFFIRM.

I.

In June 2009, the United States Marine Corps informed Ronald Bias that it had mistakenly allowed him to retire two years early. At the time, Bias was employed by the Tangipahoa Parish School Board (the "Board") as a senior instructor for Amite High School's Junior Reserve Officers' Training Corps ("JROTC"). The Marine Corps gave Bias the option of paying back the retirement funds he had erroneously earned or reenlisting for fifteen months to become eligible for retirement. Bias chose the latter. Bias was allowed to fulfill his reenlistment through his employment as a JROTC instructor. Bias alleged that he was told he would remain at Amite High School for the entirety of his fifteen-month reenlistment.

Bias contends that during this time Carl Foster, another JROTC instructor at Amite, submitted fraudulent requests for reimbursement to the Marine Corps.

Bias alleges that he reported this behavior to Michael Stant, Amite's principal, and to the Marine Corps, but he was not taken seriously.

Shortly thereafter, the Marine Corps informed Bias that he could retire or be transferred to a New Orleans school district. Bias considered this action to be retaliatory and filed this lawsuit against the Board, Stant, and Foster on September 5, 2012. Bias asserted claims under the False Claims Act ("FCA"), including a *qui tam* action and a retaliation claim. He later amended his complaint to add claims under 42 U.S.C. § 1983 and state law.

The district court granted defendants' motion to dismiss Bias's FCA retaliation claim and § 1983 and state law claims, and the parties settled Bias's remaining FCA claim. Bias appealed the dismissal. We affirmed on all grounds but one: we reversed the dismissal of Bias's FCA retaliation claim as against the Board and remanded the suit to the district court for further proceedings. *See United States ex rel.* ***Bias v. Tangipahoa*** *Par. Sch. Bd.*, 816 F.3d 315, 328 (5th Cir. 2016).

On remand, the Board filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), arguing that judicial estoppel barred Bias's suit because he had not disclosed the cause of action in his Chapter 13 bankruptcy case. Bias had filed for Chapter 13 bankruptcy in the Eastern District of Virginia in May 2008. The bankruptcy court confirmed his plan on June 5, 2008—several years before Bias initiated this

suit in September 2012. For the next five years, Bias made payments in accordance with the plan until he received a discharge on July 18, 2013. Bias did not amend his bankruptcy schedules to disclose this cause of action or otherwise inform the bankruptcy court of this litigation. Finding that judicial estoppel barred Bias's claim, the district court granted the Board's motion and dismissed the case. Bias timely appealed.

II.

We typically review de novo a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). *Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017). "But, because 'judicial estoppel is an equitable doctrine, and the decision whether to invoke it [is] within the court's discretion, we review for abuse of discretion' the lower court's decision to invoke [this doctrine.]" *Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) (alterations in original) (quoting *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 384 (5th Cir. 2008)). "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Id.* (quoting *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003)).

III.

The district court did not abuse its discretion in finding that judicial estoppel prevented Bias from

pursuing his FCA retaliation claim.[1] A court may apply judicial estoppel if "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) the court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011). We discuss each element of the judicial estoppel analysis in turn.

A.

We find that the first element of judicial estoppel is met in this case. Because he had an affirmative duty to disclose post-petition causes of action, Bias impliedly represented that he did not have such a claim when he failed to disclose this litigation to the bankruptcy court. Thus, Bias's position that he now has an FCA retaliation claim is "plainly inconsistent" with his earlier omission.

Bias and amici protest that he did not take an inconsistent position, reasoning that a Chapter 13 debtor has no obligation under the Bankruptcy Code or Rules to disclose post-confirmation causes of action. They contend that post-petition causes of action are not

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[1] Bias argues that the Board waived its judicial estoppel defense because it failed to plead it in its answer. "[T]he district court 'may invoke the [judicial estoppel] doctrine sua sponte' and therefore 'the court is not bound to accept a party's apparent waiver of the doctrine.'" *Allen*, 813 F.3d at 571 n.4 (quoting 18 *Moore's Federal Practice* § 134.34 (3d ed. 2015)). Therefore, the district court did not err in applying the doctrine here, regardless of whether the Board timely asserted the defense.

property of the bankruptcy estate because only the debtor's assets at the time of filing a petition for bankruptcy are the property of the estate—any assets acquired after the petition are the debtor's to keep. The only exceptions, they argue, are made under 11 U.S.C. § 541(a)(5) and Federal Rule of Bankruptcy Procedure 1007(h), which require debtors to report inheritances, divorce settlements, and insurance proceeds to which the debtor becomes entitled within 180 days of the petition's filing date.

Bias and amici also urge us to distinguish this case from *Flugence v. Axis Surplus Insurance Co.* (*In re Flugence*), 738 F.3d 126 (5th Cir. 2013). *Flugence* concerned a similar set of facts: the debtor brought suit after filing for Chapter 13 bankruptcy and receiving a plan confirmation. In finding that the debtor had a duty to disclose her cause of action, this court relied on the language in her confirmation plan, which "explicitly stated that the estate's assets would not revest in the debtor until *discharge*." *Id.* at 130 (emphasis added). In contrast, Bias points out, his plan stated that "[p]roperty of the estate shall revest in the debtor(s) upon *confirmation* of the plan (emphasis added)." Therefore, Bias reasons that he had no obligation to disclose this cause of action to the bankruptcy court because the litigation was not property of the estate.

Whether this litigation belongs to the estate misses the point. We have recognized that "Chapter 13 debtors have a continuing obligation to disclose post-petition causes of action." *Allen*, 813 F.3d at 572

(quoting *Flugence*, 738 F.3d at 129). Debtors must disclose post-confirmation assets to the bankruptcy court regardless of whether the assets are "treated as property of the estate or vested in the debtor." *Id.*; *see also Flugence*, 738 F.3d at 130 ("[O]ur decisions have settled that debtors have a duty to disclose to the bankruptcy court notwithstanding uncertainty."). This continuing obligation exists because the inclusion of assets in the bankruptcy estate "is often a contested issue, and the debtor's duty to disclose assets—even where he has a colorable theory for why those assets should be shielded from creditors—allows that issue to be decided as part of the orderly bankruptcy process." *Allen*, 813 F.3d at 572 (quoting *Flugence*, 738 F.3d at 130). Therefore, because Bias had an affirmative duty to disclose his FCA retaliation claim in the bankruptcy court but failed to do so, he impliedly represented that he did not have such a claim. Accordingly, the first prong of the judicial estoppel inquiry is satisfied.[2]

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[2] Bias also urges us to refrain from applying *Flugence* "retroactively," noting that *Flugence* was issued three months after his bankruptcy was discharged. But this argument is without merit because *Flugence* did not announce new law. *See Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 208 (5th Cir. 1999) ("The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action." (quoting *Youngblood Group v. Lufkin Fed. S&L Ass'n*, 932 F. Supp. 859, 867 (E.D. Tex. 1996))). Relatedly, because the duty to disclose post-confirmation causes of action is well established in this circuit, Bias and amici's argument that the court cannot infer an inconsistent statement from a debtor's silence "absent a clear and certain disclosure requirement" and that such an inference violates "due process of law" is also without merit.

Bias and amici make various equitable and policy arguments that this standard is overly rigid. But our precedent is clear: Chapter 13 debtors must disclose post-petition causes of action. *See, e.g.*, *Allen*, 813 F.3d at 572; *Flugence*, 738 F.3d at 129 n.1 ("The continuing duty of disclosure is a longstanding gloss required by our caselaw."); *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600 (5th Cir. 2005) ("The obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one."); *Superior Crewboats, Inc. v. Primary P & I Underwriters* (*In re Superior Crewboats Inc.*), 374 F.3d 330, 335 (5th Cir. 2004) ("The duty to disclose is continuous."). Bias and amici also argue that this "heightened disclosure" requirement is unduly burdensome, as it would require debtors to modify their bankruptcy plans each time they receive a paycheck or their property appreciates. These examples are inapt, however, because those paychecks and properties would already have been included in the debtor's original schedules. Thus, they would not need to be disclosed again. In contrast, Bias never disclosed this cause of action to the bankruptcy court. As the Eleventh Circuit has recognized, "The bankruptcy court is entitled to learn about a substantial asset that the court had not considered when it confirmed the debtors' plan." *Waldron v. Brown* (*In re Waldron*), 536 F.3d 1239, 1245 (11th Cir. 2008). Thus, Bias's and amici's arguments are without merit.

B.

We find that the second element of judicial estoppel is also met in this case because the bankruptcy court accepted Bias's prior position by granting him a discharge. *See Flugence*, 738 F.3d at 130 (finding that "the bankruptcy court accepted the prior position by omitting any reference to the [cause of action] in the modified plan" because "[h]ad the court been aware of the claim, it may well have altered the plan"). Although Bias argues that the bankruptcy court could not have accepted his position because he never disclosed his FCA claim to the bankruptcy court, he did not present this argument to the district court. Therefore, we decline to address it for the first time on appeal. *In re Deepwater Horizon*, 857 F.3d 246, 251 & n.8 (5th Cir. 2017) ("[A]rguments not raised before the district court are waived and cannot be raised for the first time on appeal." (quoting *LeMaire v. Louisiana*, 480 F.3d 383, 387 (5th Cir. 2007)).

C.

Finally, we find that the third element of judicial estoppel is satisfied. Judicial estoppel will not apply if the non-moving party's failure to disclose was inadvertent, meaning that he did not know of his inconsistent position or had no motive to conceal it from the court. *Jethroe*, 412 F.3d at 600-01. Bias has not met either prong here.

To show a lack of knowledge, it is not enough for the non-moving party to show that he did not know he

had a duty to disclose his claim; he must demonstrate that he was "unaware of the facts giving rise to [the claim]." *Allen*, 813 F.3d at 573 (quoting *Flugence*, 738 F.3d at 130). Thus, Bias's argument that he was confused about the law and did not know that bankruptcy law required disclosure "is, according to our precedents, irrelevant." *Id.* (quoting *Flugence*, 738 F.3d at 131). And Bias knew of the facts underlying his FCA retaliation claim during the bankruptcy proceedings—he filed this suit in September 2012, but he did not receive his discharge until July 2013. Therefore, Bias cannot establish inadvertence by showing that he did not know of his inconsistent position.

Nor has Bias demonstrated that he did not have a motive to conceal his claim from the court. When evaluating whether such a motive existed, we must consider whether Bias "had a 'motive to conceal [his] claim[]' during the pendency of the bankruptcy proceedings." *Id.* at 573-74 (quoting *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 263 (5th Cir. 2012)). Had the bankruptcy court known of his FCA claim, it may have modified his plan to require Bias to increase his payments, shorten the payoff period, or pay interest. *See U.S. ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 273 (5th Cir. 2015). Bias also admits that under the terms of his confirmation plan, any settlement or judgment in his favor would have to be disclosed to the bankruptcy court. Bias was therefore further incentivized to conceal his claim and prolong this litigation to avoid having to include it in his bankruptcy estate. Thus, Bias had a financial motive to conceal his claim.

Finally, Bias and amici make various equitable and policy arguments throughout their briefs, arguing that "the Fifth Circuit has begun using the doctrine [of judicial estoppel] as a per se rule as a perfunctory bludgeon with which to punish dishonest and honest debtors alike."[3] But for the purposes of our review, our inquiry is limited to whether the district court abused

[3] Bias also urges us to "overrule" our precedent to require a more fact-specific inquiry into the debtor's motive, as the Eleventh Circuit did in *Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017) (en banc). But Bias and the Eleventh Circuit mischaracterize our caselaw. Prior to *Slater*, the Eleventh Circuit had allowed a court applying judicial estoppel "to infer intent to misuse the courts" from a debtor's nondisclosure. *Id.* at 1177. *Slater* overruled this precedent to require courts applying judicial estoppel to review the "totality of the facts and circumstances of the case." *Id.* at 1188. The Eleventh Circuit—in a sentence fragment in a footnote—characterized our caselaw as permitting an "inference that a plaintiff who omitted a claim necessarily intended to manipulate the judicial system." *Id.* at 1189 & n.18. Summing up our caselaw in this manner is a hazardous undertaking, and one that the Eleventh Circuit got wrong. Unlike the Eleventh Circuit, our caselaw has always required courts to consider the facts before them in determining whether a debtor acted inadvertently. Take, for example, the very case the Eleventh Circuit cites in support of its erroneous proposition: *Superior Crewboats, Inc. v. Primary P & I Underwriters* (*In re Superior Crewboats Inc.*), 374 F.3d 330 (5th Cir. 2004). There, we did not draw an "inference" from the debtors' omission that they had intended to "manipulate the judicial system." Instead, we considered the facts surrounding the debtors' nondisclosure, such as their knowledge of the claim; that they had initiated the suit "only months after filing for bankruptcy and requesting service of process during the pendency of the bankruptcy petition"; and their continued silence. *Id.* at 335. We have undertaken a fact-specific inquiry in this case as well. In sum, *Slater* altered the Eleventh Circuit's caselaw to make it more like our own precedent, not less. Therefore, we see no reason to consider this case en banc.

its discretion in applying this equitable doctrine. *Coastal Plains*, 179 F.3d at 205. Because we find that the district court's decision comports with our precedent and therefore did not rely on "erroneous conclusions of law," and we do not find that it relied on "clearly erroneous factual findings" or "misapplie[d] the law to the facts," *Allen*, 813 F.3d at 572, we decline to reverse for abuse of discretion.

Therefore, because all three elements of judicial estoppel are met, we find that the district court did not abuse its discretion in granting the Board's motion for judgment on the pleadings and dismissing Bias's FCA retaliation claim.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.

United States ex rel. Bias v. Tangipahoa Parish Sch. Bd.

United States District Court for the Eastern District of Louisiana

November 30, 2017, Decided; November 30, 2017, Filed

CIVIL ACTION NO. 12-2202 SECTION "L" (1)

Counsel: For Ronald Bias, United State [sic] of America, ex rel, Plaintiff: Paul F. Bell, LEAD ATTORNEY, Bell Law Firm, LLC, Baton Rouge, LA; Alan F. Kansas, Law Office of Alan Kansas, LLC, Terrytown, LA.

For Tangipahoa Parish School Board, Defendant: Robert L. Hammonds, LEAD ATTORNEY, Courtney Terell Joiner, Danielle Ann Boudreaux, Melissa Losch, Pamela Wescovich Dill, Hammonds, Sills, Adkins & Guice, LLP, Baton Rouge, LA.

For United States of America, Interested Party: Andre Jude Lagarde, LEAD ATTORNEY, U. S. Attorney's Office (New Orleans), New Orleans, LA.

Judges: Eldon E. Fallon, UNITED STATES DISTRICT JUDGE.

Opinion by: Eldon E. Fallon

Opinion

ORDER

This action arises out of an alleged misappropriation of United States Marine Corps ("USMC") funds

and resulting retaliation. On November 1, 2006, relator Ronald Bias retired from the Marine Corps as a lieutenant colonel. Following his retirement, he was employed by the Tangipahoa Parish School Board as a senior marine instructor for the Junior Officers' Training Corps ("JROTC") at Amite High School. On June 18, 2009, the USMC contacted Mr. Bias to inform him that it had mistakenly allowed him to retire two years early. As a result of this error, the Marine Corps paid Mr. Bias $106,000 for which he had been ineligible. Accordingly, he was provided with the option of repaying those benefits or re-enlisting for a period of 15 months so as to become eligible for retirement. Mr. Bias chose the latter. Although JROTC positions are ordinarily filled by retired officers and employed by the schools, the USMC allowed Plaintiff Bias to continue his position as a JROTC instructor at Amite High School in order to fulfill his re-enlistment. Therefore, Mr. Bias was to be employed by the USMC rather than the school. According to Mr. Bias, he was informed that he would remain at this assignment for 15 months, at which point he could either re-enlist or retire.

As the senior marine instructor, Mr. Bias supervised Mr. Foster, a marine instructor and retired master sergeant in the Marine Corps, and reported to Mr. Stant, principal of Amite High School, both of whom were employees of the Tangipahoa Parish School Board. Mr. Bias alleges that in September 2009, he became aware that Mr. Foster planned to request that the Marine Corps reimburse him for non-JROTC activities, including an out-of-state trip by the school's

cross-country team. Mr. Bias then notified both Mr. Stant and the Marine Corps of Mr. Foster's intentions. However, with Mr. Stant's approval, Mr. Foster persisted and made the request, which was denied. As a result, in part, Mr. Foster was decertified as a senior instructor with the JROTC. Mr. Bias reported an additional alleged misappropriation in April 2010, which involved reimbursement for non-JROTC related concession stand supplies.

Later that month, on April 12, 2010, Mr. Bias was informed by the Marine Corps that he would be transferred to a New Orleans school district if he did not retire. Mr. Bias asserts that this transfer constituted retaliation against him for "whistleblowing." Because Bias believed the transfer would be detrimental to his career and would cause considerable strain to his family, Mr. Bias chose to retire instead of taking the assignment. His retirement occurred sometime after he had completed his 15 months of active service. Additionally, Mr. Bias asserts that between the time of the reported misappropriation of funds and the transfer order, Stant and Foster attempted to undermine his ability to perform his job by shouting at him, badgering him at school meetings, and spreading rumors.

In September 2012, Bias filed this lawsuit against the Tangipahoa Parish School Board as well as Mr. Stant and Mr. Foster, in their official capacities. R. Doc. 1. He asserted claims under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, including a *qui tam* action and a retaliation claim. Bias later amended his complaint to add claims under 42 U.S.C. § 1983 and

state law against the defendants. The defendants moved to dismiss for failure to state a claim or, alternatively, for summary judgment. This Court, relying on Rule 12(b)(6), dismissed Bias's FCA retaliation claim because he had not sufficiently alleged that the defendants caused his employer, the Marine Corps, to transfer him. The Court additionally dismissed Bias's Section 1983 and state law claims as time-barred. After the Court entered a scheduling order regarding Bias's sole remaining claim, the FCA *qui tam* action, Bias moved for leave to file a second amended complaint. This was denied by the magistrate judge and that denial was affirmed by this Court. The parties settled the remaining FCA claim and final judgment was entered on the previously-dismissed claims in the defendants' favor in January 2015.

Bias timely appealed the Court's ruling and in March 2016, the Fifth Circuit affirmed the ruling in part and remanded in part. R. Doc. 129. The Fifth Circuit affirmed the district court's dismissal of the Section 1983 claims and state law claims as time-barred. However, the Fifth Circuit reversed the dismissal of Bias's FCA retaliation claim against the School Board and remanded it to the district court in accordance with its opinion. R. Doc. 129. In reversing the district court's dismissal of the claim, the Fifth Circuit found that although Bias was employed by a different entity, the School Board may be liable because, under § 3730(h), liability extends to defendants "by whom plaintiffs are employed, with whom they contract, or for whom they are agents." R. Doc. 129-1 at 10. The

Fifth Circuit concluded, "exactly what the relationship was between Bias and the School board is unclear. It is plausible, though that he was, as claimed, an agent [of TPSB]." *U.S. ex rel.* ***Bias v. Tangipahoa*** *Par. Sch. Bd.*, 816 F.3d 315, 325 (5th Cir. 2016). Additionally, the Fifth Circuit concluded that Foster and Stant's attempts to undermine Bias's ability to perform his job plausibly constituted retaliatory acts. *Id.* at 327.

On September 13, 2017, the Court granted Defendant's Motion for Judgment on the Pleadings and Plaintiff's claims were dismissed on the ground of judicial estoppel. The Court determined that Plaintiff was required to disclose the existence of the above claims and the lawsuit to the bankruptcy court during the pendency of his bankruptcy. Because Plaintiff failed to disclose the lawsuit, his claims are judicially estopped. The Court dismissed the lawsuit without prejudice for thirty (30) days to allow time for a Chapter 7 trustee to pursue their right to the claims. R. Doc. 226.

Plaintiff Bias then requested additional time to reopen his bankruptcy, for a trustee to be assigned, and for the trustee to determine if it wanted to pursue the above claims. R. Doc. 228. The Court granted Plaintiff's Motion for Extension of Time and allowed forty-five (45) additional days for the trustee to determine whether to pursue their rights. The Court stated that after this period the case would be dismissed with prejudice. R. Doc. 231. At this time, the forty-five (45) day period has elapsed and the trustee has not determined to pursue their rights.

For the reasons stated above, **IT IS ORDERED** that Plaintiff Bias' claims are **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, this 30th day of November, 2017.

/s/ Eldon E. Fallon

UNITED STATES DISTRICT JUDGE

United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.

United States District Court for the Eastern District of Louisiana

September 13, 2017, Decided; September 13, 2017, Filed

CIVIL ACTION NO. 12-2202 SECTION "L" (1)

Counsel: For Ronald Bias, United States of America, ex rel, Plaintiff: Paul F. Bell, LEAD ATTORNEY, Bell Law Firm, LLC, Baton Rouge, LA; Alan F. Kansas, Law Office of Alan Kansas, LLC, Terrytown, LA.

For Tangipahoa Parish School Board, Michael Stant, in his official capacity, Carl J Foster, in his official capacity, Defendants: Robert L. Hammonds, LEAD ATTORNEY, Courtney Terell Joiner, Danielle Ann Boudreaux, Melissa Losch, Pamela Wescovich Dill, Hammonds, Sills, Adkins & Guice, LLP, Baton Rouge, LA.

For United States of America, Interested Party: Andre Jude Lagarde, LEAD ATTORNEY, U. S. Attorney's Office (New Orleans), New Orleans, LA.

Judges: Eldon E. Fallon, UNITED STATES DISTRICT JUDGE.

Opinion by: Eldon E. Fallon

Opinion

ORDER AND REASONS

Before the Court is Defendant Tangipahoa Parish School Board's motion for judgment on the pleadings. R. Doc. 195. Plaintiff opposes this motion. R. Doc. 213. Additionally, before the Court are cross-motions for summary judgment from relator Ronald Bias, and the sole remaining Defendant Tangipahoa Parish School Board ("TPSB"). R. Docs. 197, 206. Having considered the parties' briefs and the applicable law, the Court now issues this Order and Reasons.

I. BACKGROUND

This action arises out of an alleged misappropriation of United States Marine Corps ("USMC") funds and resulting retaliation. On November 1, 2006, relator Ronald Bias retired from the Marine Corps as a lieutenant colonel. Following his retirement, he was employed by the Tangipahoa Parish School Board as a senior marine instructor for the Junior Officers' Training Corps ("JROTC") at Amite High School. On June 18, 2009, the USMC contacted Mr. Bias to inform him that it had mistakenly allowed him to retire two years early. As a result of this error, the Marine Corps paid Mr. Bias $106,000 for which he had been ineligible. Accordingly, he was provided with the option of repaying those benefits or re-enlisting for a period of 15 months so as to become eligible for retirement. Mr. Bias chose the latter. Although JROTC positions are ordinarily filled by retired officers and employed by the schools,

the USMC allowed Plaintiff Bias to continue his position as a JROTC instructor at Amite High School in order to fulfill his re-enlistment. Therefore, Mr. Bias was to be employed by the USMC rather than the school. According to Mr. Bias, he was informed that he would remain at this assignment for 15 months, at which point he could either re-enlist or retire.

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career and would cause considerable strain to his family, Mr. Bias chose to retire instead of taking the assignment. His retirement occurred sometime after he had completed his 15 months of active service. Additionally, Mr. Bias asserts that between the time of the reported misappropriation of funds and the transfer order, Stant and Foster attempted to undermine his ability to perform his job by shouting at him, badgering him at school meetings, and spreading rumors.

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entered on the previously-dismissed claims in the defendants' favor in January 2015.

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II. PRESENT MOTIONS

Before the Court is Defendant's Motion for Judgment on the Pleadings. Also before the Court are the parties' cross-motions for summary judgment.

Defendant TPSB first asserts that Plaintiff Bias should be judicially estopped from bringing the present claim because Plaintiff failed to disclose the claim to the Bankruptcy Court during his bankruptcy proceeding. R. Doc. 195-1 at 3-6. Plaintiff Bias responds arguing that there is confusion within the Bankruptcy Code and Plaintiff was not required to disclose the present claim because he was not directed by the Court or his attorney to do so. R. Doc. 213 at 3-4. Second, Defendant alleges that Plaintiff's claims are barred by the *Feres* doctrine because adjudication of the claims will required the Court to improperly interfere with military decisions. R. Doc. 197-1 at 13. Finally, Defendant argues that it is entitled to summary judgment because Plaintiff has failed to satisfy the elements of the FCA retaliation claim. R. Doc. 197-1 at 11.

In his motion for summary judgment, Plaintiff Bias argues that he has satisfied all required elements of the FCA retaliation claim. R. Doc. 206-1 at 1.

The present motions raise three issues: 1) judicial estoppel, 2) the *Feres* doctrine, and 3) summary judgment on Plaintiff's FCA retaliation claim.

III. LAW & ANALYSIS

Defendant TPSB seeks a Rule 12(c) judgment on the pleadings based on the doctrine of judicial estoppel.

A. Rule 12(c) Standard

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is subject to the same standard as a motion pursuant to Rule 12(b)(6). *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). "[A]ll well-pleaded facts are viewed in the light most favorable to the plaintiff, but plaintiffs must allege facts that support the elements of the cause of action in order to make out a valid claim." *City of Clinton v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152-53 (5th Cir. 2010). "To avoid dismissal, a plaintiff must plead sufficient facts to 'state a claim to relief that is plausible on its face.'" *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). The court "do[es] not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005).

B. Judicial Estoppel

"Judicial estoppel 'is an equitable doctrine invoked by a court at its discretion' for the purpose of 'protect[ing] the integrity of the judicial process.'" *U.S. ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 271

(5th Cir. 2015). "[T]he Supreme Court has refused to establish inflexible prerequisite or an exhaustive formula for determining the applicability of judicial estoppel. . . ." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc). However, when determining whether judicial estoppel applies, courts consider whether: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position, (2) a court has accepted the prior position; and (3) the party did not act inadvertently." *Id.* "[T]here is no *per se* rule estopping any party who fails to disclose potential claims to a bankruptucy court"; rather, discretion is left to the trial court. *Long*, 798 F.3d at 271.

"[A]gainst the backdrop of the bankruptcy system . . . judicial estoppel must be applied in such a way as to deter dishonest debtors, whose failure to fully and honestly disclose all their assets undermines the integrity of the bankruptcy system. . . ." *Id.* "Judicial estoppel is particularly appropriate where . . . a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset." *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005).

"It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims." *In re Coastal Plains, Inc.*, 179 F.3d 197, 207-08 (5th Cir. 1999) (citing 11 U.S.C. § 521(1)). Debtors remain under a duty to disclose potential assets even when it is unclear whether

those assets will be part of the bankruptcy estate and even when those assets are ultimately determined to be outside of the bankruptcy estate. *United States v. Beard*, 913 F.2d 193, 197 (5th Cir. 1990); *see also Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) (quoting *In re Flugence*, 738 F.3d 126, 130 (5th Cir. 2013)) ("'[D]ebtors have a duty to disclose to the bankruptcy court' whether post-confirmation assets are treated as property of the estate or vested in the debtor."); *In re Aycock*, 10-80516, 2014 Bankr. LEXIS 1051, 2014 WL 1047803, at *3 (Bankr. W.D. La. Mar. 18, 2014) ("*Flugence* therefore sets forth the binding precedent that the debtor in Chapter 13 has a continuing duty to disclose the post-confirmation acquired asset so that its status as property of or outside the estate may be determined by the Bankruptcy Court."). Furthermore, "[w]hen the plan or order confirming the plan provides that the property of the estate revests in the debtor at confirmation, only those property interests existing at confirmation revest in the debtor. The estate is not extinguished by confirmation, but rather is comprised of new property acquired by the debtor post-confirmation . . . the Debtors' post-confirmation inheritance and post-confirmation business income is property of the estate, and is the proper subject of a plan modification." *In re Wetzel*, 381 B.R. 247, 254 (Bankr. E.D. Wis. 2008). When the debtor/plaintiff fails to disclose a potential legal claim in bankruptcy but then subsequently pursues that claim, they have asserted a plainly inconsistent legal position. *See, e.g.*, *Allen*, 813 F.3d 566; *Flugence*, 738 F.3d 126.

Requiring judicial acceptance "ensures that judicial estoppel is only applied in situations where the integrity of the judiciary is jeopardized." *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, 698 F.3d 231, 237 (5th Cir. 2012). "[J]udicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *In re Coastal Plains*, 179 F.3d at 206 (quoting *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 473 (6th Cir.1988)).

Inadvertence may be demonstrated by showing that debtor/plaintiff was unaware of the inconsistent position or that they had no motive to conceal it from the court. To demonstrate inadvertence, the plaintiff "must show not that she was unaware that she had a duty to disclose her claims but that . . . she was unaware of the facts giving rise to them." *Jethroe*, 412 F.3d at 601. "Bankruptcy law imposes [a duty to disclose] as long as the debtor has enough information to suggest that he may have a potential claim; the debtor need not know all of the underlying facts of even the legal basis of the claim." *U.S. ex rel. Spicer v. Westbrook*, 751 F.3d 354, 362 (5th Cir. 2014). "A motivation to conceal may be shown by evidence of a potential financial benefit that could result from concealment." *Long*, 798 F.3d at 273 (citing *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012)). "'[T]he motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court' because the 'potential financial benefit resulting from the nondisclosure' makes the motivation in this context

self-evident." *Allen*, 813 F.3d at 574 (quoting *Love*, 677 F.3d at 262).

Finally, "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). Therefore, Plaintiff's claims that cases clarifying the duty to disclose after his bankruptcy was closed cannot apply in this case are inaccurate.

C. Discussion

The threshold question before the Court is whether Plaintiff Bias is estopped from pursuing his FCA retaliation claim. Bias has argued that he never had a duty to disclose this claim to the Bankruptcy Court because disclosure of a post-petition lawsuit is only required should a plan explicitly provide for disclosure and he was never instructed to tell his attorney or the Bankruptcy Court about the suit. R. Doc. 213 at 3-4.

The Court now considers the three elements of judicial estoppel.

Plaintiff Bias admits that he never disclosed this lawsuit as an asset in his bankruptcy proceeding. Bias filed for Chapter 13 bankruptcy on May 22, 2008. R. Doc. 213-1 at 1. Plaintiff Bias filed this lawsuit on September 5, 2012, during the pendency of the bankruptcy proceeding and never disclosed it to the trustee. R. Doc.

1. The Bankruptcy Court confirmed Bias' bankruptcy plan on July 23, 2008 and discharged his bankruptcy on July 18, 2013. R. Doc. 213-1 at 1. The Bankruptcy Court accepted Plaintiff's position that he had no potential legal claims, which was inaccurate. Following his discharge, Bias continued prosecuting this lawsuit.

Finally, Plaintiff's argument that he was ignorant of the law or that the law was confusing fails. It is abundantly clear that debtors must disclose all potential lawsuits as assets, even when it is not certain that they will become part of the bankruptcy estate. Obviously, Bias had knowledge of his FCA claim during the pendency of his bankruptcy because he filed this lawsuit before he was discharged in bankruptcy. Further, Bias is not required to have had knowledge of the claim, merely the facts that lead to the claim. The alleged facts occurred in September 2009, shortly after Bias filed for bankruptcy. Motivation is generally self-evident and here, under the terms of his bankruptcy without disclosure of this lawsuit, Bias was not required to pay interest on his debt and had over $200,000 discharged. R. Doc. 213-1 at 10. "Therefore, [Bias'] arguments on the issue of inadvertence are uniformly rejected by binding precedent." *Allen v. C & H Distribs., LLC*, 2015 U.S. Dist. LEXIS 39031, 2015 WL 1399683, at *4 (W.D. La. March 26, 2015).

For these reasons, Plaintiff Bias' claims are judicially estopped and this initial issue is dispositive. Therefore, the Court does not need to address the remaining issues.

IV. CONCLUSION

For the reasons stated above, **IT IS ORDERED** that Defendant's Motion for Judgment on the Pleadings, R. Doc. 195, is **GRANTED** and Plaintiff Bias' claims are **DISMISSED** on grounds of judicial estoppel. This dismissal is **WITHOUT PREJUDICE FOR THIRTY (30) DAYS** to allow time for a Chapter 7 trustee to pursue their rights to the claims if Plaintiff Bias' bankruptcy case is reopened and converted to a Chapter 7 liquidation. *See Reed v. City of Arlington*, 650 F.3d 571, 579 (5th Cir.2011) ("Absent unusual circumstances, an innocent bankruptcy trustee may pursue for the benefit of creditors a judgment or cause of action that the debtor-having concealed that asset during bankruptcy-is himself estopped from pursuing."). After thirty (30) days, Plaintiff Bias' claims will be **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiff and Defendant's cross-motions for summary judgment, R. Docs. 197, 206, are **DISMISSED AS MOOT**.

New Orleans, Louisiana, this 13th day of September, 2017.

/s/ Eldon E. Fallon

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30982

United States of America, ex rel, RONALD BIAS,

Plaintiff - Appellant

v.

TANGIPAHOA PARISH SCHOOL BOARD,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 22, 2019)

(Opinion - 12/5/18, 5 Cir., _____, _____ F.3d _____)

Before STEWART, Chief Judge, KING and OWEN, Circuit Judges. PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
UNITED STATES CIRCUIT JUDGE

11 U.S. Code § 1325 – Confirmation of plan

(a)Except as provided in subsection (b), the court shall confirm a plan if—

* * *

(3)the plan has been proposed in good faith and not by any means forbidden by law;

(4)the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

* * *

(6)the debtor will be able to make all payments under the plan and to comply with the plan;

(7)the action of the debtor in filing the petition was in good faith;

* * *

(b)

(1)If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

* * *

(B)the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first

payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2)For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

* * *

(4)For purposes of this subsection, the "applicable commitment period"—

(A)subject to subparagraph (B), shall be—

(i)3 years; or

(ii)not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—

(II)in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

* * *

(B)may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c)After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

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11 U.S. Code § 1329 - Modification of plan after confirmation

(a)At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1)increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2)extend or reduce the time for such payments;

(3)alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4)reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that—

(A)such expenses are reasonable and necessary;

(B)

(i)if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii)if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C)the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title;

and upon request of any party in interest, files proof that a health insurance policy was purchased.

(b)

(1)Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2)The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c)A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original

confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

UNITED STATES BANKRUPTCY COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In the Matter of: RONALD BIAS Debtor	Chapter 13 Case No. 08-12901-RGM

ORDER CONFIRMING PLAN

The Chapter 13 Plan filed by Ronald Bias on June 5, 2008, having been transmitted to all creditors; and it having been determined that the plan meets each of the requirements of 11 U.S.C. Section 1325(a);

It is ORDERED that:

(1) the Plan as filed or modified is CONFIRMED.

(2) Upon entry of this order, all property of the estate shall revest in the Debtor(s). Notwithstanding such revesting, the Debtor(s) shall not encumber, refinance, sell or otherwise convey real property without first obtaining an order of approval form [sic] this Court.

(3) All funds received by the Chapter 13 Trustee on or before the date of an order of conversion or dismissal shall be disbursed to creditors, unless such disbursement would be de minimis, in which case the funds may be disbursed to the Debtor(s) or paid into the Treasury registry fund account of the Court, at the discretion of the Trustee. All funds received by the Chapter 13 Trustee after the date of the entry of the

order of dismissal or conversion shall be refunded to the Debtor(s) at their address of record.

It is further ORDERED that:

1. On June 21, 2008, and each month thereafter until further order of this Court, the Debtor shall pay to the Trustee, Gerald M. O'Donnell at P.O. Box 34780, Alexandria, Virginia 22334-0780 the sum of $1,000.00. Payments under said Plan to be completed within 60 months from the due date of the first payment in this case.

2. That the Debtor(s) shall furnish the Trustee annual federal and state income tax returns within forty five (45) days of the due date of such returns, and such additional information as the Trustee may require for determination of the Debtors' disposable income.

Dated: _____

_____
Robert G. Mayer
United States Bankruptcy
Judge

Confirmation Recommended.

_/s/ Gerald M. O'Donnell___
Gerald M. O'Donnell
Chapter 13 Trustee
211 North Union Street, Ste. 240
Alexandria, VA 22314
(703) 836-2226
VSB #7930

[Local Rule 9022-1(C) Certification Omitted]