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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

SEP 14 2021

GREGORY A JONES ET AL
Plaintiff

Case No: CV-19-923954

Cuyahoga County
Clerk of Courts
By _____ Deputy

KARL DLUGOS ET AL
Defendant

Judge: CASSANDRA COLLIER-WILLIAMS

JOURNAL ENTRY

89 DIS. W/PREJ - FINAL

FINAL OPINION AND ORDER ATTACHED AND ORDERED RECORDED. FINAL. OSJ.
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER
PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL
PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature

OSJ

Date

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

GREGORY A. JONES, et al.)	Case No. CV-19-923954
)	
Plaintiffs,)	JUDGE CASSANDRA COLLIER-WILLIAMS
)	
)	
vs.)	
)	
KARL DLUGOS, et al.)	
)	<u>FINAL OPINION AND ORDER</u>
Defendants.)	
)	

JUDGE C. COLLIER-WILLIAMS:

Plaintiffs Gregory Jones and Sharon Jones (hereinafter “Plaintiffs”) and Defendants Karl Dlugos and Lisa Gottschalt (hereinafter “Defendants”) submitted briefings to this Court on the issue of Defendants’ standing to bring a counterclaim for money damages after their Chapter 7 bankruptcy petition has been discharged. This matter is before the Court upon the parties’ briefings.

For reasons set forth more fully below, this Court hereby DISMISSES Defendants’ Counterclaim based upon Defendants’ lack of standing.

I. FACTUAL AND PROCEDURAL BACKGROUND

In February 2017, the Defendants entered into a land installment contract with the Plaintiffs. The contract was for property located in North Olmsted, Ohio, and the monthly payment was \$772.64, plus a \$50 late fee, if applicable. In February 2018, the Defendants failed to make payments according to the contract, and the Plaintiffs provided notice to them of their breach and how it could be remedied according to the terms of their contract. On March 5, 2018, the

Defendants made a \$500 payment. On March 7, 2018, the Plaintiffs filed an action in the Rocky River Municipal Court. The complaint was for forcible entry and detainer and forfeiture. The Defendants filed an answer in which they claimed, in part, that the Plaintiffs accepted their \$500 payment.

The magistrate held a trial on March 26, 2018. At the conclusion of the trial, the magistrate found in favor of the Plaintiffs and against the Defendants for nonpayment of rent on the “first cause of action,” forcible entry and detainer. The magistrate granted the Defendants until April 16, 2018, to move to plead or file an answer as to the “second cause of action,” the forfeiture action. The trial court “accepted, approved and adopted” the magistrate’s decision as the judgment of the court.

On April 2, 2018, Defendants filed a motion to stay eviction, which was denied on April 4, 2018. A writ of restitution was filed, ordering that the Defendants be “forthwith removed” from the property and the Plaintiffs have restitution of it. Defendants did not vacate the property. Therefore, the Plaintiffs filed a request to execute writ of restitution. The Defendants filed a motion to set aside the magistrate’s order and stay the writ of restitution, which the trial court denied. Thereafter, the Defendants filed objections to the magistrate’s decision; the objections were overruled.

On April 13, 2018, Defendants filed an answer to the second cause of action in the complaint and a counterclaim. Their counterclaim was for breach of contract and sought an amount for equity they claim to have in the house. The Defendants were ordered to be out of the subject property on April 20, 2018. On April 19, 2018, Defendants filed for Chapter 7 bankruptcy that resulted in an automatic stay of the case. The bankruptcy petition was dismissed on May 1, 2018. Defendants filed another Chapter 7 bankruptcy petition on May 14, 2018, resulting in

another automatic stay of the case. The bankruptcy stay was lifted in August 2018, and the eviction proceedings resumed. On October 3, 2018, two days before the day set for their eviction, Defendants filed an emergency motion for stay of eviction in the Eighth District Court of Appeals; they also filed an appeal in the Court of Appeals of the municipal court's March 2018 judgment that again stayed the eviction date. Their emergency motion was denied on October 4, 2018. The Defendants then filed a second notice of appeal on October 5, 2018, that was transferred to the first appeal. Meanwhile, the eviction proceeded and the Defendants were evicted in October 2018, and the property was restored to the plaintiffs.

The Court of Appeals dismissed the appeal as moot because the Defendants had been evicted in October 2018. The Defendants filed a motion for reconsideration, which was granted. On July 25, 2019, the Court of Appeals released an opinion, ultimately dismissing the appeal as moot. The Court of Appeals determined that since the Defendants vacated the property, their contentions relating to the alleged impropriety of their eviction were moot. On July 31, 2019, Defendants filed an application for reconsideration of the Court of Appeals' July 25th decision dismissing the appeal as moot. This application was denied as moot on August 26, 2019.

On September 4, 2019, Defendants filed a motion to vacate the magistrate's March 26, 2018 Order. The magistrate denied the motion as moot. In doing so, the magistrate stated that the March 26th Order only granted restitution of the premises to the Plaintiffs pursuant to the First Cause of a Forcible Entry and Detainer Action. The magistrate stated that, since Plaintiffs regained possession of the premises, no further relief can be granted as to that issue.

The matter was then set for a hearing on Plaintiffs' request for an order granting forfeiture of the land contract. On October 7, 2019, the matter was transferred to the Cuyahoga County

Common Pleas Court because the answer and counterclaim of the Defendants exceeded the monetary jurisdiction of the Rocky River Municipal Court.

The Defendant's debt in this matter was discharged on July 14, 2019. The final decree closing the Bankruptcy was filed January 28, 2020.

The only claims left before this Court to be adjudicated are Plaintiffs' Forfeiture of Land Contract claim and Defendants' counterclaim. On March 23, 2021, this Court held a hearing and ordered the parties to submit briefings on the issue of standing after a Chapter 7 bankruptcy has been discharged.

As revealed in the subsequent briefings and the filing of the bankruptcy petition, Defendants failed to list their counterclaim against the Plaintiffs in their petition. In their briefing, Plaintiffs assert that Defendants' claims are barred not only because they lack standing, but also by the doctrine of judicial estoppel. Plaintiffs argue that because Defendants failed to disclose their counterclaim on their bankruptcy petition, Defendants are estopped from arguing a contrary position in the present litigation. For the reasons set forth below, the Court agrees with the Plaintiffs' position.

II. APPLICABLE LAW AND ANALYSIS

A. **Standing**

"[S]tanding is required to invoke the jurisdiction of the common pleas court, and therefore it is determined as of the filing of the complaint." *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 3. In order to establish standing, a party "must assert a personal stake in the outcome of the action * * *." (Emphasis deleted.) *Reynolds*

v. HCR ManorCare, Inc., 9th Dist. Summit. No. 27411, 2015-Ohio-2933, ¶ 13, quoting *Bank of Am., N.A. v. Kuchma*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 23.

In their briefing, Plaintiffs assert that because Defendants were under bankruptcy protection while their counterclaim was pending against Plaintiffs, that counterclaim is property of the bankruptcy estate, making the bankruptcy trustee the real party in interest. *Plaintiffs' Brief*, pg. 3. Once a bankruptcy case is filed, all property, including civil causes of action, is property of the bankruptcy estate. Section 541(a), Title 11, U.S. Code. "[T]he commencement of a voluntary, involuntary, or joint bankruptcy creates an estate whereby the debtor is divested of virtually all property interests held as of the commencement of the case." *Hargreaves vs. Carter*, 9th Dist. Summit No. 17450, 1996 Ohio App. LEXIS 1167, 4 (Mar. 27, 1996). The United States Court of Appeals for the Sixth Circuit has held that upon commencement of the bankruptcy case, all causes of action, even if unassignable, become "property" of the bankruptcy estate pursuant to 11 U.S.C. 541(a)(1). *In re Cottrell*, 876 F.2d 540 (6th Cir. 1989).

The incidents underlying Defendants' counterclaim occurred between February 2018 and October 2018. Defendants filed a voluntary petition for bankruptcy under Chapter 7 on May 14, 2018. Thus, Defendants' counterclaim became part of the bankruptcy estate when they filed for Chapter 7 bankruptcy. Where a cause of action is property of the bankruptcy estate, the debtor is divested of it and does not have standing to assert the claim unless the trustee abandons the claim. *Kovacs v. Thompson, Hewitt, & O'Brien*, 117 Ohio App.3d 465, 469, 690 N.E.2d 970 (9th Dist. 1997); *see also Murray v. Miller*, 5th Dist. Richland No. 15CA02, 2015-Ohio-3726, ¶ 29.

The Defendants attempt to make an argument that the trustee abandoned the counterclaim. Given that the counterclaim was not even scheduled on the bankruptcy petition, this Court finds that it could not have been abandoned. Section 544(d), Title 11, U.S. Code; *see also Hargreaves*

at *6 (stating that a claim must be scheduled under 11 U.S.C. 521(1) in order to be abandoned); *see also Wells v. Hughes*, 3rd. Dist. No. 2-17-16, 2017-Ohio-8684 (finding that a trustee could not have abandoned a cause of action when it was never listed as an asset in plaintiff's bankruptcy petition).

Defendants seem to suggest that they adequately disclosed the ongoing legal actions between themselves and Plaintiffs during an in-person meeting with the trustee. *Defendants' Reply Brief*, pg. 4. In support of this contention, Defendants state the following:

Defendants told [the trustee] that the current amount claimed was equal to the equity in the home as stated on page 1 part 1. To the trustee, this was still a non-event as the amount was a swap between the asset listed on page 1 part 1 and then this legal claim. As a result of the counterclaim being significantly less than Defendants' outstanding debt, the trustee decided to abandon the property . . .

Defendants' Reply Brief, pg. 4.

However, informal oral discussions are insufficient and do not substitute for the mandatory filing of formal schedules, as required by Bankruptcy Rule 1007(b). *See In re Moore*, 175 B.R. 13, 17 (Bankr.S.D. Ohio 1994) ("[T]he [Bankruptcy] Code does not authorize debtors, or their counsel, to simply present words on the wind at a § 341 meeting or in any other circumstance * * *"). "It is well-settled that a cause of action is an asset that must be scheduled under § 521(1)." *Lewis v. Weyerhaeuser Co.*, 141 F. App'x 420, 424 (6th Cir. 2005). Therefore, Defendants' alleged oral disclosure to the trustee of their counterclaim against Plaintiffs does not substitute for the mandatory filing of formal schedules.

Defendants lost standing to pursue their claims against Plaintiffs when they filed their bankruptcy petition under Chapter 7. Only the trustee in bankruptcy has standing to pursue the debtor's claims on the debtor's behalf because the debtor's claims are property of the bankruptcy

estate. *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir.1988) ("Property of the estate that is not abandoned * * * and that is not administered in the case remains the property of the estate."); *Auday v. Wet Seal Retail, Inc.*, 698 F.3d 902, 904 (6th Cir.2012) (holding that only the trustee, and not the debtor have standing to pursue debtor's claims that existed at the time the bankruptcy petition was filed).

Consequently, this Court finds that the Defendants do not have standing to pursue their Counterclaim, and therefore, said Counterclaim is hereby dismissed, with prejudice.

B. Judicial Estoppel

Even if Defendants had standing to pursue their counterclaim, they would be judicially estopped from doing so due to their failure to disclose their counterclaim in their bankruptcy petition. The doctrine of judicial estoppel "precludes a party from assuming a position in a legal proceeding inconsistent with a position taken in a prior action." *Advanced Analytics eLaboratories, Inc. v. Kegler, Brown, Hill & Ritter, L.P.A.*, 148 Ohio App. 3d 440, 2002-Ohio-3328, 773 N.E.2d 1081 ¶ 37. When Defendants filed for Chapter 7 bankruptcy protection, they were required to disclose their counterclaim as an asset under the scheduling provision of Section 521(1), Title 11, U.S. Code. "[T]he duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court." *Chrysler Grp., L.L.C. v. Dixon*, 8th Dist. No. 104628, 2017-Ohio-1161, at ¶ 26, quoting *In re Tennyson*, 313 B.R. 402 (Bankr.W.D.Ky. 2004).

Consequently, this Court finds that Defendants are estopped from pursuing their counterclaim because of their failure to include the claim on their bankruptcy petition. Therefore, Defendant's counterclaim is hereby dismissed, with prejudice.

III. CONCLUSION

For all the above reasons, this Court finds that the Defendants are devoid of standing and are judicially estopped from pursuing their counterclaim. Defendants' counterclaim is hereby DISMISSED, with prejudice.

IT IS SO ORDERED.



JUDGE CASSANDRA COLLIER-WILLIAMS
9/13/2021
DATE