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IT IS SO ORDERED.

Dated: June 4, 2024



Mina Nami Khorrami
Mina Nami Khorrami
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: :
 :
 Mark Lynn Anthony, : Case No. 23-52661
 : Chapter 13
 : Judge Nami Khorrami
 Debtor. :

**OPINION AND ORDER DENYING AMENDED MOTION IN LIMINE #1 OF
DAVID STEMEN AND EVENTURESENCORE, INC. (Doc. 115)**

Before the Court is the *Motion in Limine #1: for David Stemen and Eventuresencore, Inc. Regarding Judicial Estoppel and Curative Amendments and Amended Certificate of Service and Notice as Required by Order Regarding Motion/Application (Doc. No. 107) Due to*

Noncompliance with Code and/or Rules (Doc. No. 108), (the “Motion”) (Doc. 115),¹ together with the *Memorandum Contra of Debtor to the Amended Motion in Limine 1 of Creditors Stemen and Eventuresencore (Docket 115)* (the “Objection”) (Doc. 116).²

For the reasons that follow, the Court denies the Motion.

I. Jurisdiction and Venue

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended General Order 05-02 entered by the United States District Court for the Southern District of Ohio, referring all bankruptcy matters to this Court. A motion to dismiss or convert under 11 U.S.C. § 1307(c), including the resolution of evidentiary issues in connection with such a motion, is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O) and 28 U.S.C. § 1334(b). Venue properly lies in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. Background

Mark Lynn Anthony (the “Debtor”) filed a voluntary petition for relief under chapter 13 on August 4, 2023 (the “Petition”). The Petition initiated the Debtor’s second chapter 13 case, since he had filed a chapter 13 case, Case No. 22-52784, on September 22, 2022 (the “2022 Case”). The 2022 Case was dismissed on motion of the chapter 13 trustee Faye English (the “Trustee”) on April 10, 2023.³ Creditors Eventuresencore, Inc. and David Stemen (collectively the “Stemen

¹ The motion was originally filed on May 20, 2024. *See* Doc. 107. Due to a procedural issue regarding notice of that motion, it was refiled on May 28, 2024, as an amended motion, with the changes being in the caption, the addition of a notice of motion, and the addition of the Debtor to the service list. *See* Doc. 115. There were not any substantive changes in the amended motion, but the change in the caption caused a slight change in pagination, and since an amended motion supersedes the original, the Court will refer to Doc. 115 as the “Motion” and all references to the Motion will use the pagination of that document.

² The Motion and the Objection were filed pursuant to the schedule established by the Court at a hearing on April 23, 2024 and reflected in the *Agreed Amended Pretrial Scheduling Order (ECF 81) Regarding Matters Set for Hearing Beginning June 10, 2024 (ECF 17, 19, 33 and 90)* (“Agreed Amended Pretrial Order”) (Doc. 102), under which motions in limine were due on May 20, 2024 and objections due on May 28, 2024.

³ The order of dismissal (2022 Case Doc. 60), did not specify a reason for dismissal, but the Trustee’s motion to dismiss (2022 Case Doc. 32) asserted that the Debtor was delinquent in plan funding, had failed to file documents required by 11 U.S.C. § 521 and/or had filed inaccurate documents, and that the meeting of creditors could not be concluded due to the Debtor’s failure to provide missing documentation.

Creditors”) filed their Motion to Convert or Dismiss Chapter 13 Case (Doc. 17) on August 21, 2023, which was amended on August 24, 2023 (Doc. 19). The Trustee filed a Motion to Dismiss on March 21, 2024 (Doc. 90). Both motions are set for hearing on June 10, 2024. Agreed Amended Pretrial Order at 1-2. Both motions assert that cause exists under 11 U.S.C. § 1307(c) to convert or dismiss this case, at least in part because it was filed and prosecuted in bad faith.

III. Arguments of the Parties

In the Motion, the Stemen Creditors request that the Court preclude the Debtor, at the upcoming evidentiary hearing on June 10, 2024, from offering evidence of, or argument concerning, any efforts by the Debtor to amend his bankruptcy schedules and statement of financial affairs as evidence of good faith. The Stemen Creditors assert that the Motion is grounded in the equitable doctrine of judicial estoppel. Motion at 2. They further assert that they expect the evidence to show that the Debtor failed to disclose substantial property that he owned in his bankruptcy schedules filed both in this case and the 2022 Case. Motion at 3. The Motion ultimately seeks to preclude the Debtor from asserting that he amended his schedules or statement in good faith. Motion at 4. In the Objection, the Debtor responds that the Court must consider the facts and circumstances underlying any omissions as part of its good faith inquiry.

IV. Standards Governing Motions In Limine And Judicial Estoppel

A motion in limine is “any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *Louzon v. Ford Motor Co.*, 718 F.3d 556, 561 (6th Cir. 2013) (quoting *Luce v. U.S.*, 469 U.S. 38, 41, 105 S. Ct. 460, 83 L.Ed. 2d 443, n. 2 (1984)). The burden rests upon the moving party to demonstrate that the evidence sought to be excluded is “clearly inadmissible on all potential grounds.” *Delay v. Rosenthal Collins Group, LLC*, 2012 U.S. Dist. LEXIS 166350, at *2 (S.D. Ohio Nov. 21, 2012)

(citing *Ind. Ins. Co. v. GE*, 326 F. Supp. 2d 844, 946 (N.D. Ohio 2004)). Where that high standard is not met, questions of admissibility must be reserved for trial. *Tera II LLC v. Rice Drilling D, LLC*, 2024 U.S. Dist. LEXIS 27419, at *4 (S.D. Ohio Feb. 16, 2024).

“Orders *in limine* which exclude broad categories of evidence should rarely be employed. A better practice is to deal with questions of admissibility of evidence as they arise.” *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975). In addition, the Sixth Circuit has mandated that motions in limine in civil cases should be directed *only* to evidentiary questions regarding admissibility of specific evidence, and the Court should not resolve questions of substantive law prior to trial without following the summary judgment procedures set forth in Rule 56 of the Federal Rules of Civil Procedure⁴ and the greater procedural protections that rule provides. *Louzon*, 718 F.3d at 562-63. *See also Weckbacher v. Mem'l Health Sys. Marietta Mem'l Hosp.*, 2019 U.S. Dist. LEXIS 191478, at *7-8 (S.D. Ohio Nov. 5, 2019) (“As an initial matter, the Court finds that Defendant's Motion is procedurally improper. A motion in limine is not a vehicle for Defendant to raise legal merits questions that should have been resolved at the summary judgment stage.”) (citation omitted). The Sixth Circuit has applied this principle to the doctrine of judicial estoppel. *Audio Technica U.S., Inc. v. United States*, 963 F.3d 569, 575 (6th Cir. 2020).

“The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position ‘either as a preliminary matter or as part of a final disposition.’” *Id.* (quoting *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002)). Both elements of judicial estoppel must be

⁴ Rule 56 applies in this proceeding. *See* Fed. R. Bankr. P. 9014(c). In addition to the requirements set forth in Rule 56, this Court has its own procedural requirements governing summary judgment motions, set forth in Section V of the *Pretrial Scheduling Order Following Pretrial Conference* (Doc. 81), entered on February 29, 2024, which established May 7, 2024, as the deadline for summary judgment motions. On April 23, 2024, all parties agreed that they would not file summary judgment motions, which was confirmed in the Agreed Amended Pretrial Order at 2.

established in order for judicial estoppel to apply. Further, judicial estoppel must be “applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement.” *Id.* (quoting *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990)).

V. Analysis

Applying these principles, the Court readily concludes that the Motion must be denied for the numerous reasons that follow, any one of which would independently warrant denial of the Motion.

As a starting point, Rule 1009(a) of the Federal Rules of Bankruptcy Procedure provides in part that “[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.” The Sixth Circuit has held that bankruptcy courts have no discretion to disallow an amendment, except as provided in the Bankruptcy Code, the Bankruptcy Rules, or other substantive law. *Ellmann v. Baker (In re Baker)*, 791 F.3d 677, 682-83 (6th Cir. 2015) (citing *Law v. Siegel*, 571 U.S. 415, 134 S. Ct. 1188, 188 L.Ed.2d 146 (2014)). In this case, the Debtor, based on the Bankruptcy Code and Rules as well as *Ellmann*, has the right to amend his schedules at any time. This Court recognizes that the Stemen Creditors seek to preclude the Debtor from offering evidence or argument related to potential⁵ amendments that the Debtor has the statutory right to file.

Next, the Stemen Creditors are not seeking an evidentiary ruling or requesting that the Court exclude specific items of evidence or even invoking any of the Federal Rules of Evidence. Rather, they seek to eliminate the Debtor’s defense to the Motion that any amendments were offered in good faith. Further, the Stemen Creditors request that this Court invoke the equitable

⁵ The Court is also concerned that the Motion, in part, is addressed to hypothetical amendments that the Debtor has not filed.

doctrine of judicial estoppel in granting their Motion instead of any basis under the Federal Rules of Evidence. Motion at 2. In other words, the Stemen Creditors ask the Court to foreclose an entire defense, based upon a principle of substantive law.

The Sixth Circuit has repeatedly instructed trial courts not to grant orders in limine in these circumstances: *Audio Technica*, in fact, addresses the doctrine of judicial estoppel:

[I]t was improper for the district court to consider judicial estoppel within the context of a motion in limine. Rather than addressing the admissibility of certain pieces or types of evidence, Audio Technica's motion asked the court to bar the jury from hearing one side's argument, essentially granting them judgment as a matter of law on that point. Such non-evidentiary legal issues must be decided in the context of a motion for summary judgment

Audio Technica, 963 F.3d at 575 (citing *Louzon*, 718 F.3d at 561-62). See also *Allstate Ins. Co. v. Papanek*, 2020 U.S. Dist. LEXIS 7552, at *13 (S.D. Ohio Jan. 16, 2020) (“the substantive relief now sought by Allstate -- *i.e.*, the wholesale preclusion of *defenses*, rather than questions regarding the admissibility of particular evidence -- is not relief properly sought in a motion *in limine*.”) (citation omitted). And because the Stemen Creditors seek relief that must have been sought under Rule 56, they forfeited this relief when they agreed in the Amended Agreed Pretrial Order that they would not file a summary judgment motion. See *Yukech v. Cal. Transp. LLC*, 2023 U.S. Dist. LEXIS 116571, at *19-20 (S.D. Ohio July 6, 2023) (denying motion in limine where “[d]efendants had, and forfeited, the opportunity to move for summary judgment on the issue of Plaintiff's entitlement to the exemptions.”).

In addition to these procedural flaws, the Stemen Creditors fail to establish any factual basis for the relief they request. Even if the Court could ignore the holdings in *Louzon* and *Audio Technica*, so that it could rule on the question of judicial estoppel at this point in the proceedings, the Stemen Creditors do not cite to the kind of factual evidence required to establish judicial estoppel. Indeed, they do not cite to any evidence at all. Rather, they state that “the evidence will

show” that both in this case and in the 2022 Case, the Debtor’s schedules and statements of financial affairs were incomplete and inaccurate; and that the Debtor did not make any attempt to fix those issues until he was forced to concede that there had been nondisclosure during examination under oath by creditors and Trustee. Mot. 2-3. The Stemen Creditors state that they learned at the Debtor’s Rule 2004 examination of nondisclosures such as “an entire work barn full of tools, machinery, power tools, materials and other wood and metal working equipment.” *Id.* But these “[a]ssertions by counsel do not constitute probative evidence.” *Sicherman v. Cohara (In re Cohara)*, 324 B.R. 24, 29 (B.A.P. 6th Cir. 2005) (citations omitted).⁶ And even if the Court could accept those statements as evidence, they do not establish that judicial estoppel should apply here. Indeed, the Stemen Creditors do not set forth the elements for judicial estoppel and fail to demonstrate that those elements are satisfied.

One of the essential elements of judicial estoppel is that the prior representation must have been accepted by a court. Here, however, the Motion does not identify any such acceptance by any court in any judicial proceeding. *See Audio Technica*, 963 F.3d at 576 (reversing trial court decision that judicial estoppel applied because there was no evidence to show that a court had ever accepted the appellant’s earlier position),

The Court cannot assume, as the Stemen Creditors assert, that there were omissions from the schedules, that those omissions were material, and that they were not inadvertent. Those are contested issues for the Court to determine at the June 10 hearing based upon the totality of the circumstances. *See Alt v. United States (In re Alt)*, 305 F.3d 413, 420 (6th Cir. 2002). Granting

⁶ The transcript of this examination was not filed with the Motion, and although the Court directed that it needed to be filed if the parties intend to use it, it has not been filed with this Court as of the date of this Opinion and Order.

the Motion would impede, rather than serve, that inquiry.⁷

VI. Conclusion

Based on the reasons stated, the Debtor's Objection is sustained, and the Stemen Creditors' Motion is hereby denied.

IT IS SO ORDERED.

Copies to:
Default List

⁷ As noted above, the Sixth Circuit has instructed that judicial estoppel must be applied with caution because of its potential to interfere with the truth-seeking function of the court. *Audio Technica*, 963 F.3d at 576. That warning applies with full force here.