United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re John P. Messina

Bankruptcy No. 99 B 29371

Adversary Caption: John P. Messina v. American Citrus Products Corp, John Labatt Ltd. and Lawrence Fisher

Adversary No. 03 A 01803

Date of Issuance: September 29, 2003

Judge: John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: JOHN P. MESSINA, Debtor.	)	Chapter 7 Bankruptcy No. 99 B 29371 Judge John H. Squires
JOHN P. MESSINA, Plaintiff, v.	)	Adversary No. 03 A 01803
AMERICAN CITRUS PRODUCTS CORP., JOHN LABATT LTD., and LAWRENCE FISHER as Chapter 7 Trustee of the Estate of John P. Messina, Defendants.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Lawrence Fisher, the Chapter 7 trustee of the Debtor's estate (the "Trustee") for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on the complaint filed by John P. Messina (the "Debtor") against American Citrus Products Corp. ("American Citrus"), John Labatt Ltd. ("Labatt") and the Trustee. For the reasons set forth herein, the Court grants the Trustee's motion. The Court hold that the performance bond proceeds in the sum of $50,000.00 constitute property of the bankruptcy estate under 11 U.S.C. § 541.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. APPLICABLE SUMMARY JUDGMENT STANDARDS

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998).

The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Fed. Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the

material facts are not in dispute, the sole issue is whether the moving party is entitled to judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998). In 1986, the United States Supreme Court decided a trilogy of cases which encourages the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Celotex, 477 U.S. at 322; Matsushita, 475 U.S. at 585-86.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "[S]ummary judgment is not an appropriate occasion for weighing the evidence; rather, the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327,

331 (7th Cir. 1990). The Seventh Circuit has noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. Opp v. Wheaton Van Lines, Inc., 231 F.3d 1060, 1065-66 (7th Cir. 2000); Szymanski v. Rite-Way Maint. Co., Inc., 231 F.3d 360, 364 (7th Cir. 2000).

The party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion, identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on filed, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings, rather its response must show that there is a genuine issue for trial. Anderson, 477 U.S. at 248; Celotex, 477 U.S. at 323; Matsushita, 475 U.S. at 587; Patrick v. Jasper County, 901 F.2d 561, 565 (7th Cir. 1990). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial would be on the non-moving party, the party moving for summary judgment may satisfy Rule 56's burden of production by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. See Union Nat'l Bank of Marseilles v. Leigh (In re Leigh), 165 B.R. 203, 213 (Bankr. N.D. Ill. 1993) (citation omitted).

Local Bankruptcy Rule 7056-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Illinois, which deals with summary judgment motions, was modeled after LR56.1 of the Local Rules of the United States District Court for the Northern District of Illinois. Hence, the case law construing LR56.1 and its predecessor Local Rule 12 applies to Local Bankruptcy Rule 7056-1.

Pursuant to Local Bankruptcy Rule 7056-1, a motion for summary judgment imposes special procedural burdens on the parties. Specifically, the Rule requires the moving party to supplement its motion and supporting memorandum with a statement of undisputed material facts ("7056-1 statement"). The 7056-1 statement "shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Local Bankruptcy Rule 7056-1B.

The Trustee filed a 7056-1 statement that complies with the requirements of the Rule. It contains numbered paragraphs setting out uncontested facts with specific references to attached exhibits.

The party opposing a summary judgment motion is required by Local Rule 7056-2 to respond ("7056-2 statement") to the movant's 7056-1 statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr.R. 7056-2. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr.R. 7056-2A(2)(a). Most importantly, "[a]ll material facts set forth in the [7056-1] statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party." Local Bankr.R. 7056-2B.

On August 26, 2003, the Debtor filed a motion to extend the time to respond to the Trustee's motion at bar. Prior to that date, the Court set a briefing schedule in this and other matters, which required the Debtor to file a response, inter alia, to the instant motion for summary judgment by or before August 9, 2003. On August 28, 2003, the Court denied the Debtor's motion for an extension to respond to the summary judgment motion and told that parties that a draft Opinion was currently in working progress. The day after the Court denied the Debtor's motion, and in complete disregard for the Court's order and oral explanation denying his request for an extension, the Debtor sent the Court a copy of a letter he mailed to the Trustee's counsel wherein he states in pertinent part: "I am writing to confirm our agreement regarding the due date for my responses to all pending motions. You have agreed to extend the due date to Wednesday, September 3, 2002." To top it off, in disregard of his side agreement with the Trustee's counsel, on September 10, 2003, the Debtor belatedly filed a memorandum in opposition to the Trustee's motion for summary judgment, a Rule 7056-2 statement and an appendix of exhibits thereto.

The Court will not tolerate the Debtor's blatant defiance and disregard of its order and oral ruling. When this Court denies a motion to extend the date to file a pleading, the parties may not, in complete disregard for the Court's ruling, later agree amongst themselves to extend the filing date. Even though the parties may have agreed to the extension of the Debtor's response date to the motion for summary judgment, the Court did not. It denied the extension and will adhere to its ruling. That the parties may agree to an extension of a deadline imposed by the Court does not mean, ipso facto, that the

Court also acquiesces. "Adherence to established deadlines is essential if all parties are to have a fair opportunity to present their positions." Hill v. Porter Memorial Hosp., 90 F.3d 220, 224 (7th Cir. 1996). "Deadlines, in the law business, serve a useful purpose and reasonable adherence to them is to be encouraged." Spears v. City of Indianapolis, 74 F.3d 153, 157 (7th Cir. 1996). As the Seventh Circuit has warned:

> Ignoring deadlines is the surest way to lose a case. Time limits coordinate and expedite a complex process; they pervade the legal system, starting with the statute of limitations. Extended disregard of time limits (even the non-jurisdictional kind) is ruinous. 'Lawyers and litigants who decide that they will play by rules of their own invention will find that the game cannot be won.'

United States v. Golden Elev., Inc., 27 F.3d 301, 302 (7th Cir. 1994) (quoting Northwestern Nat. Ins. Co. v. Baltes, 15 F.3d 660, 663 (7th Cir. 1994)). Accordingly, the Court will not consider the Debtor's belated filings and hereby strikes those pleadings from the record.

The Debtor has not timely filed a Rule 7056-2 statement. The Seventh Circuit has upheld strict application of local rules regarding motions for summary judgment. See Dade v. Sherwin-Williams Co., 128 F.3d 1135, 1140 (7th Cir. 1997); Feliberty v. Kemper Corp., 98 F.3d 274, 277-78 (7th Cir. 1996); Bourne Co. v. Hunter Country Club, Inc., 990 F.2d 934, 938 (7th Cir.), cert. denied, 510 U.S. 916 (1993); Schulz v. Serfilco, Ltd., 965 F.2d 516, 519 (7th Cir. 1992); Maksym v. Loesch, 937 F.2d 1237, 1240-41 (7th Cir. 1991) (citations omitted).

Local Bankruptcy Rules 7056-1 and 7056-2 are patterned after and substantially similar to Local District Court Rules 56.1(a) and 56.1(b). The precedents decided about

the latter are instructive and applicable to the former. Compliance with Local Rules 7056-1 and 7056-2 is not a mere technicality. Courts rely greatly upon the information presented in these statements in separating the facts about which there is a genuine dispute from those about which there is none. American Ins. Co. v. Meyer Steel Drum, Inc., 1990 WL 92882 at *7 (N.D. Ill. June 27, 1990). The statements required by Rule 7056 are not merely superfluous abstracts of evidence. Rather, they "are intended to alert the court to precisely what factual questions are in dispute and point the court to specific evidence in the record that supports a party's position on each of these questions. They are, in short, roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information on its own." Waldridge v. American Hoechst Corp., 24 F.3d 918, 921 (7th Cir. 1994). Because the Debtor failed to timely comply with Rule 7056-2, all material facts set forth in the Trustee's 7056-1 statement are deemed admitted.

III. UNDISPUTED FACTS AND BACKGROUND

The Debtor is a practicing Illinois attorney doing business as the Law Office of John P. Messina. On September 22, 1999, he filed a Chapter 11 bankruptcy petition. Thereafter, on February 6, 2001, the case was converted to Chapter 7 and the Trustee was appointed. The Debtor filed his initial schedules on September 22, 1999 and filed amended schedules on January 27, 2000. See Trustee's Exhibits B and C to the Motion for Summary Judgment. The Debtor's amended Schedule B listed a performance bond, held by the Clerk of the District Court for the Northern District of Illinois, valued at

$50,000.00, as property of the Debtor's estate. See Trustee's Exhibit C to the Motion for Summary Judgment. The original Schedule B did not list the performance bond. See Trustee's Exhibit B to Motion for Summary Judgment. However, the original Schedule D listed the Clerk of the District Court for the Northern District of Illinois for the benefit of American Citrus and Labatt as holding a contingent, unliquidated and disputed claim in the amount of the performance bond–$50,000.00. Id.

On February 7, 1997, American Citrus and Labatt obtained a judgment from the District Court for the Northern District of Illinois (the "District Court") against the Debtor in the approximate amount of $150,000.00. On February 26, 1997, the Debtor filed a notice of appeal from that judgment. Thereafter, on March 18, 1997, the District Court stayed enforcement of the money judgment with a bond of $40,000.00 and with the additional security of the $50,000.00 performance bond posted by the Debtor. In October1998, the Debtor lost his appeal and the decision became final. On March 27, 2000, this Court held that the debt owed by the Debtor to American Citrus and Labatt was non-dischargeable under 11 U.S.C. § 523(a)(6).

On July 23, 2002, the Trustee filed a motion to recover the performance bond with the District Court, alleging that the bond was property of the Debtor's estate and asking that the District Court release the bond. See Trustee's Exhibit D to Motion for Summary Judgment. On August 6, 2002, the District Court granted the Trustee's motion and stated that "[t]he performance bond in the amount of $50,000.00 posted with the Clerk of Court in June 1996 shall be released to the Trustee of the Estate of the Law

Office of John P. Messina, Mr. Lawrence Fisher." See Trustee's Exhibit E to Motion for Summary Judgment.

On May 1, 2003, the Debtor filed the instant adversary proceeding. See Trustee's Exhibit A to Motion for Summary Judgment. Therein, the Debtor seeks a declaratory judgment that the performance bond became property of American Citrus and Labatt in October 1998 before the bankruptcy case was filed, and never became property of the bankruptcy estate. In their response to the Trustee's attorneys' interim request for fees and reimbursement of expenses, American Citrus and Labatt did not contest the Trustee's motion to release the bond, nor did they contest the release of the bond to the Trustee. See Trustee's Exhibit F to Motion for Summary Judgment.

The Trustee argues that he is entitled to summary judgment for several reasons: (1) the Court has no jurisdiction over this adversary proceeding because the Debtor lacks standing to bring the instant adversary proceeding; (2) the issue of the ownership of the performance bond is moot because the District Court previously decided the issue; (3) the ownership issue of the performance bond is moot because American Citrus and Labatt, the judgment creditors, have disclaimed any interest in the bond; (4) the Debtor is barred by the doctrine of collateral estoppel from raising the ownership issue; (5) the Debtor's declaratory judgment action is barred by the doctrine of judicial estoppel; (6) the Debtor is barred from changing his legal position at this stage of the case under the "mend the hold" doctrine; (7) the Debtor's reversionary interest in the performance bond was property of the Debtor's estate prior to the release of the bond to the Trustee by the District Court; and (8) the Debtor is equitably estopped from denying that the bankruptcy

estate owns the funds. The Court will address each argument in turn.

IV. DISCUSSION

A. Whether the Court Lacks Jurisdiction Over this Adversary Proceeding

The Trustee contends that the Court lacks jurisdiction over this adversary proceeding because the Debtor has no standing to pursue this adversary proceeding. The Court rejects the argument that it lacks subject matter jurisdiction over the dispute because the Debtor's complaint seeks a determination of whether the subject bond proceeds are property of the bankruptcy estate. The bankruptcy court has jurisdiction to determine whether an asset is part of the bankruptcy estate under 11 U.S.C. § 541. See Knopfler v. Schraiber (In re Schraiber), 97 B.R. 937, 942 (Bankr. N.D. Ill. 1989); Cole Taylor Bank v. Ratner (In re Ratner), 146 B.R. 211, 214-15 (Bankr. N.D. Ill. 1992) (citing Schraiber). Moreover, if the Court were to find it lacked jurisdiction, it would be logically impossible to act on the Trustee's motion for summary judgment, which the Court should address on the merits. That the Court has proper subject matter jurisdiction does not mean that the Debtor has standing.

The requirement of standing is both a "constitutional limitation on federal-court jurisdiction and prudential limitations on its exercise." Warth v. Sedin, 422 U.S. 490, 498 (1975) (citation omitted). Standing requires a party to have a personal stake in the outcome of the controversy. Baker v. Carr, 369 U.S. 186, 204 (1962). To ensure a personal stake, a plaintiff seeking to invoke federal court jurisdiction must demonstrate: (1) an injury that is concrete, particularized, and actual or imminent rather than

conjectural or hypothetical; (2) causal connection between the injury and the challenged conduct, such that the injury may be fairly traceable to the conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. Perry v. Sheahan, 222 F.3d 309, 313 (7th Cir. 2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). An individual must assert his own legal rights and interests. Warth, 422 U.S. at 499. A party "cannot rest his claim to relief on the legal rights or interests of third parties." Id. (citations omitted). That a party may benefit collaterally is not sufficient to warrant invocation of the Court's jurisdiction.

The Court finds that the Debtor fails the above articulated test to demonstrate a personal stake in the outcome of this proceeding. The heart of this dispute centers around whether the performance bond constitutes property of the Debtor's estate. The Debtor seeks a declaration from the Court that the property pledged as security for the appeal bond became the property of American Citrus and Labatt once the decision on appeal became final in October 1998, prior to the bankruptcy petition being filed. If that is so, then the real fight, if there truly is one, is between the Trustee on one hand and American Citrus and Labatt on the other. American Citrus and Labatt, however, do not dispute that the funds constitute property of the estate. The Debtor cannot rest his claim on the legal rights or interests of American Citrus and Labatt who do not dispute that the funds are property of the Debtor's estate.

Furthermore, the complaint alleges that by declaring the funds the property of American Citrus and Labatt, it may serve to reduce the Debtor's non-dischargeability debt to them. However, the possibility that the Debtor's personal liability for a non-

dischargeable debt may be reduced does not serve to create standing for the Debtor. See Slack v. Saint Paul/Seaboard Surety Co. (In re Slack), 164 B.R. 19, 23 (Bankr. N.D. N.Y. 1994). Accordingly, the Court finds that the Debtor lacks standing to bring this adversary proceeding against the Trustee, American Citrus and Labatt, although the Court has subject matter jurisdiction over this declaratory judgment action to determine what constitutes assets of the bankruptcy estate under § 541. Hence, the Trustee is entitled to summary judgment as a matter of law under this defense. The Court will, however, address the Trustee's remaining arguments.

B. Whether the Ownership Issue is Moot Because the District Court Decided the Issue

The Trustee argues that the District Court determined on August 6, 2002 that the performance bond constituted property of the Debtor's estate. Accordingly, the Trustee posits that the ownership issue is now moot because there are no longer any live issues. The general rule is that a matter becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980). "A case is moot if there is no possible relief which the court could order that would benefit the party seeking it." In re Envirodyne Indus., Inc., 29 F.3d 301, 303 (7th Cir. 1994) (citation omitted).

The Court agrees with the Trustee's position and determines that the ownership issue of the funds was effectively decided by the District Court and thus, the issue is now moot. On July 23, 2002, after notice to the Debtor, American Citrus and Labatt, the Trustee filed a motion with the District Court specifically alleging that the bond was

estate property and seeking the turn over of the funds to him. See Trustee's Exhibit D to Motion for Summary Judgment. No objections or responses thereto were filed. On August 6, 2002, the District Court entered an order stating: "Motion granted. The performance bond in the amount of $50,000.00 posted with the Clerk of Court in June 1996 shall be released to the Trustee of the Estate of the Law Office of John P. Messina, Mr. Lawrence Fisher." See Trustee's Exhibit E to Motion for Summary Judgment. Accordingly, the Court agrees with the Trustee that the issue of the ownership of the funds is now moot because the District Court effectively made that determination in August 2002. Therefore, the Court holds that the Trustee is entitled to summary judgment as a matter of law with respect to this defense.

C. Whether the Ownership Issue is Moot Because American Citrus and Labatt Disclaimed an Interest in the Performance Bond Funds

Next, the Trustee argues that the ownership issue is moot because American Citrus and Labatt disclaimed any interest in the performance bond funds. The Trustee contends that when American Citrus and Labatt filed a response to the interim fee application of the Trustee's attorney, they disclaimed any ownership in the subject funds.

The Court agrees that the ownership issue is also moot because American Citrus and Labatt did not contest the release of the funds to the Trustee. In their response to the Trustee's attorney's interim fee application, they stated in relevant part: "To the extent objections focus on the possession of the performance bond that [the Debtor] was compelled to deposit with the Clerk of the Court to secure his adherence to [the District Court's] orders, these creditors did not contest the motion to release the bond to the

Trustee, nor do they now contest the release of the funds to the Trustee." See Trustee's Exhibit F to Motion for Summary Judgment. Based on this language, the Court finds that American Citrus and Labatt disclaimed any interest in the performance bond proceeds and the issue of ownership of the funds securing the performance bond is moot. Hence, as a matter of law, the Court finds that the Trustee is entitled to summary judgment under this defense.

D. Whether the Debtor's Declaratory Judgment Action is Barred by the Doctrine of Collateral Estoppel

Further, the Trustee posits that the Debtor's declaratory judgment action is barred by the doctrine of collateral estoppel. Issue preclusion or collateral estoppel bars the relitigation of issues that have already been litigated between the parties. Four requirements must be met to invoke the doctrine of collateral estoppel: (1) the issue sought to be precluded is the same as that involved in a prior action; (2) the issue was actually litigated; (3) the determination of the issue was essential to the final judgment; and (4) the party against whom estoppel is invoked was represented in the prior action. Adair v. Sherman, 230 F.3d 890, 893 (7th Cir. 2000) (citations omitted). Because issue preclusion is an affirmative defense, the party seeking to invoke the doctrine has the burden of satisfying each of these elements. Id. at 894 (citations omitted). As the Supreme Court of the United States has stated: "[u]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979) (citations omitted). "Whether the issues are identical is a question of law." E.B.

Harper & Co., Inc. v. Nortek, Inc., 104 F.3d 913, 922 (7th Cir. 1997) (citations omitted).

The Court finds that the Trustee demonstrated all of the requisite elements for the imposition of the doctrine of collateral estoppel. On July 23, 2002, the Trustee filed a motion with the District Court in the suit involving the Debtor, American Citrus and Labatt, seeking the release of the performance bond to the Debtor's bankruptcy estate. See Trustee's Exhibit D to Motion for Summary Judgment. The Debtor was given notice of the motion. Id. In the motion, the Trustee described the bond, alleged that the bond was the property of the Debtor's bankruptcy estate and alleged that the release of the bond would result in the increase of the value of the estate. Id. The Debtor did not object or otherwise respond to the motion. The District Court granted the motion. See Trustee's Exhibit E to Motion for Summary Judgment.

The issues are identical in the Trustee's motion filed in the District Court and the ultimate issue in this adversary proceeding–whether the performance bond constitutes property of the Debtor's bankruptcy estate. Further, that issue was actually litigated and decided. The District Court held a hearing on the motion at which time the Debtor, as well as American Citrus and Labatt, had a full and fair opportunity to object to the motion. No objections or responses were made to the Trustee's motion. Moreover, resolution of the ownership of the funds was necessary to the District Court's grant of the motion and release of the funds to the Trustee. Finally, the Debtor was represented by attorney Stuart D. Cohen in the District Court matter. Mr. Cohen was served with a copy of the Trustee's motion. Consequently, the Trustee has established all requisite elements for the application of the doctrine of collateral estoppel. The Court grants the Trustee's

motion for summary judgment as a matter of law with respect to this defense.

E. Whether the Debtor's Declaratory Judgment Action is Barred by the Doctrine of Judicial Estoppel

Next, the Trustee argues that the Debtor's declaratory judgment action is also barred by the doctrine of judicial estoppel. The doctrine of judicial estoppel, also known as the doctrine of inconsistent positions, precludes a party from asserting a position in a subsequent legal proceeding inconsistent with a position taken by that party in the same or prior litigation. McNamara v. City of Chicago, 138 F.3d 1219, 1225 (7th Cir.), cert. denied, 525 U.S. 981 (1998); Kale v. Obuchowski, 985 F.2d 360, 361 (7th Cir. 1993); In re Cassidy, 892 F.2d 637, 641 (7th Cir.), cert. denied, 498 U.S. 812 (1990). It is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. Levinson v. United States, 969 F.2d 260, 264 (7th Cir.), cert. denied, 506 U.S. 989 (1992) (citation omitted).

The doctrine extends to inconsistent positions of law as well as fact. Cassidy, 892 F.2d at 642 ("[W]e think that the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact."). The applicability of the doctrine rests with the Court's discretion and should not be used to work an injustice, such as where the party's former position was the product of inadvertence or mistake, or where there is only the appearance of inconsistency between two positions but both may be reconciled. Id.

Judicial estoppel is a flexible standard not reducible to a pat formula. Levinson, 969 F.2d at 264. The Seventh Circuit has set some boundaries for the application of judicial estoppel:

> First, the later position must be clearly inconsistent with the earlier position. . . . Also, the facts at issue should be the same in both cases. . . . Finally, the party to be estopped must have convinced the first court to adopt its position; a litigant is not forever bound to a losing argument.

Id. at 264-65 (citations omitted). See also Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523, 527 (7th Cir. 1999) (citing Levinson). As further observed in Cassidy, "a court . . . may raise the [judicial] estoppel on its own motion in an appropriate case." 892 F.2d at 641 (citation omitted).

The Court opts to exercise its discretion and apply the doctrine in light of the Debtor's original and amended Schedules filed in the bankruptcy case. Both the original and amended Schedules, which were filed under oath, refer to the funds as property of the Debtor's estate. The Debtor's verified Schedules are not just pleadings, motions or exhibits; they contain evidentiary admissions. See In re Stanfield, 152 B.R. 528, 531 (Bankr. N.D. Ill. 1993) (citations omitted). The Debtor's position in this adversary proceeding–that the funds are really property of American Citrus and Labatt–is inconsistent with both his original Schedule D and amended Schedule B. Additionally, the Debtor failed to object when the Trustee filed his motion before the District Court seeking to obtain the funds as estate property. Thus, the Court finds that the doctrine of judicial estoppel bars the Debtor's declaratory judgment action because the relief requested herein–that the funds are the property of American Citrus and Labatt–is inconsistent with the original and amended Schedules filed in the bankruptcy case, as well as the Debtor's position before the District Court. Therefore, the Court grants the Trustee's motion for summary judgment under this defense.

F. Whether the Mend the Hold Doctrine Bars the Debtor's Declaratory Judgment Action

Under a theory similar to judicial estoppel, the Trustee maintains that the "mend the hold" doctrine bars the Debtor from bringing this declaratory judgment action. The "mend the hold" doctrine provides that a party to a contract cannot take inconsistent positions in litigation over that contract. See Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1251 (7th Cir. 1996) (citations omitted); C.L. Maddox, Inc. v. Coalfield Servs., Inc., 51 F.3d 76, 79 (7th Cir. 1995) (citations omitted). The "mend the hold" doctrine extends to situations where a position taken in prior dealings with a party to a contract is inconsistent with a position taken during litigation. In re Kids Creek Partners, L.P., 233 B.R. 409, 421 (N.D. Ill. 1999) (citations omitted), aff'd, 200 F.3d 1070 (7th Cir. 2000).

For the reasons articulated with respect to the application of judicial estoppel, the Court finds that the Trustee has demonstrated that the mend the hold doctrine should apply to the Debtor's declaratory judgment action. In the instant adversary proceeding, the Debtor seeks to take a position inconsistent with that taken in his filed Schedules and in litigation before the District Court. The Court will not allow the Debtor to take inconsistent positions. Therefore, the Court grants the Trustee summary judgment under this defense.

G. Whether the Funds were Property of the Debtor's Bankruptcy Estate

Moreover, the Trustee maintains that until the funds were released to him by the District Court, the Trustee had at least a reversionary interest in the funds, which interest was property of the Debtor's estate. Property of the estate includes "all legal or equitable

interests of the debtor in property as of the commencement of the case" or "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(1) and (7). Property rights belonging to the debtor or which the estate acquires after the commencement of the bankruptcy case become assets of the bankruptcy estate. See Koch Refining v. Farmers Union Cent. Exch., Inc., 831 F.2d 1339, 1343 (7th Cir. 1987), cert. denied, 485 U.S. 906 (1988). The term "legal or equitable interests of the debtor in property" has been broadly interpreted to include any legally enforceable right. United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05 (1983); Cable v. Ivy Tech State College, 200 F.3d 467, 472-73 (7th Cir. 1999). "'[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541.'" In re Carousel Int'l Corp., 89 F.3d 359, 362 (7th Cir. 1996) (quoting In re Yonikus, 996 F.2d 866, 869 (7th Cir. 1993)). "Filing a bankruptcy petition does not expand or change a debtor's interest in an asset; it merely changes the party who holds the interest." In re Sanders, 969 F.2d 591, 593 (7th Cir. 1992) (citation omitted). "Thus, whatever rights a debtor has in property at the commencement of the case continue in bankruptcy–no more, no less." Moody v. Amoco Oil Co., 734 F.2d 1200, 1213 (7th Cir.), cert. denied, 469 U.S. 982 (1984). "Property interests are created and defined by state law." Butner v. United States, 440 U.S. 48, 55 (1979). "The nature of a debtor's interest in property is determined by state law..., but the question whether the resulting interest should count as 'property of the estate' for § 541 purposes is an issue of federal law." Fisher v. Apostolou, 155 F.3d 876, 880 (7th Cir. 1998) (citations omitted). The Court finds that none of the statutory exceptions or exclusions provided by § 541(b)-(d) apply

and thus, the proceeds of the performance bond became part of the bankruptcy estate when the Debtor filed his voluntary petition on September 22, 1999.

The Debtor argues that the performance bond became the property of American Citrus and Labatt in October 1998 when the decision of the District Court was affirmed on appeal before the Seventh Circuit Court of Appeals and became final. The Trustee, on the other hand, argues that the District Court released the funds to him, therefore those funds must be property of the Debtor's estate. The Trustee cites In re Alwan Bros. Co., Inc., 105 B.R. 886 (Bankr. C.D. Ill. 1989) in support of his position. Further, he argues that American Citrus and Labatt have disclaimed any interest in the performance bond.

First, the Court finds that the Alwan case is not directly on point with the matter at hand. In Alwan, the debtors moved, inter alia, for a determination of whether a supersedeas bond was property of the estate. A supersedeas bond is generally required by courts to obtain a stay of execution on a judgment pending appeal. "The purpose of the bond is to protect the appellee, who normally would have the right to execute on the judgment immediately, and 'insures that if the judgment is affirmed, the appellee will have a source of recovery and will not have been prejudiced by being prevented from executing on the judgment.'" Duplitronics, Inc. v. Concept Design Electronics & Mfg., Inc. (In re Duplitronics, Inc.), 183 B.R. 1010, 1014 (Bankr. N.D. Ill. 1995) (quoting M. Smith, "Obtaining a Supersedeas Bond," 23 Colo. Law. 607 (1994)). The appellant retains a reversionary interest in the bond, subject to divestment. Id. (citation omitted); Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.), 162 B.R. 935, 942 (Bankr. S.D. N.Y. 1994); In re Celotex Corp., 128 B.R. 478, 482 (Bankr. M.D. Fla. 1991). Thus, if the

appeal is successful and the judgment is overturned, what remains of the bond reverts to the appellant. Id. If the appeal fails, however, the appellant is divested of its interest in the bond. Id. Thus, if the debtor has no interest in the bond after final judgment on an unsuccessful appeal, the bond is not property of the estate. See, e.g., In re Alwan Bros. Co., Inc., 112 B.R. 294, 296 (Bankr. C.D. Ill. 1990).

A performance bond, on the other hand, ensures that the litigant will perform that which was required on him. This is a distinction with a difference from a traditional supersedeas bond posted to stay execution on a judgment. The Court thus questions whether the subject performance bond was truly in the nature of a supersedeas bond. Hence, the Trustee's reliance on the Alwan decision is both misplaced and technically in error. The ultimate question the Court must answer is what interest the Debtor had in the funds on the date of the filing of the bankruptcy petition. The Debtor contends that he possessed no interest in those funds on that date. However, the Trustee maintains that the Debtor at least had a contingent reversionary interest in the $50,000.00 performance bond and that interest of the Debtor became property of the bankruptcy estate when the District Court released the funds to the Trustee. The Court agrees with the Trustee's position that the funds were actually acquired by the Trustee after the bankruptcy case was filed and thus became property of the Debtor's estate under § 541(a)(7). Accordingly, the Court grants the Trustee summary judgment under this defense.

H. Whether the Debtor is Equitably Estopped from Denying that the Funds are Property of the Bankruptcy Estate

Finally, the Trustee contends that the Debtor is equitable estopped from denying that the estate owns the funds. The Seventh Circuit has indicated that application of the

doctrine of equitable estoppel is particularly appropriate in bankruptcy proceedings. Citation Cycle Co., Inc. v. Yorke, 693 F.2d 691, 695 (7th Cir. 1982). "The reasons for the general application of estoppel are simple enough–the doctrine prevents a party from benefitting from its own misrepresentations." Black v. TIC Invest. Corp., 900 F.2d 112, 115 (7th Cir. 1990). Equitable estoppel "'aid[s] a party who, in good faith, has relied, to his detriment, upon the representations of another.'" In re Vick, 75 B.R. 248, 249 (Bankr. E.D. Va. 1987) (quoting United States v. Fidelity & Cas. Co. of New York, 402 F.2d 893, 897 (4th Cir. 1968)). In order to apply equitable estoppel, three elements must be satisfied: (1) the party to be estopped made a representation; (2) a second party relied on that representation; and (3) the second party changed positions based upon that representation. See Federal Deposit Ins. Corp. v. Rayman, 117 F.3d 994, 1000 (7th Cir. 1997) (citation omitted). The Court finds that each of these elements is present in this matter, thereby estopping the Debtor from challenging the ownership of the funds in the declaratory judgment action.

The Debtor made a representation in his amended Schedule B that the performance bond was property of the estate. See Trustee's Exhibit C to Motion for Summary Judgment. The Trustee relied on that representation, and pursuant to his duty to collect and reduce to money the property of the estate for which he serves, 11 U.S.C. § 704(1), he spent estate assets to file a motion before the District Court to recover the performance bond as property of the Debtor's estate. That motion was granted and the Trustee currently has possession of the funds to distribute to the Debtor's creditors. Consequently, the Court grants summary judgment on this defense in favor of the

Trustee.

V. CONCLUSION

For the foregoing reasons, the Court grants the Trustee's motion for summary judgment and holds that the performance bond proceeds, valued at $50,000.00, constitute property of the Debtor's estate.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List