SO ORDERED.

SIGNED this 8th day of October, 2013.

Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re:	)	
	)	
Harold Barry Wood and	)	
Rose Marie Wood,	)	**Case No. 10-50002**
	)	
Debtors.	)	
	)	
	)	
Harold Barry Wood,	)	
	)	
	)	
Plaintiff,	)	**Adv. Proc. No. 12-06079**
	)	
v.	)	
	)	
South Carolina Bank and Trust of	)	
the Piedmont, N.A.,	)	
	)	
Defendant.	)	
	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on August 1, 2013 in Greensboro, North Carolina, after notice to all parties in interest, upon Defendant's Motion for Summary Judgment.

Neil Jonas appeared on behalf of South Carolina Bank and Trust of the Piedmont, N.A. and Christian Felden and Eric Spade appeared as attorneys for Harold Barry Wood. After considering arguments of counsel, briefs, and evidence on the record, this Court makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure:

JURISDICTION

This Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334 and Local Rule 83.11 entered by the United States District Court for the Middle District of North Carolina. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) which this Court has the jurisdiction to hear and determine. Pursuant to the analysis in *Stern v. Marshall*, ___ U.S. ____, 131 S. Ct. 2594 (2011), this Court may enter a final order in this matter.

PROCEDURAL HISTORY & FACTS

The Loan

In 2005, Harold Barry Wood and Rose Marie Wood owned and resided at 7423 Broome's Old Mill Road in Waxhaw, North Carolina ("Old Mill Property"). The Debtors also owned real property located at 4107 Newtown Road in Waxhaw, North Carolina ("Newtown Property"). On June 22, 2005, Harold Barry Wood ("Plaintiff") executed an adjustable rate construction loan with South Carolina Bank and Trust of the Piedmont, N.A. ("SCBT") in the amount of $431,500.00. The amount of the note was increased to $463,500.00, as evidenced by an adjustable rate note executed on December 22, 2005 ("Loan"). The Loan is secured by both the Old Mill Property and the Newtown Property.[1] SCBT employees, J. Harvey Hawkins and

[1] As of June 22, 2005, the Debtors owed Chase Home Finance $99,588.06 on the Newtown Property. Chase Home Finance's debt was satisfied with proceeds from the Construction Loan.

Greg Ayers, assisted the Plaintiff during the Construction Loan process. The purpose of the Loan was to build a retirement home.

In 2007, SCBT erroneously reported late payment reports on the Loan to the credit bureau due to an accounting error[2]. Sometime during 2008, the Plaintiff became delinquent on the Loan payments and sought options to satisfy the Loan or refinance the Loan. In April 2008, the Plaintiff sold part of the Old Mill Property for $45,000.00 and remitted the monies to SCBT. SCBT applied the proceeds first to the arrearage and then to the Loan's principal balance. In May 2008, SCBT did not accept the Plaintiff's proposed sale of the Newtown Property because the proposed sale amount did not sufficiently reduce the principal balance on the Loan or satisfy the Loan such that SCBT would release the deed of trust. Thereafter, Plaintiff and SCBT executed a modification of the Loan, which was effective June 16, 2008. The principal amount of the Loan became $429,189.62. Pursuant to the modification, Plaintiff's Loan payments consisted of principal and interest of $2,300.00 per month until the next interest change date, at which time the principal and interest payments were subject to change.

Plaintiff alleges that SCBT employees, Harvey Hawkins and Greg Ayers ("Ayers"), verbally promised that after construction was completed, the Plaintiff would be able to refinance the Loan at a low fixed interest rate. Plaintiff believed that SCBT would help Plaintiff refinance the Loan and the Plaintiff's belief was based upon a January 16, 2008 email ("Email") written by Ayers to the Plaintiff. The Email states:

> Dear Harold,
> Please know that I regret that you are in this situation. Our bank is doing all that we can do to help. As a bank, we have always taken the approach to put the customer first and do what is best for them in any given situation. We discussed your situation at length investigating all of the best alternatives for you. We are in

[2] Exhibit B of Plaintiff's affidavit is a letter dated July 30, 2007 from Greg Ayers of SCBT stating that "[t]he mortgage lates [sic] reports to the credit bureau were due to an accounting error on behalf of South Carolina Bank and Trust."

> agreement that selling your primary residence is your best option. As an experienced mortgage loan officer, I honestly cannot find any positive benefit to you and your family with refinancing your mortgage.

Plaintiff also alleges that SCBT prevented Plaintiff from refinancing the Loan with First Horizon Home Loans ("First Horizon"). Plaintiff did not refinance the Loan with SCBT or any other bank.

Litigation

Due to non-payment on the Loan, Harold Barry Wood and Rose Marie Wood (collectively the "Debtors") filed a petition for relief under Chapter 13 of the Bankruptcy Code on January 4, 2010 ("Petition") in the U.S. Bankruptcy Court for the Middle District of North Carolina. The Court confirmed the Debtors' Chapter 13 Plan on July 8, 2010 ("Plan"). At the time of confirmation, the Plan provided for payments of $3540.00 per month and a 100% dividend to unsecured creditors. SCBT filed a timely proof of claim asserting a secured claim in the amount of $458,949.95. The Plan treated SCBT as a secured claim in the Plan to be paid $2,101.92 per month with all available funds to the $31,552.69 arrearage balance.

On June 20, 2011, almost a year after Plan confirmation, the Plaintiff filed a complaint against SCBT in the U.S. District Court for the Western District of North Carolina ("District Court") asserting claims against SCBT for fraud and violation of the North Carolina Deceptive Trade Practices Act ("Complaint"). The allegations in the Complaint were based upon circumstances surrounding the Loan prior to filing the Petition. Even though circumstances and facts alleged in the Complaint occurred pre-Petition, the Debtors did not disclose any contingent claims with SCBT in the Petition and the Debtors did not indicate any dispute with SCBT in the Plan. SCBT moved for summary judgment in the District Court. Prior to the hearing on the summary judgment motion, on December 3, 2012, the Debtors amended schedule B in the

Petition to include a potential claim against SCBT ("Claim"). Due to the pending bankruptcy in this Court, at the summary judgment hearing on December 6, 2012, Judge Whitney of the District Court transferred the case to this Court to decide the merits of the summary judgment.

DISCUSSION

The standard for summary judgment is set forth in Fed. R. Civ. P. 56, which is made applicable to this proceeding by Bankruptcy Rule 7056, and provides that the movant will prevail on a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2514 (1986). The mere existence of a scintilla of evidence in support of the non-movant's position will be insufficient to prevent summary judgment; there must be evidence on which the trier of fact could reasonably find for the non-movant. *Anderson*, 477 U.S. at 255; *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). While a party moving for summary judgment has the initial burden of showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, once the movant has met this burden, the non-moving party may not rest on its pleadings, but must come forward with specific facts showing that evidence exists to support its claims that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323. However, the nonmoving party cannot "create genuine issue of material fact through mere speculation or the building of one inference upon another." *Harleysville Mut. Ins. Co. v. Packer*, 60 F.3d 1116, 1120 (4th Cir.

1995) (quoting *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). Trial is unnecessary if "the facts are undisputed, or, if disputed, the dispute is of no consequence to the dispositive question." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315-16 (4th Cir. 1993).

A. Standing

SCBT argues that the Plaintiff only has standing to bring an action against SCBT if done so for the benefit of the estate and not the Plaintiff's personal benefit. Plaintiff argues that the suit against SCBT is for the benefit of the estate and if successful with recovering assets or changing terms of the Construction Loan then the Plan would be modified so all creditors would benefit from any recovery. This Court finds that the Plaintiff has standing to bring the lawsuit.

Property of the estate includes all of the debtor's interest in any cause of action that has accrued prior to the bankruptcy petition. *In re Bostic Constr., Inc.*, 435 B.R. 46, 60 (Bankr. M.D.N.C. 2010). *See Tignor v. Parkinson, Jr.*, 729 F.2d 977, 980-81 (4th Cir. 1984) (overruled on other grounds). In a chapter 13 case, the debtor remains in possession of the property of the estate and the debtor has standing to bring claims in their own name on behalf of the bankruptcy estate. *Smith v. Rockett*, 522 F.3d 1080, 1081 (10th Cir. 2008). *E.g., Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 343-44 (4th Cir. 2013). Scheduled or not scheduled, as a matter of law, this Claim is property of the estate. *See Harris v. hhgregg, Inc.*, slip op., 2013 WL 1331166, at *5-6 (M.D.N.C. Mar. 29, 2013). *See e.g., Hutchins v. Internal Revenue Serv.*, 67 F.3d 40, 43 (3d Cir. 1995) (since the bankrupt estate retains unscheduled assets, only the bankruptcy trustee has the authority to control them); *Sain v. HSBC Mortg. Servs., Inc.*, 2009 WL 2858993, at *5 (D.S.C. Aug. 28, 2009) ("a cause of action becomes a part of the estate whether or not it is disclosed by the debtor"). In a chapter 13 case, the Plaintiff has standing to bring this action on behalf of the bankruptcy estate.

B. Fraud

Plaintiff alleges that SCBT defrauded him by representing to him that he would be able to refinance the Loan, reporting incorrect information to the credit agencies, blocking Plaintiff's attempt to refinance with First Horizon and forcing Plaintiff to sell a portion of the Old Mill Property. To state a claim for fraud under North Carolina law, the plaintiff must allege (1) false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (3) which does in fact deceive; and (5) which results in damage to the plaintiff. *Andrews v. Fitzgerald*, 823 F. Supp. 356, 375 (M.D.N.C. 1993); *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 793 (N.C. App. 2002).

The Plaintiff's fraud claim fails as a matter of law. Ayers' statements in the Email do not rise to the level of a false representation or concealment of a material fact. It is well-settled that the "mere expression of an opinion or belief, or more precisely, a representation which is nothing more than the statement of an opinion, cannot constitute fraud." *Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co.*, 258 N.C. 49, 52, 127 S.E. 2d 759, 761 (N.C. 1962). *See also Johnson v. Washington*, 559 F.3d 238, 245 (4th Cir. 2009) (providing that statements such as "we want to help you" are accurate or forward-looking statements of opinion, although applying Virginia state law). Furthermore, the Plaintiff did not provide any evidence of a loan commitment for a fixed rate loan or any other loan to refinance the Loan. The Plaintiff did not submit a statement from First Horizon evidencing a refinancing option or any evidence that SCBT blocked Plaintiff's refinancing with First Horizon. Plaintiff has failed to provide evidence supporting the allegations so there is no creation of a genuine issue of material fact. As such, the Plaintiff's claim for fraud fails as a matter of law and does not survive summary judgment.

C. Unfair and Deceptive Trade Practices Act Claims

Plaintiff also alleges that the same facts that support its claim for fraud also support a claim under the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") as set forth in Chapter 75 of the North Carolina General Statutes. The Court finds that as a matter of law the Plaintiff's UDTPA claim must fail. UDTPA provides that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. 75-1.1 (2005). The purpose of the UDTPA is to "provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State [,] and [it] applies to dealings between buyers and sellers at all levels of commerce." *In re Brokers, Inc.*, 396 B.R. 146, 160 (Bankr. M.D.N.C. 2008) (citing *Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 444-45 (N.C 1991). To state a claim under UDTPA, the plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce and (3) which proximately caused actual injury to the plaintiff." *In re Brokers*, 396 B.R. at 160 (citing *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 71-72, 653 S.E.2d 393, 399 (N.C. 2007). The plaintiff need not "show fraud, bad faith, deliberate or knowing acts of deception, or actual deception," but only "show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." *Gress v. Rowboat Co.*, 190 N.C. App. 773, 776, 661 S.E.2d 278, 281 (N.C. App. 2008) (quoting *Overstreet v. Brookland Inc.*, 52 N.C. App. 444, 452-53, 279 S.E. 2d 1, 7 (N.C. App. 1981). An act or practice is unfair "when it offends established public policy" or "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Gary v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E. 2d 676, 681 (N.C. 2000). When the unfair or deceptive practice claim is based upon an alleged misrepresentation, the Plaintiff must show actual reliance on the alleged misrepresentation.

In this case, SCBT honored the Loan between SCBT and the Plaintiff. *See Mitchell v. Linville,* 148 N.C. App. 71, 75, 557 S.E.2d 620, 624 (N.C. App. 2001) (stating that a violation of Chapter 75 is unlikely to occur during the course of contractual performance). SCBT's Email is not deceptive or unfair. The act of SCBT not accepting the sale of the Newtown property is not deceptive or unfair. No principle of the law of contracts requires SCBT to accept less than the bargained for terms of the Loan. Furthermore, the Plaintiff has failed to present any evidence that SCBT blocked efforts to refinance or engaged in any other deceptive or unfair acts. As such, the Plaintiff has not met its burden of providing evidentiary support for each essential element of the claim. Thus, the Plaintiff's UDTPA claim fails as a matter of law.

D. Slander

To the extent that Plaintiff asserts a claim of slander against SCBT for erroneously reporting the Plaintiff to the credit bureau, the claim does not survive summary judgment. Any state law slander claim is preempted by the Fair Credit Reporting Act. *Joiner v. Revco Disc. Drug Ctrs., Inc.*, 467 F. Supp. 2d 508, 515 (W.D.N.C. 2006). The Fair Credit Reporting Act ("FCRA") provides that "no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency …except as to false information furnished with malice or willful intent to injure such consumer." 15 U.S.C. 1681h(e). In this case, Plaintiff did not provide any evidence of malice or willful intent. If anything, the Plaintiff has only submitted a statement of apology from SCBT. Furthermore, the evidence submitted shows this act was discovered in 2007. Any potential claim under the FCRA relating to the reporting is barred by the statute of limitations. 15 U.S.C. § 1681(p) (stating that an action to enforce any liability

created under this subchapter may be brought … not later than the earlier of 2 years after the date of discovery by the plaintiff … or 5 years after the date on which the violation occurred). This claim fails as a matter of law.

E. Judicial Estoppel

Notwithstanding the Court's findings that Plaintiff's claims fail as a matter of law, even if the Plaintiff was able to provide evidentiary support such that a jury could return a verdict in Plaintiff's favor, the Plaintiff is barred from bringing this action by the doctrine of judicial estoppel. The Plaintiff filed a Petition in this Court. A year after Plan confirmation, the Plaintiff filed in the District Court of a different district the Complaint relating to circumstances known at the time of filing the Petition. The Plaintiff did not show candor in amending the Petition to include the Claim. In fact, the Plaintiff did not amend the Petition until eighteen months after the Complaint was filed and after SCBT pled judicial estoppel as an affirmative defense in its answer and moved for summary judgment on the same grounds.

The doctrine of judicial estoppel "is an equitable doctrine that precludes a party from gaining an advantage by taking a clearly inconsistent position." *In re Hamlett*, 304 B.R. 737, 741 (Bankr. M.D.N.C. 2003). Judicial estoppel "seeks to protect courts, not litigants, from individuals who would play 'fast and loose' with the judicial system." *In re Tanglewood Farms, Inc. of Elizabeth City*, slip op., 2013 WL 1829910 at *8n.10 (Bankr. E.D.N.C. May 1, 2013) Under North Carolina law, in determining whether a party's claim is barred by judicial estoppel, courts look to the following factors: (1) the party to be estopped must be advancing an assertion that is inconsistent with a position taken during previous litigation; (2) the position must be one of fact instead of law; (3) the prior position must have been accepted by the court in the first proceeding; and (4) the party to be estopped must have acted intentionally, not inadvertently.

Folio v. City of Clarksburg, W.Va., 134 F.3d 1211, 1217-18 (4th Cir. 1998). "To satisfy the final prong, the party 'must have intentionally misled the court' for purposes of 'gain[ing] unfair advantage.'" *Vanderheyden v. Peninsula Airport Com'n*, slip op., 2013 WL 30065 at *11 (E.D. Va. Jan. 2, 2013) (citing *Whitten v. Fred's Inc.*, 601 F.3d 231, 241 (4th Cir. 2010) (abrogated on other grounds by *Vance v. Ball State Univ.*, 133 S.Ct. 2434 (2013)). Without bad faith there can be no judicial estoppel. *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007).

Federal bankruptcy law provides that the debtor has a statutory duty to disclose a legal or equitable interest, including potential causes of action. *Vanderheyden v. Peninsula Airport Com'n*, slip op., 2012 WL 6760107, at *3 (E.D. Va. Sept. 27, 2012). *See* 11 U.S.C. 521(a)(1), 541(a). "This duty to disclose does not end once the debtor submits the required forms to the bankruptcy court, but rather, continues for the entirety of the bankruptcy proceeding." *Id*. A plaintiff has knowledge of undisclosed claims when the plaintiff is aware of the factual basis of such claims, and in absence of direct evidence to conceal, the court will infer "deliberate or intentional manipulation … from the record where the debtor has knowledge of undisclosed claims and motive for concealment. *Vanderheyden*, 2013 WL 30065, at *12.

In this case, the Plaintiff's allegations stem from pre-Petition events. Yet, initially, the Plaintiff did not include the Claim in the Petition. The Plan was confirmed and even though the Plan provided secured treatment for SCBT, there was no indication of the Claim against SCBT. A year after confirmation, the Plaintiff filed the Complaint in a different district than the Petition, and the Plaintiff only amended the Petition after SCBT pled judicial estoppel as an affirmative defense and sought summary judgment on same grounds. Not only did the Plaintiff have knowledge of the Claim and fail to disclose the Claim, but the Plaintiff also filed the Complaint in a separate district. The plaintiff is judicially estopped from bringing this action. *See In re*

Hovis, 396 B.R. 895, 904-05 (D.S.C. 2007) (finding that the debtor was barred, on judicial estoppel grounds, from pursuing breach of contract claim that it failed to schedule or otherwise disclose until after confirmation of its plan); *De Leon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1289 (11th Cir. 2003) (stating debtor is judicially estopped from asserting claim when debtor did not amend bankruptcy documents to add a potential employment discrimination claim until after defendant relied on the failure to disclose in its motion to dismiss). This Court will not allow the Plaintiff to disregard the duty to disclose, a fundamental cornerstone of the Bankruptcy Code, and attempt to gain an unfair advantage.

CONCLUSION

Based upon the foregoing, this Court will grant Defendant's Motion for Summary Judgment. It is ORDERED, ADJUDGED, and DECREED that the Defendant's Motion for Summary Judgment is hereby GRANTED.

END OF DOCUMENT

SERVICE LIST

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