IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

EUGENE BIESEK,

Plaintiff,

v.

MEMORANDUM AND ORDER
04-C-223-S

SOO LINE RAILROAD COMPANY &
CANADIAN PACIFIC RAILWAY,

Defendant.

Plaintiff Eugene Biesek commenced this civil action in the United States District Court for the Northern District of Illinois against defendant Soo Line Railroad Company & Canadian Pacific Railway seeking damages pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51-60, for bodily injuries allegedly sustained as the result of defendant's negligence. Plaintiff amended his complaint to allege defendant's breach of a settlement allegedly agreed to by the parties in resolution of plaintiff's FELA claim. On September 8, 2004, the Court dismissed plaintiff's complaint and entered judgment against him on the basis of judicial estoppel, plaintiff having knowingly excluded the FELA claim from the listed assets of his bankruptcy estate. On November 2, 2004 the Court denied plaintiff's Rule 52(b) and 59(a) motions to open the judgment. The matter now comes before the Court on plaintiff' motion to vacate the judgment pursuant to Rule 60(b)(2).

BACKGROUND

The Court has extensively recounted and examined the circumstances surrounding plaintiff's failure to disclose the FELA claim as an asset of his bankruptcy estate in its previous decisions of September and November, 2004 and incorporates those memoranda by reference. To summarize, the facts established that plaintiff had both knowledge of the claim and motive to conceal it from the bankruptcy court when he obtained a discharge without listing the claim.

On June 7, 2005 plaintiff and the trustee in bankruptcy entered a "Stipulation Regarding FELA Claim" which provided as follows:

> WHEREAS, the above Debtors filed Chapter 7 bankruptcy on September 20, 2002; and
>
> WHEREAS, at the time of the filing of their Chapter 7, Debtor Eugene Biesek had a FELA claim pending against Soo Line Railroad Company & Canadian Pacific Railway; and
>
> WHEREAS, the Debtors did not list the FELA claim as an asset on schedule B and did not exempt the FELA claim on schedule C; and
>
> WHEREAS, the undersigned parties are in agreement that the Debtors' failure to list the FELA claim in their Chapter 7 was inadvertent and was not done with intent to defraud;
>
> IT IS HEREBY STIPULATED AND AGREED by and between Michael E. Kepler, Trustee and the Debtors by their attorney, Nancy A. Thorne, as follows:
>
> 1. That the law firm of Hoey & Farina shall continue representation of Debtor Eugene Biesek with regard to the FELA claim.

2. That the Debtors' amended Schedules B & C filed with the Court on 10/18/04 shall be allowed as filed, less $7,000.00 pursuant to paragraph 3, below.

3. That in the event the Debtor Eugene Biesek receives any money from the FELA claim net of attorneys fees, the Debtors shall surrender the sum of $7,000.00 to Trustee Kelper to be added to the bankruptcy estate, except that if the amount Debtor Eugene Biesek receives is less than $7,000.00, the Debtors shall surrender the total sum received.

On June 9, 2005 the Bankruptcy Court, "based upon the stipulation," entered the three final three numbered paragraphs of the stipulation as an order.

MEMORANDUM

Plaintiff now argues that his stipulation with the bankruptcy trustee, entered as an order by the Bankruptcy Court constitutes newly discovered evidence entitling him to relief under Rule 60(b)(2). Defendant opposes the motion.

Rule 60(b)(2 permits the Court to relieve a party from a final judgment because there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Relief under this provision is an extraordinary remedy granted only in exceptional circumstances. Jones v. Lincoln Elec. Co., 188 F.3d 709, 732 (7th Cir. 1999). To gain relief under this provision the movant must not only present newly discovered evidence, he must present evidence that is material and likely to change the outcome. Id.

Only evidence in existence at the time of entry of the original judgment can constitute "newly discovered evidence." Rivera v. M/T Fossarina, 840 F.2d 152, 156 (1st Cir. 1988); See Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1207 n.6 (7th Cir. 1989); C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2859 (1995)(collecting cases at n. 4). The stipulation and order now presented were not in existence at the time of the original judgment and therefore do not qualify as newly discovered evidence. Particularly so in this case where the debtor seeks to manufacture evidence after the entry of judgment which contradicts the facts at the time of judgment.

Furthermore, the stipulation and order are entirely unpersuasive as a basis to overcome the Court's conclusion that judicial estoppel is appropriate. In opposition to the judicial estoppel argument plaintiff argued vigorously that he lacked a motive to conceal the claim because it was entirely exempt and the bankruptcy estate had no interest. The present stipulation belies that earlier position, confirming that the estate was interested and that plaintiff had motive to conceal the asset.

Meanwhile, nothing about the stipulation or order suggests actual fact finding by the trustee or the Bankruptcy Court which would contradict this Court's earlier conclusion. Regardless of the trustee's knowledge or lack of knowledge concerning plaintiff's intent to exclude the claim from his asset list, the trustee had

$7000 to gain and nothing to lose by signing the stipulation suggesting inadvertence. By signing the stipulation the trustee was simply representing the best interest of the estate. The Bankruptcy Court order made no pretense of endorsing the "whereas clause" which purports to prove inadvertence, it simply entered the parties' stipulation that the trustee was entitled to the first $7,000 recovered.

The alleged newly discovered evidence presented by plaintiff in support of his motion is legally and factually insufficient to support a request for relief under Rule 60(b)(2).

ORDER

IT IS ORDERED that plaintiff's motion of relief from judgment pursuant to Rule 60(b)(2) is DENIED.

Entered this 7th day of September, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge