IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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| In re | ) | |
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| C AND M PROPERTIES, L.L.C., | ) | Bankruptcy Case No. 01-38555 |
| | ) | Chapter 11 |
| Debtor. | ) | |
| | ) | |
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| C AND M PROPERTIES, L.L.C., a Utah Limited Liability company, | ) | Adversary Proceeding No. 03P-2024GEC |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| RICHARD D. BURBIDGE, an individual; et al., | ) | |
| | ) | **ORDER DENYING MOTION FOR SUMMARY JUDGMENT** |
| Defendants. | ) | |

This matter came before the United States Bankruptcy Court for the District of Utah (the "Court") on the 6th day of March, 2003. Duane H. Gillman of McDowell & Gillman and James S. Jardine of Ray Quinney & Nebeker appeared on behalf of the Defendants: Richard D. Burbidge, an individual; Jefferson W. Gross, an individual; Burbidge & Mitchell, a Utah partnership; Richard D. Burbidge, Inc., a Utah corporation; Stephen B. Mitchell, Inc., a Utah corporation; Jefferson W. Gross, P.C., Inc., a Utah corporation; and Doe Defendants 1-10, hereinafter collectively referred to as ("Burbidge & Mitchell"). Peter W. Billings and Douglas J.

Payne of Fabian & Clendenin, and Alan K. Hyde of Holm, Wright, Hyde & Hayes, appeared on behalf of C & M Properties, L.L.C., the reorganized Debtor ("C&M").

Procedurally, this matter was presented to the Court as Burbidge & Mitchell's motion to dismiss adversary proceeding pursuant to Bankruptcy Rule 7012. At the hearing of March 6, 2003, C&M argued facts alleged in the affidavit of Peter W. Billings ("Billings") which was filed with the Court on March 6, 2003. Following the hearing, an affidavit of Timothy R. Olson, ("Olson"), a second affidavit of Olson, an objection to the affidavit of Olson, and the affidavits of Jefferson W. Gross and Raymond O. Klein ("Klein") were submitted for the Court's consideration. Having heard argument based upon Billing's affidavit and having considered the affidavits filed in conjunction with this matter, the Court will treat the motion to dismiss as a motion for summary judgment and proceed under Bankruptcy Rule 7056. Dean Witter Reynolds, Inc., v. Howsam, 261 F.3d 956 (10th Cir. 2001).

## FACTS

Based upon the complaint, the answer, and the affidavits filed by the parties, the Court finds the following facts to be uncontested:

1. C&M is a limited liability company organized pursuant to the laws of the State of Utah with its principle place of business in Summit County, Utah. Its primary business is the development of real property.
2. On January 3, 2001, C&M, through its counsel Burbidge & Mitchell, filed a complaint against American Skiing Company and others.

3. Burbidge & Mitchell was retained by C&M in December 2000 to pursue certain claims against American Skiing Company and to defend C&M in a lawsuit brought against it by Canyon Estates Homeowners Association.

4. From 1997 through October 2001, Klein served as the primary manager of C&M.

5. Klein was primarily responsible for communication between C&M and Burbidge & Mitchell.

6. Prior to and during C&M's representation by Burbidge & Mitchell, Klein was separately and personally represented by Burbidge & Mitchell.

7. During the time that Burbidge & Mitchell represented C&M, it had four principal owners, including High Mountain Partners, L.L.C. ("High Mountain Partners"), an entity owned and controlled by Olson.

8. A settlement between C&M and American Skiing Company Resort Properties, Inc., and others was reached in the summer of 2001.[1]

9. On September 13, 2001, a meeting of C&M's members was conducted. Present at the meeting of were Klein, counsel for Olson and High Mountain Partners, Jonathan Hafen ("Hafen"), Billings, and others.

10. At the meeting of September 13, Hafen advised the group that C&M had a claim against Burbidge & Mitchell for several million dollars due to an alleged conflict of interest.

11. C&M's claim against Burbidge & Mitchell was discussed again on October 2, 2001, at another meeting of C&M's members. At the October 2, 2001, meeting, Billings advised

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[1]The agreement settled C and M Properties, LLC v. American Skiing Co. Resort Properties, et al, Case No. 010600005 in the Third Judicial District Court for Summit County, Utah.

C&M's members that the claim against Burbidge & Mitchell would need to be disclosed in C&M's Schedules and Statement of Financial Affairs if C&M were to file bankruptcy.[2]

12. On December 11, 2001, C&M filed Chapter 11 bankruptcy. Olson signed the petition for relief.

13. On January 4, 2002, C&M filed its Statement of Financial Affairs and Schedules of Assets. C&M's Schedules and Statements do not disclose a specific claim against Burbidge & Mitchell. The only possible reference to a claim against Burbidge & Mitchell is found in C&M's Schedule B, personal property, at paragraph #20 - contingent and unliquidated claims wherein C&M discloses: "Possible claims against insiders, former insiders, lenders, former lenders, and former professionals." C&M lists the value of the possible claims as "unknown." Olson signed the perjury statement attached to the Schedules and Statements.

14. At a meeting of C&M's members held on February 6, 2002, Olson sought and received authority from C&M's members to hire counsel to prosecute claims against Burbidge & Mitchell.

15. At the meeting of February 6, 2002, Billings reminded the members that an action to recover on the claims against Burbidge & Mitchell may need to be brought in the bankruptcy court.

16. At the meeting of February 6, 2002, Olson stated that in an analogous circumstance, his lawyers had obtained a judgment against another law firm in excess of $6 million.

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[2]C&M discussed filing for relief under Chapter 11 in order to stay a foreclosure of C&M's real property scheduled by Private Funding Lenders, L.C.

17. On March 7, 2002, Burbidge & Mitchell filed a proof of claim in C&M's case in the amount of $62,940.60 as a general unsecured claim for services performed between September 2000 and October 2001.

18. C&M did not object to Burbidge & Mitchell's proof of claim. The only objection to the proof of claim was filed by High Mountain Partners.

19. Olson states that in his business judgment C&M did not have sufficient evidence of facts prior to confirmation to ascertain whether C&M might have a viable malpractice claim against Burbidge & Mitchell.

20. Olson states that in his business judgment that it was essential for C&M to focus on the sale of C&M's real property prior to confirmation.

21. Olson states that in his business judgment C&M did not have the financial resources or time to fully investigate the claim against Burbidge & Mitchell before the sale of C&M's real property.

22. C&M did not disclose or discuss the claim against Burbidge & Mitchell in its Disclosure Statement filed March 11, 2002, despite the fact that the disclosure statement contains a lengthy and in-depth discussion of the litigation upon which C&M now basis its claim against Burbidge & Mitchell.

23. C&M did not disclose or discuss the claim against Burbidge & Mitchell in any of its Monthly Financial Reports filed with the Court despite the fact that each Monthly Financial Report contained a balance sheet. C&M did disclose assets such as "Zions Checking - $66.83" and "petty cash - $170.42" in its monthly financial reports.

24. C&M did not disclose or discuss the claim against Burbidge & Mitchell in its Disclosure Statement filed August 22, 2002, or its Amended Plan of Reorganization filed August 21, 2002.

25. C&M did not disclose or discuss the claim against Burbidge & Mitchell in its Disclosure Statement filed September 4, 2002, or its Amended Plan of Reorganization filed September 4, 2002.

26. Olson signed all of the Disclosure Statements filed by C&M in this bankruptcy proceeding.

27. On September 19, 2002, the hearing on C&M's Chapter 11 Plan came before the Court. Burbidge & Mitchell did not object, and the plan was ordered confirmed by the Court.

28. There is no specific mention or reference to the claim against Burbidge & Mitchell in the Order Confirming Chapter 11 Plan entered on September 20, 2002.

29. The Plan called for the sale of C&M's real property, to K-2 Properties and implementing a settlement agreement reached between C&M and other parties on July 19, 2002. Pursuant to the plan, all unsecured creditors were paid in full plus interest.

30. Pursuant to paragraph H(1) of C&M's plan, all membership interests of C&M other than that of High Mountain Partners were cancelled. Timothy Olson was named as the sole manager of C&M.

31. Only after plan confirmation and the subsequent sale of C&M's real property did C&M obtain "critical documents" relating to Burbidge & Mitchell's representation.

32. The "critical documents" contained information regarding Burbidge & Mitchell's representation of C&M.

33. The sale of C&M's real property gave C&M the financial resources to pursue its claims.

34. On October 11, 2002, High Mountain Partners objected to Burbidge & Mitchell's proof of claim.

35. On January 3, 2003, C&M filed a complaint in Third District Court for the State of Utah (Case # 030900584) alleging breach of fiduciary duty and legal malpractice against Burbidge & Mitchell seeking a judgment of $52,000,000.00.

36. On January 14, 2003, the above state court action was removed to this Court as Bankruptcy Adversary Proceeding 03P-2024GEC.

**DISCUSSION**

Burbidge & Mitchell argue that C&M's complaint should be dismissed under the doctrine of *res judicata* arguing that because C&M's confirmed plan does not include the $52,000,000.00 claim against Burbidge & Mitchell the confirmation order is *res judicata* and precludes C&M from asserting the claim post-confirmation. Burbidge & Mitchell also argue that under the doctrine of judicial estoppel, C&M should not be permitted to pursue the claim because C&M failed to disclose the claim during its bankruptcy proceeding. The Court will address *res judicata* and the doctrine of judicial estoppel in that order.

Res Judicata

Burbidge & Mitchell raise *res judicata* as a defense arguing that C&M's complaint should be dismissed because the $52,000,000.00 claim against Burbidge & Mitchell was not included or even mentioned in C&M's disclosure statement or confirmed plan of reorganization and that the order confirming C&M's plan is a final judgment that prevents C&M from asserting, post-confirmation, any claim that was not a part of the confirmed plan. The doctrine of *res*

*judicata* precludes relitigation of claims that were or could have been raised in an earlier proceeding. Hoxwarth v. Blinder, 74 F.3d 205, 208 (10th Cir. 1996); see also Allen v. McCurry, 449 U.S. 90, 94 (1980).

C&M argues that because its plan paid all creditors in full plus interest, disclosure of the $52,000,000.00 claim was not a material omission from its disclosure statement and plan and that C&M's claim was not "litigated" as a part of the plan process because its existence and value was immaterial and irrelevant to plan confirmation.

In Plotner v. AT&T Corp., the Tenth Circuit states that a party raising a *res judicata* defense must establish the following four elements:

> (1) the prior suit must have ended with a judgment on the merits, (2) the parties must be identical or in privity, (3) the suit must be based on the same causes of action, and (4) the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit.

224 F.3d 1161, 1168 (10th Cir. 2000); see also Nwosun v. General Mills Restaurants, Inc., 124 F.3d 1255, 1257 (10th Cir. 1997); Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 686 (10th Cir. 1992). Essential to the application of the doctrine of *res judicata* on an unlitigated claim is the principal that the previously unlitigated claim could and should have been brought in the earlier litigation. Id. at 1170. That the claim could have been asserted at the time of the hearing is sufficient to satisfy the requirement for purposes of the doctrine of *res judicata*. Id. at 1173. "Thus, *res judicata* bars litigation of all issues actually decided and all issues that might have been decided." Wilkinson v. Pitkin County Board of Commissioners, 142 F.3d 1319, 1322 (10th Cir. 1998).

Burbidge & Mitchell have satisfied the first element. Because C&M's plan was ordered confirmed, there was a final judgment of the bankruptcy court. Confirmation of a plan constitutes a final judgment in a bankruptcy proceeding. In re Talbot, 124 F.3d 1201, 1209 (10th Cir. 1997).

Burbidge & Mitchell have satisfied the second element. Both parties participated in the Chapter 11 plan confirmation process. "A party for the purposes of former adjudication includes one who participates in a Chapter 11 plan confirmation proceeding." In re Varat Enterprises, Inc., 81 F.3d 1310, 1316 (4th Cir. 1996). Burbidge & Mitchell and C&M were both a party to the confirmation process, thus this is a "subsequent action between the same parties." See In re A.P. Liquidating Co., 283 B.R. 456, 459 (Bkrtcy E.D. Mich. 2002).

The third and fourth elements have not been satisfied by Burbidge & Mitchell because of the relatively narrow scope of issues that were actually and necessarily raised at the confirmation hearing. At confirmation, the Court considers only evidence that is relevant to the issue of plan confirmation and will not consider extraneous or irrelevant evidence.

At C&M's confirmation hearing, there was no discussion or valuation of any of C&M's assets other than the real property because the plan relied exclusively upon the sale of C&M's real property to pay all claims in full. There was no discussion or valuation of the claim against Burbidge & Mitchell because valuation of assets other than real property, including the claim against Burbidge & Mitchell, was unnecessary and irrelevant to the confirmation process. "[A] claim should not be barred unless the factual underpinnings, theory of the case, and relief sought against the parties to the proceedings are so close to a claim actually litigated in the bankruptcy that it would be unreasonable not to have brought them both at the same time in the bankruptcy

forum." In re USN Communications, Inc., 280 B.R. 573, 586 (Bankr. D. De. 2002); see also Eastern Minerals & Chems. Co. v. Mahan, 225 F.3d 330, 337-338 (3d Cir. 2000).

The claim against Burbidge & Mitchell was not relevant to C&M's plan. Had valuation of the claim been raised at the confirmation hearing, the Court would likely have refused to consider it. C&M's claim against Burbidge & Mitchell was not litigated at confirmation, and no opportunity to litigate the claim at confirmation was afforded because the issue would have been irrelevant to the plan confirmation process. Burbidge & Mitchell have failed to satisfy the third and fourth elements of *res judicata*.

Judicial Estoppel

Burbidge & Mitchell next argue that C&M's claim is barred by the doctrine of judicial estoppel because C&M's $52,000,000.00 claim against Burbidge & Mitchell was not disclosed to the Court in C&M's Schedules or Statements, C&M's monthly financial statements, C&M's Disclosure Statements, C&M's Plan of Reorganization, or any other document filed with the Bankruptcy Court and that C&M should not be permitted to assert a claim that was not disclosed to the Court during its bankruptcy proceeding. C&M responds arguing that the claim against Burbidge & Mitchell was disclosed in its Schedules and Statements[3] and that the lack of detail was a result of C&M's uncertainty regarding the viability of the claim. "Judicial estoppel is an equitable doctrine invoked at a court's discretion." New Hampshire v. Maine, 532 U.S. 742, 750; 121 S. Ct. 1808, 1815 (2001). The doctrine of judicial estoppel is an equitable concept used to "prevent the perversion of the judicial process" by precluding one party from asserting a claim

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[3]C&M's Schedule B contains a reference to "Possible claims against insiders, former insiders, lenders, former lenders, and former professionals."

in a latter proceeding that is inconsistent with the claim taken by the party in a previous proceeding. See Burnes et al. v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2000). citing 18 James Wm. Moore et al., Moore's Federal Practice § 134.30, p. 134-162 (3d ed. 2000). The purpose of the doctrine "is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." New Hampshire, 532 U.S. at 749-750; 121 S. Ct. at 1814.

"[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." Id. at 750-751. Courts generally look to such factors as (1) whether the present position taken by the party is "clearly inconsistent" with the position taken in a prior proceeding; (2) whether the party succeeded in persuading the court in a prior proceeding to accept its position so that accepting the inconsistent position in a later proceeding creates the perception that either court was misled; and (3) whether the party advancing the inconsistent position would derive an unfair advantage over the adverse party. Id.

In the present case, it is not disputed that C&M had knowledge of a claim against Burbidge & Mitchell. At various meetings, members of C&M discussed the claim C&M had against Burbidge & Mitchell, and at these meetings they were advised by Billings that the claim may need to be disclosed. Members of C&M were also advised by Olson that in an analogous circumstance, a judgment in the millions of dollars had been obtained. C&M should have disclosed the details and nature of its claim against Burbidge & Mitchell and should have provided an estimate of the claim's value.

When a debtor has knowledge of a claim at the time it prepares its schedules and disclosure statements and fails to disclose the claim, some courts hold that the debtor will be judicially estopped from pursuing that claim. See Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417-418 (3d Cir. 1998). Although C&M states it did not have the information necessary to confirm the validity of the claim, it is undisputed that C&M knew of the claim against Burbidge & Mitchell and that the claim could exceed a million dollars. As the Fifth Circuit stated in Coastal Plains: "The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed." 179 F.3d at 208; citing Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n, 932 F.Supp. 859, 867 (E.D. Tex. 1996).

The duty of a debtor in bankruptcy to disclose all assets is mandatory. This is true with respect to all known assets and it is true with respect to all contingent and unliquidated assets. Failure to disclose an asset in bankruptcy defeats the purpose of the bankruptcy laws and is punishable under 18 U.S.C. § 152. The duty to disclose is extremely broad and requires a debtor to disclose its possession of assets even in situations when the asset may not belong to the estate. Even assets that are ultimately determined to not be assets of the bankruptcy estate must be disclosed if information about the asset is capable of influencing the bankruptcy proceeding. See United States of America v. McIntosh, 124 F.3d 1330, 1335 (10th Cir. 1997) (Conviction of bankruptcy fraud for failure to disclose the receipt of funds arising from a contingent fee lawsuit will not be reversed despite the fact that the fee was not property of the bankruptcy estate and the debtor had no immediate obligation to turn the funds over to the bankruptcy court). Failure of a

debtor to disclose an asset, even if the asset is nominally the debtor's property, constitutes bankruptcy fraud and warrants a two-level sentencing enhancement. United States of America v. Messner, 107 F.3d 1448 (10th Cir. 1997).

C&M's argument that the existence and value of the claim against Burbidge & Mitchell was irrelevant to the plan confirmation process does not excuse C&M from its duty to disclose. See U.S. v. Brown, 943 F.2d 1246 (10th Cir. 1991) (Debtor convicted of bankruptcy fraud on charge of concealing records despite the fact that the concealed records may be insignificant). For C&M to fail to provide detailed information and an estimate of the value of its $52,000,000.00 claim against Burbidge & Mitchell in its Schedules, Statements, Operating Reports and Disclosure Statements is inexcusable and is most likely criminal.

The doctrine of judicial estoppel may be invoked at a court's discretion. New Hampshire, 532 U.S. at 750. That discretion is controlled by the Tenth Circuit Court of Appeals which has continuously held that "this circuit has expressly rejected the [doctrine] of judicial estoppel." U.S. v. 162 Megamania Gambling Devices, 231 F.3d 713, 726 (10th Cir. 2000); see also McGuire v. Continental Airlines, Inc., 210 F.3d 1141, 1145 n. 7 (10th Cir. 2000). ("[I]t is well established that judicial estoppel does not exist in the Tenth Circuit."); Webb v. ABF Freight Sys. Inc., 155 F.3d 1230, 1242 (10th Cir. 1998); U.S. v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986).

In Been v. McKune, 317 F.3d 1175 (10th Cir. 2003), although Judges O'Brien, Kelly, Hartz, McKay, Henry, Seymour and Lucero in their concurring and dissenting opinions suggest future consideration of the Supreme Court's invitation in New Hampshire, to adopt the doctrine of judicial estoppel, the Court did not do so in that case. This Court must, therefore, follow the

precedent set by the Tenth Circuit and reject Burbidge & Mitchell's argument that C&M's claim is barred by judicial estoppel.

Based upon the above, it is hereby

ORDERED that Burbidge & Mitchell's motion to dismiss, being treated by this Court as a motion for summary judgment, is denied.

DATED this 23 day of July, 2003.

BY THE COURT:

GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

CERTIFICATE OF MAILING

I hereby certify that on the 23 day of July, 2003, I mailed a true and accurate copy of the foregoing Order Denying Motion for Summary Judgment to the following by depositing the same in the United States mail, postage prepaid, addressed as follows:

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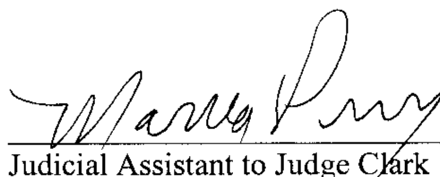

Judicial Assistant to Judge Clark



EOD: 07/28/03