

**United States Bankruptcy Court  
District of New Mexico**

**Document Verification**

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**Case Number:** 03-18972  
**Chapter :** 7  
**Judge Code:** SA  
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<b>Description:</b>	Memorandum Opinion re: [13-1] Motion To Set Aside [12-1] Order Reopening Bankruptcy Case by Mike Yont, Steve McCandless, Paul Riensche, Steve Mason, Tim Minter, Tormey Bewley Corporation and Objection Thereto .		
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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In re:  
Claudette Chavez,  
Debtor.

NO. 7 - 03-18972 - SA

**MEMORANDUM OPINION ON MOTION TO SET ASIDE  
ORDER REOPENING CASE AND OBJECTION  
THERE TO FILED BY DEBTOR and ORDER**

Tormey Bewley Corporation, Tim Minter, Steve Mason, Paul Riensche, Steve McCandless and Mike Yont ("Movants") filed a Motion to Set Aside Order Reopening Case (doc 12). The Debtor objected to the motion to set aside (doc 15). The case had been reopened upon motion by the debtor to schedule additional assets and amend her exemptions (docs 11 and 12). The reappointed Chapter 7 Trustee Michael Caplan joined in the Debtor's objection. Having considered the file, the briefs submitted, and being otherwise sufficiently informed, the Court finds that the Motion to Set Aside Order Reopening Case is not well taken and should be denied. This is a core proceeding.

**FACTS**

There are several undisputed facts which dispose of this matter. Debtor had a prepetition cause of action against Movants when she filed her Chapter 7 petition. This cause of action was not listed on her schedules or statements. Movants were not creditors in the Chapter 7 case. The Trustee

administered the case and filed a report of no distribution. The Debtor received her discharge and the case was closed. Debtor then filed a motion to reopen the case to list the omitted cause of action and claim some (or all) of it exempt. The Court reopened the case and ordered the appointment of a trustee. The Trustee objected to the amended exemptions, but this objection is beyond the scope of the instant matter. Movants filed their Motion to Set Aside Order Reopening case, arguing judicial estoppel.<sup>1</sup> Debtor and Trustee have responded on the merits and have also argued that Movants lack standing in the bankruptcy case to seek any relief.<sup>2</sup>

#### **DISCUSSION**

Having considered the briefs and the authorities<sup>3</sup>, the Court is persuaded by Parker v. Wendy's International, Inc., 365 F.3d 1268 (11<sup>th</sup> Cir. 2004) and its application in In re Phelps, 329 B.R. 904 (Bankr. M.D. Ga. 2005). Together these

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<sup>1</sup> Following New Hampshire v. Maine, 532 U.S. 742 (2001), the Tenth Circuit recognized the doctrine of judicial estoppel, effectively overruling cases such as Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corporation), 119 F.3d 852, 858 (10<sup>th</sup> Cir. 1997). Johnson v. Lindon City Corp., 405 F.3d 1065, 1068-69 (10<sup>th</sup> Cir. 2005).

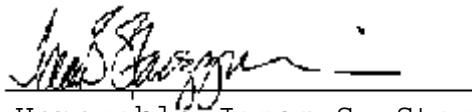
<sup>2</sup> The Court need not decide the standing issue in order to adjudicate the motion to reopen.

<sup>3</sup> Neither the parties nor the Court has found any cases from the Tenth Circuit that are on point.

cases indicate that 1) Debtor's cause of action became property of the estate and only the trustee had standing to pursue it; 2) because the asset was unscheduled it was not abandoned back to the Debtor upon closure of the case; 3) the Trustee is the real party in interest in the cause of action; 4) the Trustee never took an inconsistent position that would trigger judicial estoppel; 5) judicial estoppel does not apply to this case; and 6) it was proper for the Court to reopen the case to administer the unscheduled asset.

This decision does not deprive Movants of the right to defend against the cause of action in the court in which it will be tried. See Parker v. Wendy's International, Inc., 365 F.3d at 1272 n. 2. The decision merely deprives Movants of the windfall that would be created were the Court to deprive the estate and its creditors of the benefit (such as it might be) of a portion of the property of the estate.

**IT IS THEREFORE ORDERED** that the Motion to Set Aside Order Reopening Case (doc 12) is denied.



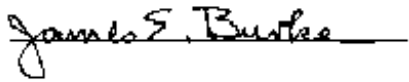
Honorable James S. Starzynski  
United States Bankruptcy Judge

I hereby certify that on February 6, 2006, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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A handwritten signature in black ink that reads "James S. Burlee". The signature is written in a cursive style and is positioned above a solid horizontal line.