UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

In re:	John J. Tworog, Debtor	BK No. 18-11752 Chapter 7

John J. Tworog,
Plaintiff

v. A.P. No. 20-01008

William Burke,
Defendant

DECISION AND ORDER

This is one of two adversary proceedings filed by Debtor John Tworog that continues the saga of contentious and protracted litigation spurred by the divorce proceedings between Mr. Tworog and his former spouse Dolores Tworog ("Dolores"). Defendant William Burke is an attorney who represented Dolores at some point during the divorce proceedings before the Rhode Island Family Court ("Family Court"). Mr. Tworog, a former lawyer, is appearing pro se in this adversary proceeding. Before the Court is Mr. Tworog's belated motion to amend his complaint ("Motion," Doc. #26) under Federal Rule of Civil Procedure 15(a)(2), made applicable to this adversary proceeding by Rule 7015.[1] Mr. Burke filed an initial objection to the Motion (Doc. #31) and Mr. Tworog responded by filing a "Preliminary Memo in Support of Amended Adversary Complaint" (Doc. #63). He later filed his proposed amended complaint (Doc. #64) as directed by the Court because it was not filed with the Motion. Mr. Burke then filed a "Supplemental Memorandum in Support of Motion to Dismiss Adversary Proceeding"

[1] Unless otherwise indicated, the terms "Bankruptcy Code," "chapter," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq*. Reference to the "Bankruptcy Rules" or "Rule" shall mean the Federal Rules of Bankruptcy Procedure.

("Supplemental Memo," Doc. #70).[2] Mr. Tworog then filed a reply (Doc. #71).

After reviewing the proposed amended complaint and the various related filings the Court concludes that, with the exception of his claim of stay violation during this case, all other claims Mr. Tworog seeks to assert would be futile. Consequently, amendment of the complaint to add such claims is denied.

I. Background[3]

To place the Motion in its proper context, it is necessary to recite the relevant background. During the last 10 years, Mr. Tworog has filed five separate bankruptcy cases before this Court, resulting each time in the imposition of the automatic stay under Bankruptcy Code § 362(a) and the halting, at least temporarily, of the Family Court's adjudication of several contested issues in the divorce proceedings.[4] These prior bankruptcy filings were skeleton cases that were dismissed for failure to file required documents. The present case was filed by Mr. Tworog on October 23, 2018.

In 2010, during the divorce proceedings, the Family Court found Mr. Tworog in contempt of the final divorce judgment. Once the contempt order was affirmed by the Rhode

[2] Mr. Burke's Supplemental Memo is procedurally a misnomer as its focus is on the proposed amended complaint and the reasons the Court should deny the amendment. But leave to amend the complaint has not at this stage been granted so there is no amended complaint to dismiss. Because Mr. Burke had to file an objection to the Motion without the benefit of seeing the proposed amended complaint, the Court will treat the Supplemental Memo as a further objection to the Motion.

[3] This background is gleaned from the parties' filings, the Court's docket, and two opinions of the Rhode Island Supreme Court decided adversely to Mr. Tworog on his appeals from orders of the Family Court. *See Berrios-Romero v. Estado Libre Asociado de Puerto Rico*, 641 F.3d 24, 26 (1st Cir. 2011) (explaining that "[a] decision of a sister [state] court is a proper matter of judicial notice" because it is "law, not fact"); *In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 8 (1st Cir. 1999) ("The bankruptcy court appropriately took judicial notice of its own docket[.]"); *see also White v. Gittens*, 121 F.3d 803, 805 n.1 (1st Cir. 1997) (taking judicial notice of a published state court of appeals disposition of a case when there was "nothing in the record evidencing the state appeals court's actions").

[4] These cases are BK No. 10-13411; BK No. 11-11808; BK No. 12-11215; BK No. 13-12130; and BK No. 18-11752 (the present case).

Island Supreme Court, the Family Court assessed Mr. Burke's attorney's fees against Mr. Tworog as a sanction for his contempt and issued a judicial lien to secure the judgment. In turn, Mr. Burke recorded this lien against Mr. Tworog's personal residence. Mr. Tworog appealed and the Family Court judgment was affirmed by the Rhode Island Supreme Court. *See Tworog v. Tworog*, 140 A.3d 159 (R.I. 2016).

In the present bankruptcy case, Mr. Tworog successfully completed his obligations as a debtor and a discharge was entered. Thereafter, he filed a motion under Bankruptcy Code § 522(f) to avoid Mr. Burke's judicial lien as impairing his state homestead exemption. Hedging his bets, Mr. Tworog also commenced this adversary proceeding challenging the validity of the judgment lien. In his complaint, Mr. Tworog explained that: "Plaintiff John J. Tworog has filed a Motion To Avoid Lien of William Burke which should be sufficient to remove the lien but out of an abundance of caution he is also filing this Adversary Proceeding to invalidate the lien against his property." (Doc. #1). Mr. Burke responded by filing a motion to dismiss the complaint. In light of Mr. Tworog's stated purpose for commencing this adversary proceeding, the Court deferred ruling on the motion to dismiss pending the outcome of the lien avoidance motion. Ultimately, Mr. Tworog was successful in his lien avoidance motion and Mr. Burke's lien against the residence was avoided in its entirety.

Apparently, this was not sufficient for Mr. Tworog. Nearly six months after the commencement of this adversary proceeding and several months after the filing of Mr. Burke's motion to dismiss, Mr. Tworog sought to amend his complaint to assert claims not previously raised in the original complaint. The Court held a hearing on the Motion, and explained to Mr. Tworog that leave to amend his complaint had to be reviewed under Federal Rule of Civil

Procedure 15(a)(2),[5] which the Court could not do without having before it the proposed amended complaint. Also during the hearing the grounds upon which Mr. Burke objected to amendment of the complaint as generally described in Mr. Tworog's Motion were discussed at length. The Court granted Mr. Tworog time to file his proposed amended complaint, and afforded Mr. Burke an opportunity to supplement his objection. Indeed, many of Mr. Burke's arguments against amendment are relevant to the proposed amended complaint subsequently filed. Having discussed Mr. Burke's objections to the amendment of the complaint, the Court advised the parties that further oral argument would not enhance the Court's analysis and the Motion would be decided on the parties' filings.

II. The Proposed Amended Complaint

Mr. Tworog's proposed amended complaint contains numbered paragraphs but no separate counts. It also lacks clarity and does not cite to any law underpinning the claims or his entitlement to relief. Nevertheless, the Court has attempted to discern what these asserted claims are. To briefly summarize, Mr. Tworog maintains that the attorney's fees granted to Mr. Burke by the Family Court "should be reduced to zero" because the award was improperly granted. Even if not reduced, he argues, the debt should be set off because Mr. Burke violated the automatic stay in Mr. Tworog's 2013 bankruptcy case and in the present case when, knowing of the bankruptcy filings, he pressed his arguments before the Family Court and the Rhode Island Supreme Court. He also asserts that he should be awarded "a substantial amount based on his efforts in selling the [former marital] property" and negotiating a short sale of the property with the mortgagee, while Mr. Burke's conduct impeded and delayed such efforts. Based on these

[5] Under that rule, "a party may amend its pleading once as a matter of course" if done within "21 days after serving," or within "21 days after service of a motion under Rule 12(b), (e), or (f)." This time period had long expired when the Motion was filed and is inapplicable.

claims, he alleges that he is entitled to an award of punitive damages of $100,000 against Mr. Burke.

For ease of discussion, the Court will refer to the claims for which Mr. Tworog seeks leave to amend the complaint as follows:

- Claim I: Mr. Burke's violation of the automatic stay in the 2013 bankruptcy case ("2013 Stay Violation Claim") (Doc. #64, ¶¶ 11, 13, 14, 15, 20);
- Claim II: An award of a substantial amount for his efforts in the short sale of the former marital property and negotiating the balance of the mortgage against the property ("Services Claim") (Doc. #64, ¶¶ 21-24);
- Claim III: A full offset against the attorney's fees judgment ("Offset Claim") (Doc. #64, ¶ 24);
- Claim IV: A declaration that the Family Court's award of attorney's fees is "worthless and reduced to zero" ("Declaratory Claim") (Doc. #64, ¶¶ 21-24); and
- Claim V: Mr. Burke's violation of the automatic stay in the present bankruptcy case ("2018 Stay Violation Claim") (Doc. #64, ¶¶ 15, 17-20).

III. Mr. Burke's Objection

In his initial objection, Mr. Burke argues that the Motion should be denied because (1) Mr. Tworog does not have standing to bring some of his claims because they arose prepetition and he failed to disclose them on his schedules; (2) Mr. Tworog is judicially estopped from pursuing prepetition claims not listed on his bankruptcy schedules; (3) the Family Court is the proper judicial forum to adjudicate claims challenging the validity and amount of the lien; and (4) this Court is barred from exercising appellate review of the Family Court's judgment.

IV. Standard of Review

Federal Rule of Civil Procedure 15(a)(2) provides that a "court should freely give leave" to amend a complaint "when justice so requires." In *Foman v. Davis*, the Supreme Court explained the standard that courts must employ when deciding a motion to amend under this

Rule:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, *futility of amendment*, etc.—the leave sought should, as the rules require, be "freely given."

371 U.S. 178, 182 (1962) (emphasis added).

Courts, however, have "significant latitude in deciding whether to grant leave to amend." *U.S. ex rel. Gagne v. City of Worcester*, 565 F.3d 40, 48 (1st Cir. 2009) (citation omitted). When "a party seeks leave to amend before any discovery has occurred, a reviewing court assays futility with reference to the Rule 12(b)(6) pleading criteria. An attempt to amend is regarded as futile if the proposed amended complaint fails to state a plausible claim for relief." *Privitera v. Curran (In re Curran)*, 855 F.3d 19, 28 (1st Cir. 2017) (internal citation omitted); *see also Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996) ("There is no practical difference, in terms of review, between a denial of a motion to amend based on futility and the grant of a motion to dismiss for failure to state a claim.").

In *Boudreau v. R.I. Div. of Tax. (In re Boudreau)*, 562 B.R. 853, 857 (Bankr. D.R.I. 2017), this Court outlined the general standards under Federal Rule of Civil Procedure 12(b)(6), stating:

> When considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept the well-pleaded facts of the complaint as true, but the Court need not accept as true any allegations that are no more than "labels and conclusions" or "formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"). Instead, a complaint must "state a claim to relief that is plausible on its face," rather than merely conceivable. *Twombly*, 550 U.S. at 570. The Court must also "give the plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding*

Corp., 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir.1999)).

An amendment is considered futile if it "is jurisdictionally fatal on its face" and the claims are "not within the subject matter jurisdiction of" the court. *Van Daam v. Chrysler First Fin. Servs. Corp. of Rhode Island*, 124 F.R.D. 32, 33 (D.R.I. 1989); *see also Bauer v. Dean Morris, L.L.P.*, No. CIV.A. 08-5013, 2010 WL 4103192, at *7 (E.D. La. Oct. 18, 2010) (holding that a motion to amend was futile because judicial estoppel barred plaintiffs' claims); *Reaves v. Sielaff*, 382 F. Supp. 472, 475 (E.D. Pa. 1974) (denying motion to amend complaint "because plaintiff lacks standing to litigate this issue").

V. Analysis

As it must, the Court accepts Mr. Tworog's alleged facts as true for purposes of considering the Motion. Still, his quest to amend his complaint to assert most of his claims fails for several reasons.

A. The Prepetition Unscheduled Claims – Claims I and II

The 2013 Stay Violation Claim (Claim I) and the Services Claim (Claim II) arose well before the filing of the present bankruptcy case. Mr. Tworog alleges that Mr. Burke violated the automatic stay imposed by § 362(a) in his 2013 bankruptcy case, which was filed the day before a hearing scheduled in the Family Court to determine the value of the former marital residence. Despite the stay, he alleges, the Family Court proceeded with the hearing over his objection and Mr. Burke presented his valuation evidence.[6]

[6] During the 2013 bankruptcy case this Court determined that the automatic stay under § 362(a) was in effect and applied to the pending matter before the Family Court. (BK No. 13-12130, Doc. #13). Not long after this determination, the case was dismissed for failure to file all requisite documents.

Similarly, the Services Claim accrued at least as of 2013.[7] Mr. Tworog alleges that he expended considerable efforts to negotiate a short sale of the former marital property and negotiated with the mortgage holder, achieving a favorable result for both he and Dolores. Without citing any authority, he asserts that Rhode Island "case law states an attorney in a partition action can collect fees from both parties based upon the work the attorney does for the common good in selling the property." (Doc. #64, ¶ 22). In contrast, he alleges, Mr. Burke obstructed such efforts by advising Dolores not to sign the real estate listing agreement, necessitating his filing of a motion in the Family Court to compel Dolores' cooperation in marketing and selling the property.

Neither of these prepetition claims were disclosed on Mr. Tworog's bankruptcy schedules filed in the present case. Consequently, he lacks standing to raise these claims before this Court and is judicially estopped from pursuing the claims in the adversary proceeding.

1. Lack of Standing

Under § 541(a)(1), the filing of a bankruptcy case creates a bankruptcy estate compromising "all legal and equitable interest in [the debtor's] property as of the commencement of the case." The commencement of a chapter 7 case divests the debtor of all right, title, and interest in nonexempt property of the estate. *See In re El San Juan Hotel*, 809 F.2d 151, 154-55 (1st Cir. 1987). The trustee becomes the successor to the debtor's rights in such property and, as such, has standing to pursue all causes of action on behalf of the estate. *See* § 541; *see also Sender v. Simon*, 84 F.3d 1299, 1305 (10th Cir. 1996) ("When asserting claims under the authority of 11 U.S.C. § 541 . . . the trustee stands in the shoes of the debtor and can take no greater rights than the debtor himself had.") (internal quotation marks omitted).

[7] According to Mr. Tworog's original complaint, the Family Court ordered Dolores to sign the listing agreement in January 2013 and the house was sold shortly after. (Doc. #1, ¶ 13).

Moreover, under § 541(a)(1), all pre-petition claims become property of the estate regardless of whether they were scheduled, but only scheduled claims not administered by the trustee during the case revert to the debtor when the case closes. *Pretscher-Johnson v. Aurora Bank, FSB (In re Pretscher-Johnson)*, 2017 WL 2779977, *4 (9th Cir. BAP May 31, 2017) (citing *Cusano v. Klein*, 264 F.3d 936, 945-46 (9th Cir. 2001)). Unscheduled assets continue to belong to the estate and do not revert back to a debtor when property of the estate is abandoned or the case closes. *Cusano*, 264 F.3d at 945. Because Claims I and II were not scheduled by Mr. Tworog, they were not abandoned by the trustee and remain assets of the estate. *See* 11 U.S.C. § 554(d); *United States v. Grant*, 971 F.2d 799, 803 n. 4 (1st Cir. 1992) (en banc) (holding that abandonment by trustee "does not relinquish an *undisclosed* interest in property") (emphasis in original); *see also In re Harber*, 553 B.R. 522, 534 (Bankr. W.D. Pa. 2016) ("[A]ny property of the estate which is unscheduled, including a cause of action, remains property of the estate because it was not administered by the trustee or abandoned by the estate."). Thus, if "a debtor conceals an asset or fails to schedule it, the asset remains the property of the bankruptcy estate and, accordingly, the debtor can be found to lack standing to pursue its further disposition." *In re Kane*, 628 F.3d 631, 641 (3d Cir. 2010). The First Circuit is clear that a debtor lacks standing to prosecute a cause of action that was not listed on the schedules. *Brooks v. Beatty*, 25 F.3d 1037 (Table), 3 (1st Cir. 1994).

Mr. Tworog attempts to defeat the challenge to his standing by arguing that he orally disclosed his claims to the chapter 7 trustee at the first creditors' meeting. The argument has been unequivocally rejected. *See Jeffrey v. Desmond*, 70 F.3d 183, 186 (1st Cir. 1995) ("What matters here is not what the appellants or their counsel said, it is what they did or, rather, failed to do. The state court action was not scheduled as an asset at any time during the bankruptcy

proceedings."). "The law is abundantly clear that the burden is on the debtors to list the assets and/or amend their schedules, and that in order for property to be abandoned by operation of law pursuant to 11 U.S.C. § 554(c), the debtors must formally schedule the property pursuant to 11 U.S.C. § 521(1) before the close of the case." *Id.*

Mr. Tworog did not amend his schedules before he received his discharge and the underlying bankruptcy case closed on October 19, 2020. Therefore, he lacks standing to pursue his 2013 Stay Violation Claim and the Services Claim.[8] It follows then that Mr. Tworog's lack of standing is fatal to his attempt to amend his complaint to assert Claims I and II, and the Court "should not engage in useless acts of futility." *Van Daam*, 124 F.R.D. at 33.

2. Judicial Estoppel

The other impediment that arises is that Mr. Tworog is judicially estopped from pursuing these claims. "[J]udicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 32-33 (1st Cir. 2004) (quoting *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir.2003)). It is triggered when (1) "the estopping position and the estopped position [are] directly inconsistent, that is, mutually exclusive," and (2) "the responsible party . . . succeeded in persuading a court to accept its prior position." *Alternative Sys. Concepts*, 374 F.3d at 33. Although not a required element of the judicial estoppel analysis, another factor courts have considered is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001).

[8] Procedurally, in this district an underlying bankruptcy case is administratively closed once the no asset/no distribution report is filed by the trustee, but any pending adversary proceedings remain open.

In a case squarely on point, the First Circuit held that once a debtor has received a discharge, judicial estoppel precludes that debtor from pursuing a cause of action that was not—but should have been—listed on the debtor's schedules. *Guay v. Burack*, 677 F.3d 10, 21 (1st Cir. 2012). "[F]ailure to identify a claim as an asset in a bankruptcy proceeding is a prior inconsistent position" satisfying the first prong of the estoppel inquiry. *Id.* at 17. The second prong is met when "[a] bankruptcy court 'accepts' a position taken in the form of omissions from bankruptcy schedules when it grants the debtor relief, such as discharge, on the basis of those filings." *Id.* at 18.

When Mr. Tworog filed for bankruptcy protection in 2018, he was required to file his schedules under oath. *See* Rule 1008. His schedules did not include either of these alleged causes of actions against Mr. Burke. Notably, on Schedule A/B he identified two unrelated claims against Mr. Burke (a fraud counterclaim and a claim of intentional infliction of emotional distress), but failed to disclose the 2013 Stay Violation Claim or the Services Claim. Having made a sworn representation that these unrelated claims against Mr. Burke were the only prepetition causes of action he held against him, Mr. Tworog's allegations of Claims I and II are inconsistent with that representation. As previously noted, Mr. Tworog's alleged oral disclosure of these claims to the chapter 7 trustee does not alter the analysis of the judicial estoppel doctrine here. *See Guay,* 677 F.3d at 20 (stating "the fact that the debtors brought their claims to the Trustee's attention by means of oral notification still left open the possibility of judicial estoppel"). The first requirement for application of the estoppel doctrine is satisfied.

Turning to the second prong of the analysis, the Court accepted Mr. Tworog's schedules as true and accurate and granted him a discharge on December 11, 2019. The second prong is met because the Court accepted Mr. Tworog's "omission [of the claims] from bankruptcy

schedules when it grant[ed]" a "discharge[] on the basis of those filings." *Guay,* 677 F.3d at 18; *see also In re Edwards Theatres Cir., Inc.*, 281 B.R. 675 (Bankr. C.D. Cal. 2002) (denying motion to amend a claim as futile because the claimant was judicially estopped from taking a position inconsistent with a prior position).

The bottom line is that amendment of the complaint to pursue the 2013 Stay Violation and Services Claims is futile; both claims would not survive a motion to dismiss due to Mr. Tworog's lack of standing and the bar of judicial estoppel.

B. The Offset Claim – Claim III

The Court has no jurisdiction over Mr. Tworog's alleged claim of a complete offset against the debt owed to Mr. Burke, and amendment of the complaint to include the Offset Claim would also be futile.

1. Lack of Ripeness

The Offset Claim is simply not ripe for adjudication; there is no immediate controversy for which relief is necessary. The "ripeness doctrine seeks to prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). A plaintiff must "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of" the relief sought. *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

There has not been any determination as to the non-dischargeability of Mr. Burke's debt and exemption from the discharge injunction. This contingent event may never occur; Mr. Burke may not seek such determination, and if he should do so in the future, Mr. Tworog is free to

assert his alleged claim of offset at that time. So, presently, there is no immediate controversy that warrants or necessitates adjudication of this claim by this Court. Amendment of the complaint to add the claim would be futile.

2. Lack of an Impact on the Bankruptcy Estate

A bankruptcy court's jurisdiction is limited to cases "that 'arise under title 11'; those that 'arise in' a Title 11 case; and those that are 'related to a case under title 11.'" *Stern v. Marshall*, 564 U.S. 462, 473 (2011) (cleaned up); 28 U.S.C. § 157(a). The Court's jurisdictional analysis in *In re Travers*, 507 B.R. 62 (Bankr. D.R.I. 2014), is applicable to the Offset Claim.

> Though this proceeding does not invoke a substantive right created by bankruptcy law and could exist outside of bankruptcy, Plaintiff nevertheless claims that this case represents a core proceeding because, pursuant to 28 U.S.C. § 157(b)(2)(K), a core proceeding may be brought to determine the "validity, extent, or priority of liens." However, this provision only encompasses proceedings to determine the validity, extent, or priority of liens on the estate's or the debtor's property. Cases have held that, to fall within the court's jurisdiction, a plaintiff's claims must affect the estate, not just the debtor. Indeed, "[t]o the extent that the literal wording of some of the types of proceedings [listed in § 157(b)] might conceivably seem to apply, it should be remembered that engrafted upon all of them is the overarching requirement that property of the estate under § 541 be involved."

Travers, 507 B.R. at 70 (quoting *Maxwell v. HSBC Mortg. Corp. (USA) (In re Maxwell)*, Adv. No. 12-5284, 2012 WL 3678609, at *2 n. 2 (Bankr. N.D. Ga. Aug. 22, 2012)).

Mr. Burke's lien against his personal residence has been avoided, the discharge order has entered, this is a no-asset case, the chapter 7 trustee filed a report of no distribution to creditors, and the underlying bankruptcy case has been closed. Even if successful, resolution of the Offset Claim would only benefit Mr. Tworog; it will have no effect on the bankruptcy case or the estate (which actually does not exist anymore). This claim then does not involve a core proceeding under 28 U.S.C. § 157.

For the same reason, it is not a "related to" proceeding. The First Circuit "has defined

'related to' proceedings as proceedings which 'potentially have some effect on the bankruptcy estate, such as altering debtor's rights, liabilities, options, or freedom of action, or otherwise have an impact upon the handling and administration of the bankrupt estate.'" *In re Middlesex Power Equip. & Marine, Inc.*, 292 F.3d 61, 68 (1st Cir. 2002); *see also United States v. Fleet Nat'l Bank (In re Calore Express Co., Inc.)*, 288 B.R. 167, 169-70 (D. Mass. 2002) ("A matter may be unrelated to a bankruptcy estate because it substantively has no impact on that estate, or it may be unrelated because the estate does not exist anymore. Either way . . . a bankruptcy court . . . has no subject-matter jurisdiction over that dispute.").

The absence of this Court's subject matter jurisdiction over the Offset Claim renders amendment of the complaint to include this claim futile.[9]

C. The Declaratory Claim – Claim IV

In seeking to add this claim, Mr. Tworog alleges that "Mr. Burke was hired to collect a nonexistent debt and is now trying to collect from the Plaintiff for his worthless efforts." (Doc. #64, ¶ 5). He further alleges that for five years Mr. Burke tried to obstruct the sale of the former marital domicile, and he requests that this Court "declare the alleged debt to Mr. Burke worthless and reduced to zero." (Doc. #64, ¶ 24 and wherefore clause). Essentially, Mr. Tworog is requesting that this Court modify the Family Court judgment by reducing it to zero. In opposition, Mr. Burke argues that Mr. Tworog may not seek relief before this Court "to second guess, challenge and or modify the prebankruptcy judgement," and that this Court is not the

[9] For the sake of completeness, the Court notes that even if it had jurisdiction, it would abstain from determining the Offset Claim. Adjudication of the claim has no bankruptcy purpose and abstention is warranted. *See United States v. Paolo*, No. C.A. 08-482MDL, 2009 WL 2208094, at *4 (D.R.I. July 23, 2009) (explaining in the context of a tax determination that where there is "no bankruptcy purpose" abstention is appropriate). When, as here, there is no impact on the bankruptcy estate, abstention is proper. *See In re Am. Motor Club, Inc.*, 139 B.R. 578, 581 (Bankr. E.D.N.Y. 1992) (cleaned up) (citing *In re Smith*, 122 B.R. 130, 133 (Bankr. M.D.Fla. 1990) ("If the impact of abstention on the general administration of the estate of this Chapter 11 Debtor, and, of course, on the Debtor, is minimal or non-existent, abstention may be appropriate.").

appropriate "appellate forum" in which to challenge the judgment.[10] (Doc. #70, ¶¶ 3-5). The Court agrees.

1. The Bar of the Rooker-Feldman Doctrine

The *Rooker-Feldman* doctrine precludes federal courts, other than the Supreme Court, from sitting as appellate courts to review final state-court judgments. *Lance v. Dennis*, 546 U.S. 459, 463 (2006). In *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, the Supreme Court declared that lower courts do not have jurisdiction when the "losing party in state court file[s] suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of the judgment." 544 U.S. 280, 291 (2005). The *Rooker-Feldman* doctrine is a jurisdictional gate-keeper and "it cannot be waived." *In re Zambre*, 306 B.R. 428, 432 (Bankr. D. Mass. 2004); *see also Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42, 44 (1st Cir. 2003).

In seeking relief to essentially nullify the Family Court's award of attorneys' fees, Mr. Tworog would have this Court act as a super appellate court to reverse the state court's final judgment affirmed by the Rhode Island Supreme Court. The *Rooker-Feldman* doctrine prohibits this Court from doing so. *See Tyler v. Supreme Judicial Court of Massachusetts*, 914 F.3d 47, 50 (1st Cir. 2019) ("Where federal relief can only be predicated upon a conviction that the state

[10] The Family Court's final judgment of divorce permitted Mr. Tworog to live in the marital residence for the next two years but required him to continue making the mortgage payments. *See* BK No. 13-12130 (Doc. #12). After learning that Mr. Tworog had not made any of the mortgage payments and had activated a $6,000 line of credit under both of their names, Dolores filed a motion to adjudge him in contempt of the divorce decree. The Family Court granted that motion and Mr. Tworog appealed. The contempt order was affirmed by the Rhode Island Supreme Court and the matter remanded for further proceedings. *Tworog v. Tworog*, 45 A.3d 1194, 1200 (R.I. 2012). On remand, Dolores sought an award of attorney's fees and costs as a contempt sanction. *See* BK No. 13-12130 (Doc. #12). The Family Court granted her motion and entered a judgment for Mr. Burke for his attorney's fees. The judgement was upheld on appeal in *Tworog v. Tworog*, 140 A.3d 159, 161 (R.I. 2016). ("Our careful review of the record reveals that the trial justice based the award of attorneys' fees on the finding of contempt that was affirmed by this Court in *Tworog I*. In light of the ample evidence that existed in support of the reasonableness of the award, the Family Court justice did not abuse his discretion.").

court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.").

The prohibition operates even if Mr. Tworog's attack on the validity of the state court judgment were to be based on a legal theory not argued in the state court. *See Klimowicz v. Deutsche Bank Nat'l Tr. Co.*, 907 F.3d 61, 66 (1st Cir. 2018) (holding that the *Rooker-Feldman* doctrine "is not contingent upon an identity between the issues actually litigated in the prior state-court proceedings and the issues proffered in the subsequent federal suit. Instead, the critical datum is whether the plaintiff's federal suit is, in effect, an end-run around a final state-court judgment.").

Like the party in *Exxon Mobil Corp*., who as the "losing party in state court filed in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment," Mr. Tworog cannot proceed on the Declaratory Claim in this Court. 544 U.S. at 291.

2. The Effect of Claim Preclusion

Another basis upon which the Declaratory Claim cannot be pursued in the adversary proceeding is claim preclusion, an aspect of the umbrella doctrine of *res judicata*. Claim preclusion prevents Mr. Tworog from "relitigating claims that were or could have been brought in a prior action." *Universal Ins. Co. v. Off. Ins. Com'r*, 755 F.3d 34, 37 (1st Cir. 2014).

"The doctrine of *res judicata* promotes the goals of fairness and efficiency by preventing vexatious or repetitive litigation." *Caballero-Rivera v. Chase Manhattan Bank, N.A.,* 276 F.3d 85, 86 (1st Cir. 2002). "[A] judgment rendered in a state court is entitled to the same preclusive effect in federal court as it would be given within the state in which it was rendered." *In re Kittery Point Partners, LLC,* 623 B.R. 825, 838 (1st Cir. BAP 2021) (quoting *Pisnoy v. Ahmed*

(In re Sonus Networks, Inc.), 499 F.3d 47, 56 (1st Cir. 2007)). Here the Court must look to Rhode Island law on the principles of claim preclusion. Rhode Island law invokes claim preclusion where "(1) the parties are the same or in privity with the parties of the previous proceeding; (2) [there is] an identity of issues in both proceedings; and (3) a valid final judgment on the merits has been entered in the previous proceeding." *Lennon v. Dacomed Corp.*, 901 A.2d 582, 591 (R.I. 2006); *accord Faye v. Quicken Loans Inc*, No. 1:19-CV-00671, 2020 WL 5258695, at *3 (D.R.I. Sept. 3, 2020).

Mr. Burke was not a party in the Family Court proceedings. So, the question is whether he was in privity with Dolores. "Parties are in privity when 'there is a commonality of interest between the two entities' and when they 'sufficiently represent' each other's interests." *Duffy v. Milder,* 896 A.2d 27, 36 (R.I. 2006) (quoting *Commercial Union Insurance Co. v. Pelchat,* 727 A.2d 676, 680 (R.I. 1999)). The Court finds that Mr. Burke was in privity with Dolores because both he and Dolores had a direct financial interest in the award of attorney's fees for his services rendered in connection with the contempt and sanctions motions.

For the second element, the Rhode Island Supreme Court has "adopted the broad 'transactional' rule," which "precludes the re-litigation of 'all or any part of the transaction, or series of connected transactions, out of which the [first] action arose." *Waters v. Magee*, 877 A.2d 658, 666 (R.I. 2005). To meet this standard, the two "causes of action [need only] arise out of a common nucleus of operative facts." *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 38 (1st Cir. 1998). "One indication of whether *res judicata* applies is whether a decision in the second action may contradict the prior adjudication." *Nuey v. City of Cranston*, No. 1:19-CV-104, 2021 WL 858551, at *5 (D.R.I. Mar. 8, 2021) (internal quotation marks

omitted). Mr. Tworog's Declaratory Claim involves the same "series of connected transactions" and "operative facts" raised in Dolores's sanctions motion before the Family Court.

Finally, the judgment entered in favor of Mr. Burke is a final judgment, affirmed by the Rhode Island Supreme Court. Accordingly, amendment of the complaint to add Claim IV is also futile; the *Rooker- Feldman* doctrine prohibits the Court from adjudicating the claim and Mr. Tworog is precluded from relitigating the validity and the amount of the attorney's fees assessed against him by the Family Court and affirmed on appeal.

D. 2018 Stay Violation Claim – Claim V

Mr. Tworog contends that Mr. Burke violated the automatic stay when, two days after he filed the present case, they both appeared before the Rhode Island Supreme Court and Mr. Burke pressed his argument in opposition to Mr. Tworog, the appellant in that appeal. He alleges that at the outset of oral argument he advised the court that he had filed for bankruptcy. In his reply memorandum he further alleges that on the day prior to oral argument he informed Mr. Burke's assistant that he had filed for bankruptcy. A week later the Rhode Island Supreme Court entered an order staying the appeal in accordance with § 362, noting that "it [wa]s regrettable that the Court was not notified sooner of the bankruptcy filing or of the appellant's intent to file for bankruptcy." (BK No. 18-11752, Doc. #152, Ex. 2). Mr. Burke does not dispute that the hearing proceeded and he presented his argument before the court. He maintains, however, that if a violation of the stay occurred, that action was undertaken by the justices of the Rhode Island Supreme Court, not him. Additionally, he argues that he did not violate the automatic stay because he was only defending an appeal brought by Mr. Tworog; he was not seeking affirmative relief.

Sections 362(a)(1) and (2) provide that upon the filing of a bankruptcy petition, a stay

arises automatically as to all entities of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> (2) the enforcement, against the debtor or property of the estate, of a judgment obtained before the commencement of the case under this title.

Redress for stay violations is provided by § 362(k)(1). It states that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1). To state a plausible claim under this provision the complaint must include facts indicating: "(1) that a violation of the automatic stay occurred; (2) that the violation was willfully committed; and (3) that the debtor suffered damages as a result of the violation." *Slabicki v. Gleason (In re Slabicki)*, 466 B.R. 572, 577-78 (1st Cir. BAP 2012) (citing *In re Panek,* 402 B.R. 71, 76 (Bankr. D. Mass. 2009)).

"Courts within the First Circuit have concluded that the words 'shall recover' [in § 362(k)(1)] indicate that 'Congress intended the award of actual damages, costs and attorney's fees be mandatory upon a finding of a willful violation of the stay.'" *In re Duby*, 451 B.R. 664, 670 (1st Cir. BAP 2011) (citing *Vázquez Laboy v. Doral Mortgage Corp. (In re Vázquez Laboy)*, 416 B.R. 325, 332 (1st Cir. BAP 2009). The First Circuit has ruled that "emotional damages" qualify as "actual damages" under § 362(k). *Fleet Mortg. Grp., Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999).

In his proposed amended complaint Mr. Tworog states that: (1) Mr. Burke violated the automatic stay by making an oral argument to the Rhode Island Supreme Court after the petition filing; (2) the violation was willful because Mr. Burke knew of the pending bankruptcy case; and

(3) the conduct caused him "pain and suffering and mental anguish." (Doc. #64, ¶¶ 15, 17). "[A] violation will be found 'willful' if the creditor's conduct was intentional (as distinguished from inadvertent), and committed with knowledge of the pendency of the bankruptcy case." *In re McMullen*, 386 F.3d 320, 330 (1st Cir. 2004). These allegations, at least for purposes of the Federal Rule of Civil Procedure 12(b)(6) standard, state a plausible claim for stay violation. Arguably, once Mr. Tworog announced that he had filed for bankruptcy, Mr. Burke should have requested a postponement of the hearing (even if only to verify the bankruptcy filing). While the Rhode Island Supreme Court has jurisdiction to determine whether a proceeding is exempted from the automatic stay, a litigant who proceeds does so at their "own risk." *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 940 (6th Cir. 1986). Mr. Tworog has sufficiently pled a plausible stay violation in the present case to be entitled to amend the complaint to pursue this claim.

VI. Conclusion

For the foregoing reasons, the Motion is granted in part and denied in part. Amendment of the Complaint to assert Claims I, II, III, and IV is denied as futile. Leave to amend the complaint is granted only to assert Claim V, the 2018 Stay Violation Claim. In light of the already protracted litigation that has occurred in this adversary proceeding, the Court deems the amended complaint, limited to Claim V, as having been filed and served. For the sake of clarity, and in accordance with this ruling, the operative amended complaint consists of the introductory paragraph, paragraphs 15, 17, 18, 19, and 20 (the latter two paragraphs only as to the reference to the 2018 Stay Violation), and requested relief clause (hereafter the "Operative Complaint"). The original filed complaint is superseded by the Operative Complaint, as once an amended complaint is filed the antecedent complaint "is a dead letter and no longer performs any function

in the case." *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008) (citing *Kolling v. Am. Power Conversion Corp.,* 347 F.3d 11, 16 (1st Cir. 2003)).

Mr. Burke is afforded 21 days from the date of this Decision and Order to respond to the Operative Complaint.

Dated: May 14, 2021

By the Court,

Diane Finkle
U.S. Bankruptcy Judge