

<b>Mathus v Bouton's Bus. Machine's Inc.</b>
2009 NY Slip Op 30529(U)
March 9, 2009
Supreme Court, New York County
Docket Number: 603790/06
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Index Number : 603790/2006  
**MATHUS, KEITH**  
VS.  
**BOUTON'S BUSINESS MACHINES**  
SEQUENCE NUMBER : 003  
DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1, 2, 3, 4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN WRITING WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

**FILED**

MAR 11 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/9/09 JUSTICE SHIRLEY WERNER KORNREICH  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
KEITH MATHUS, individually and as shareholder of  
BOUTON'S BUSINESS MACHINES, INC.,

Plaintiff,

-against-

BOUTON'S BUSINESS MACHINE'S INC., PATRICK  
DESPIRITO, CHRISTOPHER DESPIRITO, KAL  
ROTHMAN, ESQ., FACSIMILE COMMUNICATIONS,  
INC., d/b/a, ATLANTIC BUSINESS PRODUCTS,  
GOLDSTEIN, KARLEWICZ & GOLDSTEIN, LLP,  
BOB GOLDMAN & JOHN DOE.

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

Index No.:603790/06

**DECISION and  
ORDER**

**FILED**  
MAR 11 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

This is an action to recover on a June 13, 1997, \$400,000 promissory note. Plaintiff, now acting *pro se*, brings this motion seeking a default judgment against defendants for their failure to make two court appearances. Defendant Goldman opposes plaintiff's default motion. Defendant-DeSpirito also opposes and cross-moves for dismissal.

*I. Facts*

*A. Plaintiff's Motion*

Plaintiff asks that defendants be defaulted for failing to appear on March 6 and July 24, 2008. The pleadings are not appended to the papers.

*B. Goldman Opposition*

Goldman, by his attorney, avers that he filed a timely answer, has abided by court orders, appeared on the March 6 date and inadvertently failed to appear on July 24.

C. *DeSpirito Opposition and Cross-Motion to Dismiss*

DeSpirito begins by noting that plaintiff was represented by counsel prior to August 11, 2008 and that the March appearance involved plaintiff's counsel's Order to Show Cause requesting that he be relieved. DeSpirito contends that he did not receive the Order to Show Cause, perhaps because counsel's address had changed. Further, DeSpirito alleges that he failed to receive the decision of the court relieving counsel and setting the matter down for July 24. In addition, he argues that he has answered the action and actively defended it both here and in Rockland County, where it originally was brought. He argues that the Rockland Justice found the claim had no merit. Annexed to his papers are the complaints in this action and the Rockland action and a February 13, 2002 decision in the Rockland case.

*Rockland Complaint*

The February 2002 complaint in Rockland County was brought by Mathus individually and as a shareholder of Bouton against Bouton and DeSpirito only. The complaint alleged that as of December 2005, DeSpirito owned only 5% of Bouton shares and John Maiorano owned 95% of the shares. The two principles of Bouton were in litigation. The complaint stated that at the request of DeSpirito, Mathus advanced funds to DeSpirito and that a June 1997 agreement, drafted by Rothman, memorialized an agreement between DeSpirito and Mathus. The agreement gave Mathus a 50% interest in Bouton. The complaint alleged that DeSpirito and Rothman falsely represented that 50% of the Bouton shares could not be transferred to Mathus until the debt owed Maiorano was satisfied and that Maiorano owned only 51% of the shares. It further alleged that a draft shareholder agreement and business plan were prepared. Upon satisfaction of the debt in or around July 2001, Mathus exercised his option for the 50% interest in Bouton, but

DeSpirito refused to deliver the shares. The complaint then stated that the parties' agreement provided that should Mathus exercise his option to purchase 50% of the Bouton shares, DeSpirito would owe him \$115,000 to be paid in 24 monthly installments, beginning on August 1, 2001. Otherwise, DeSpirito owed Mathus \$400,000 with interest at 4½% to be paid monthly from July 13, 1997 to July 3, 2001. The complaint continued by contending that DeSpirito and Bouton acknowledged the exercise of the option but claimed that the stock could not be delivered because it was held in escrow and lost. Finally, the complaint alleged that DeSpirito wrongfully terminated Mathus' employment at Bouton and that Bouton owed Mathus more than \$5,000 in unpaid salary.

The complaint asked for injunctive, money and declaratory relief. It alleged the following causes of action: 1) breach of contract as against DeSpirito and Bouton; 2) fraud as against Despirito and Bouton; 3) a claim for unpaid salary and benefits against Bouton for wrongful termination; 4) a claim for wrongful termination against DeSpirito; 5) money owed by DeSpirito for monthly payments pursuant to the agreement; 6) breach of fiduciary duty as against DeSpirito; 7) a derivative action; and 8) a request that DeSpirito be removed and barred from the Bouton Board.

#### *Rockland Decision*

The Rockland court denied plaintiffs' motion for a preliminary injunction. In that decision, the court set forth the facts alleged by each party. Plaintiff alleged that in 1995, Maiorano owned 95% of Bouton stock and DeSpirito owned 5%. The two were involved in litigation, and Mathus loaned DeSpirito money for the litigation. A loan agreement was memorialized in a June 13, 1997 promissory note. Mathus also alleged that he and DeSpirito had

orally agreed that upon exercising his option set forth in the note, Mathus would become a 50% shareholder and equal partner. At some point, Mathus quit his job at Toshiba and began working for Bouton as a salesman. Nonetheless, all decisions continued to be made solely by DeSpirito. In addition, Mathus claimed that DeSpirito refused to turn over 50% of the stock certificates to him, refused to make monthly payments on the note, excluded him from decision-making, and negotiated, without him, to sell the business. Finally, on February 5, 2002, DeSpirito terminated Mathus from his employment at Bouton.

DeSpirito opposed the injunction and alleged that he had no intention of transferring Bouton shares until an agreement with plaintiffs had been reached. However, DeSpirito further claimed that Bouton was a non-exclusive dealer for Toshiba products, that Toshiba held an irrevocable right of first refusal and option to purchase Bouton stock, that DeSpirito would consult with Mathus should there be negotiations regarding a sale or transfer of Bouton, that "there is no money to re-pay loans, or make distributions," that all of Bouton's financials were turned over to Mathus and that Mathus was an at-will employee and was terminated for poor performance.

The court denied a preliminary injunction, stating: "it has become clear to the Court [after a conference with the parties] that defendants do not refute plaintiff's contention that he is a fifty percent shareholder and arrangements were underway to acknowledge his ownership interest either through transfer of his shares or the execution of an affidavit of lost shares." It found no evidence to substantiate plaintiff's claim that DeSpirito was negotiating to sell his shares, "a claim that DeSpirito expressly denies." It also found that DeSpirito was amenable to

negotiating with Mathus and that there was no evidence that Mathus was denied access to Bouton's books.

*Bankruptcy*

On January 16, 2004, Mathus filed for Chapter 7 bankruptcy protection and received a discharge on April 22, 2004. A copy of Mathus' Financial Affairs schedule is annexed to DeSpirito's papers. The promissory note, the causes of action brought in Rockland and those which are the subject of this case, were not listed.

*New York County Complaint*

The instant complaint was filed in October 2006. It is brought by plaintiff Mathus on his own behalf and as a shareholder of Bouton's Business Machines, Inc. (Bouton). It alleges that in June 1997, Mathus signed a non-negotiable promissory note in the presence of DeSpirito and DeSpirito's attorney, defendant Rothman. The note provided for a \$400,000 loan with accrued interest at 4½% to be paid monthly over a two-and-one-half year period. The note further provided that Mathus could elect to receive 50% of Bouton's shares in lieu of repayment. Mathus alleges that he was led to believe, by Rothman and DeSpirito, that DeSpirito was the sole director of the Board of Bouton and that Bouton consisted of 100 shares, when 200 shares really existed. Plaintiff elected to receive 50% of the Bouton shares, but DeSpirito issued 50 shares, only 25% of the shares, to him. In making his election, Mathus claims that he relied upon Bouton's financial statements prepared by defendant Goldstein, which statements were false and misleading. Mathus claims that DeSpirito wasted and misappropriated Bouton's assets and was involved in self-dealing in negotiating a May 2002 offer to purchase the company, thereby

depriving the shareholders of an opportunity to save Bouton from insolvency. Moreover, the complaint alleges that DeSpirito misappropriated property belonging to Bouton.

The complaint asks for money damages, an accounting and declaratory relief, setting forth the following causes of action: 1) breach of contract against DeSpirito; 2) breach of fiduciary duty against DeSpirito as director of Bouton; 3) breach of good faith and fair dealing against Despirito; 4) fraud in the inducement as against DeSpirito and Rothman as a result of intentionally misleading Mathus as to the amount of shares of Bouton; 5) conversion as against DeSpirito in regard to Bouton's customer list; 6) conversion as against DeSpirito in regard to Bouton's inventory; 7) conversion as against John Doe in regard to Bouton's inventory; 8) conversion as against Bob Goldman in regard to Bouton's customer list appropriated in favor of Facsimile Communications, Inc. (Facsimile); 9) conversion against Facsimile for collecting on Bouton's accounts receivable and misappropriating Bouton property; 10) tortious interference with prospective business relations against Facsimile; 11) breach of fiduciary duty against Facsimile; 12) negligence against Goldman; and 13) a declaration removing DeSpirito from the Bouton Board.

DeSpirito argues that Mathus lacks standing to bring this action since the instant claims belong to the bankruptcy estate.

*D. Mathus' Opposition to the Cross-Motion and his "Summary Judgment Motion"*

Mathus submits an affidavit and a number of documents in opposition to the cross-motion and requests summary judgment in his favor. Among the documents attached are the promissory note which he avers that Rothman drafted, 50 shares of Bouton common stock issued to him, and the July 1996 agreement between DeSpirito and Maiorano. He avers that his

bankruptcy counsel, the Trustee in Bankruptcy and the creditors were told of the promissory note and annexes a copy of August 2004 bankruptcy court papers, which do not list the promissory note, the instant claims or any claim against defendants.

Exhibits C, D and E are documents from a Rockland County court proceeding and DeSpirito's bankruptcy proceeding. The matter involved Klaas deWaal and his company, DW Projects, Inc., in which they sued DeSpirito and Bouton on a 2001 \$30,000 promissory note and \$50,000 loan, alleging misrepresentations by DeSpirito. Mr. Rothman advised the Rockland court in that matter that DeSpirito had filed for Chapter 7 bankruptcy protection. A default judgment in the amount of \$80,000 was rendered against Bouton. Further, Mr. DeWaal commenced an action against DeSpirito in bankruptcy court. After a trial, Judge Hardin pierced the corporate veil, finding DeSpirito personally liable to deWaal for \$80,000 with interest from February 2001, and since he found the \$80,000 was obtained by fraud, the \$80,000 was not dischargeable in bankruptcy. Mr. Rothman represented DeSpirito in the matters.

*E. DeSpirito Reply and Opposition*

DeSpirito raises the issue that summary judgment was not properly filed and reargues that Mathus has no standing to bring this action, since this matter was not listed in Mathus' bankruptcy filing and he was discharged. DeSpirito argues that the bankruptcy trustee alone has standing to bring this action.

*II. Conclusions of Law*

A debtor filing for bankruptcy must list all of his legal and equitable claims on a financial statement, including potential causes of action. *Weitz v. Lewin*, 251 A.D.2d 402 (2d Dept. 1998); *Sea Trade Co., Ltd. v. FleetBoston Financial Corp.*, 2008 U.S. Dist. LEXIS 67221, p. 35

(S.D.N.Y. 2008); *Negron v. Weiss*, 2006 U.S. Dist. LEXIS 69906; *Rosenshein v. Kleban*, 918 F. Supp. 98, 102 (S.D.N.Y. 1996). The claims, then, become part of the bankruptcy estate, and only the trustee has standing to bring any adversary action to collect on the debtor's assets. *Rooney v. Thorson*, 209 F.3d 114, 116 (2d Cir. 2000); *Galín v. U.S.A.*, 2008 U.S. LEXIS 103884, p. 14 (E.D.N.Y. 2008); *Mehlenbacher v. Swartout*, 289 A.D.2d 651, 651-2 (3d Dept. 2001).

Undisclosed assets and claims do not revert to the debtor once the bankruptcy is discharged. *Rosenshein, supra*, 918 F. Supp.102. Rather, the undisclosed claims remain the property of the bankruptcy estate, and the debtor lacks standing to bring suit upon them. *Weitz, supra* 251 A.D.2d 402; *Hansen v. Madani*, 263 A.D.2d 881, 882 (3d Dept. 1999); *Rosenshein* at 103.

In addition, judicial estoppel forecloses suit upon an undisclosed claim. *Koch v. N.B.A.*, 245 A.D.2d 230 (1<sup>st</sup> Dept. 1997); *Rosenshein, supra*. Judicial estoppel will lie when a party has adopted a position in one legal proceeding and, subsequently, assumes an opposite position. *Rosenshein, supra* at 104. To establish judicial estoppel, it must be established that the party against whom estoppel is sought asserted an inconsistent position in a prior proceeding and the prior court adopted that position in some manner. *Negron, supra*, 2006 U.S. Dist. LEXIS 69906 at p. 9; *Rosenshein, id.* In the bankruptcy context, once the bankruptcy court has confirmed a plan and discharged the debts based upon incomplete disclosure, it has adopted the position of the debtor in the bankruptcy action and the debtor may no longer bring an action on the undisclosed claim. *Id.*

In the instant action, plaintiff has brought an action against defendants, which pre-existed his bankruptcy. The claims, however, were not disclosed, and he was discharged from bankruptcy. Moreover, the trustee in bankruptcy is not a plaintiff nor does plaintiff have the

trustee's consent to bring this action. Consequently, this action must be dismissed both for lack of standing and on the ground of judicial estoppel. Accordingly, it is

ORDERED that the instant action is dismissed and the remaining motions are denied as moot; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

March 9, 2009

ENTER:

A handwritten signature in black ink, appearing to be "J.C.", written over a horizontal line.

**FILED**  
MAR 11 2009  
COUNTY CLERK'S OFFICE  
NEW YORK