

**Burbacki v Abrams, Fensterman, Fensterman,
Eisman, Formato, Ferrara & Wolf, LLP**

2016 NY Slip Op 30749(U)

April 15, 2016

Supreme Court, Kings County

Docket Number: 509725/2015

Judge: David B. Vaughan

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of APRIL, 2016

P R E S E N T:

HON. DAVID B. VAUGHAN

Justice.

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ELLA BURBACKI,

Plaintiff,

- against -

Index No. 509725-2015

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATTO, FERRARA & WOLF, LLP, et al

Defendants.

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The following papers were read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1</u>
Opposing Affidavits (Affirmations) _____	<u>2</u>
Reply Affidavits (Affirmations) _____	<u>3, 4</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	<u>5, 6</u>

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Defendants move to dismiss pursuant to CPLR §§ 3016 and 3211(a)(1), (3), (5) and (7). Plaintiff Ella Burbacki ("Burbacki" or "plaintiff") opposes the motion.

The main thrust of the plaintiff's complaint is that she would have been successful in her claims and legal actions against Gorelik, the plaintiff in *Gorelik et al v Burbacki, et al*, Index No 18128-2008, Stuart Wachs, Esq ("Wachs" or "first attorney")--her prior counsel, and Richard Kaplan ("Kaplan")--her accountant, had it not been for the

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defendants' actions and/or omissions in advising her about the bankruptcy process prior to her filing for bankruptcy and in the preparation and filing of her bankruptcy petition.

The following facts are stated in the plaintiff's complaint. Ella Burbacki was a named defendant in *Gorelik et al v Burbacki, et al*, Index No 18128-2008 in 2008 ("Gorelik matter"). She was initially represented in that action by Stuart Wachs, Esq, ("Wachs" or "first attorney"), who was recommended to her by her accountant Richard Kaplan ("Kaplan" or "accountant"). In 2011 Plaintiff sought to obtain new counsel and retained the defendant on December 14, 2011. Upon Burbacki's failure to compensate her first attorney \$80,000 and the accountant \$20,000, they refused to turn over her files to her new counsel, the defendants in the instant matter.

After the defendants made several appearances for plaintiff in court, Burbacki's matter was set for trial for March 22, 2012. Unable to compensate either Wachs and Kaplan for their past litigation work or to pay her newly retained attorneys for litigation work going forward, Burbacki filed for bankruptcy. Prior to filing for bankruptcy, Burbacki's greatest concern was that her house be protected. On or about March 20, 2012, Burbacki filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York.

On April 25, 2012 Burbacki learned that the bankruptcy trustee's position was that Burbacki was a 100% owner of the house and that he was going to argue his position to the bankruptcy court. The bankruptcy court agreed with the trustee, Burbacki's home became part of the bankruptcy estate and Burbacki moved to dismiss her own bankruptcy petition. Burbacki's motion was opposed by the bankruptcy trustee, Gorelik, Wachs and Kaplan--creditors in the bankruptcy action. The trustee further argued to the bankruptcy

* 3] court that there was another potential creditor, the First National Bank of Jeffersonville, which had a large deficiency judgement against Burbacki.

On August 6, 2012 Burbacki signed a consent to change attorneys, and retained Robert Musso, Esq of Rosenberg, Musso and Weiner LLP ("Musso", "3d counsel" or "bankruptcy attorney"). On August 23, 2012, the bankruptcy court adjoined Burbacki's bankruptcy matter and lifted the stay based upon other existing creditors that may chose to enter the action in the interim. Burbacki settled with Wachs and Kaplan for \$55,000 out of \$100,000, in exchange for her signing a general release. On March 4, 2013 the jury found Burbacki liable to Gorelik and on November 22, 2013 the jury unanimously found that Burbacki owed Gorelik the total sum of \$331,423.04. By Order dated April 4th, 2014, the Hon. Bernadette Bayne, JSC denied Burbacki's motion to set aside the damages verdict. Thereafter, Burbacki settled with the bankruptcy trustee and all her creditors for \$500,000, and as part of the settlement signed a general release for Gorelik.

To state a cause of action to recover damages for legal malpractice a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages. *Alaimo v Mongelli*, 93 AD3d 742 (2nd Dept. 2012) citing *Dempster v Liotti*, 86 AD3d 169 (2nd Dept. 2011). To prove causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have suffered any damages but for the attorney's negligence. *Delollis v Archer*, 128 AD3d 755 (2nd Dept. 2015). See *Kenedy v H. Bruce Fischer, Esq., PC*, 78 AD3d 1016, 1018 (2nd Dept. 2010). Mere speculation about a loss

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resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice. *Alaimo v Mongelli*, supra at 743.

Here, it is undisputed that at the time plaintiff switched counsel to the defendants she owed substantial amounts of money to several creditors including \$100,000 to her former counsel Wachs and accountant Kaplan. Furthermore, the defendants' could not obtain plaintiff's legal file from Wachs and Kaplan, since they asserted a retaining lien for their fees, hindering their ability to represent Burbacki. Plaintiff was also unable to compensate her new counsel for their litigation work going forward. By plaintiff's own admission in her pleadings, First National Bank of Jeffersonville had a large deficiency judgement against her. Furthermore, a unanimous jury returned a verdict against plaintiff and in favor of Gorelik in the amount of \$331,423.04, which Justice Bayne refused to set aside.

Besides filing for bankruptcy and settling the claims, as she did, plaintiff fails to articulate any theory as to how she would have compensated all her creditors or dealt with the situation she was in, when she admits she had no money to do so. The Court finds that Burbacki's blanket assertion that she would not have filed for bankruptcy had she known that her house "was not safe" or that she would not have settled with Wachs, Kaplan and Gorelik but would have prevailed against them in court is mere speculation. Finally, a settlement where an outstanding amount is lowered in exchange of a general release is a common and generally accepted practice in litigation. Accordingly, accepting as true the facts alleged in the complaint and according the plaintiff the benefit of every favorable inference the compliment, this Court rules that on its face, the complaint fails to

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allege facts from which it could be reasonably inferred that the plaintiff would not have suffered any damages but for the defendants' negligence.

The Court also agrees with the defendants that Burbacki's claims are the property of the bankruptcy estate and may not be maintained by the plaintiff in her individual capacity. Pursuant to 11 USC 241(a)(1), all the causes of actions that could have been brought on the date of filing a bankruptcy petition become property of the bankruptcy estate upon the filing of the petition. *In re Costello*, 255 BR 110, 113 (Bkrtcy, EDNY 2000). Pre-petition and filing malpractice claims fully accrue by the time the petition is filed and these claims become property of the estate. *In re Strada Design Associates, Inc.*, 326 BR 229 (Bkrtcy, SDNY 2005). Even if a cause of action accrues after the bankruptcy petition is filed, it still becomes property of the bankruptcy estate if there are "sufficient roots" in the debtor's pre-bankruptcy activities to warrant inclusion in their estate. *Rivera v Ndola Pharmacy Corp.*, 497 F.Supp.2d 381, 396 (EDNY 2007) citing *In re Strada Design Associates, Inc.*, 326 BR 229, 236 (Bkrtcy. S.D.N.Y.2005). See, *Segal v Rochelle*, 382 US 375 (1966).

Here, Plaintiff argues that her legal malpractice claim did not accrue before or during bankruptcy because the damage was when she was forced to enter into the settlements and signed general releases so as to not lose her home, which were not approved by the Court until 2015. This Court disagrees. Irrespective of when plaintiff's settlements were "approved by the Court," as the plaintiff claims, it is clear from the plaintiff's complaint that she entered into the settlements while her bankruptcy matter was ongoing. Plaintiff's complaint states that plaintiff settled with Wachs and Kaplan in accordance with the instructions of her bankruptcy attorney Musso. The sale of plaintiff's Florida condo by the

bankruptcy court occurred while her bankruptcy case was ongoing. Finally, plaintiff settled with the bankruptcy trustee and the other creditors, including Gorelik since she was "fearful that the [bankruptcy court] was going to order that her house be sold next," which is clearly before her bankruptcy case was closed.

Furthermore, pursuant to Section 541(a) of the Bankruptcy Code, plaintiff's Chapter 7 bankruptcy estate was created at the time her bankruptcy petition was filed. The transfer of plaintiff's interests in property, including her home, is sufficient injury to indicate that plaintiff had a cognizable interest in her legal malpractice claim at the moment her bankruptcy petition was filed. See *In re Alvarez*, 224 F3d 1273 (11th Cir. 2000). Since it is plaintiff's position in the action at bar, that she entered into settlements so as to avoid losing her home, it is clear that the settlements were "rooted" in the plaintiff's pre-bankruptcy concern of "keeping her house safe," to warrant the inclusion of her malpractice claims in the bankruptcy estate. Accordingly, Burbacki knew or should have known of the facts allegedly giving rise to her legal malpractice cause of action at the time she filed her bankruptcy petition. It is well settled that where the plaintiff knew or should have known about her legal malpractice claims during her bankruptcy proceeding, her failure to disclose them as an asset deprives the plaintiff of the legal capacity to sue subsequently. *Whelan v Longo*, 23 AD3d 459, 460 (2nd Dept. 2005), citing *Dynamics Corp. Of Am. v. Marine Midland Bank-NY*, 69 NY2d 191 (1987).

Accordingly, defendants' motion is granted and the case is dismissed.

This constitutes the Decision and Order of the Court.



J. S. C.

HON. DAVID B. VAUGHAN

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