Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Argued - April 12, 2019

WILLIAM F. MASTRO, J.P.
RUTH C. BALKIN
COLLEEN D. DUFFY
FRANCESCA E. CONNOLLY, JJ.

2016-10340 DECISION & ORDER

Kalaish Gobindram, appellant, v Ruskin Moscou Faltischek, P.C., et al., respondents.

(Index No. 67737/14)

Dell & Dean, PLLC (Mischel & Horn, P.C., New York, NY [Scott T. Horn], of counsel), for appellant.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City, NY (Marian C. Rice and Meredith D. Belkin of counsel), for respondents.

In an action, inter alia, to recover damages for legal malpractice, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Elizabeth H. Emerson, J.), dated September 14, 2016. The order, insofar as appealed from, granted that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss the first cause of action, alleging legal malpractice.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss so much of the first cause of action as sought to recover damages for the defendants' alleged legal malpractice in failing to file an amended petition in an underlying bankruptcy proceeding, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The defendants represented the plaintiff in connection with his filing of a voluntary bankruptcy petition in federal court in August 2011. Although the Statement of Financial Affairs (hereinafter SOFA) form appended to the petition called for the disclosure of recent payments to

creditors and insiders, the plaintiff failed to report such payments he made to creditors and to his wife from 2010 tax refunds he had received in May and June 2011. Rather, the SOFA indicated that no such payments were made. The plaintiff's signature on the SOFA was preceded by the following statement: "I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct." Shortly after the commencement of the proceeding, the bankruptcy trustee requested an accounting of the transfers that had disposed of the plaintiff's 2010 tax refunds, and the omissions in the SOFA then came to light. In November 2011, two of the plaintiff's major creditors commenced an adversary proceeding in the Bankruptcy Court, contending that the plaintiff should be denied a discharge in bankruptcy based on his misrepresentations in the SOFA relating to the disposition of the 2010 tax refunds. In his defense, the plaintiff argued that the defendants had prepared the bankruptcy submissions and he had relied on them to do so accurately.

At the ensuing trial in the adversary proceeding, the defendants admitted that they had been aware of the plaintiff's transfers of his 2010 tax refunds at the time they prepared the bankruptcy petition and had erroneously checked boxes marked "none" where the SOFA called for their disclosure. The plaintiff admitted that the defendants had provided him with a copy of the draft petition to review before they filed it and that he had represented to them that he had read it and that it was accurate, and that he had signed the verification line of the petition declaring that it was true and correct despite the fact that he had not actually read the petition in its entirety before signing.

The Bankruptcy Court denied the plaintiff a discharge in bankruptcy pursuant to section 727(a)(4)(A) of the Bankruptcy Code, which provides for such denial where the debtor "knowingly and fraudulently, in or in connection with the case made a false oath or account" (11 USC § 727[a][4][A]). The court found that the plaintiff had made a false statement under oath in response to the questions regarding transfers to creditors and to insiders, and that the false statement was made with fraudulent intent by reason of the plaintiff's reckless indifference to the truth. The court further observed that reckless indifference to the truth was established by the evidence that the defendants had provided a copy of the draft petition to the plaintiff to review before filing; that the plaintiff told them that he had reviewed it and it "look[ed] fine"; that the plaintiff falsely signed the SOFA stating, under penalty of perjury, that he had read it and that it was correct; and that the plaintiff admitted that had he reviewed the sections of the SOFA in question, he would have known that the stated answers were incorrect and would have advised the defendants of same. The court rejected the plaintiff's argument that he lacked the requisite intent because he had relied on the defendants to accurately prepare the petition, finding that he had a duty to independently review his documents before signing them, that the relevant questions were fact-based ones which he needed no legal advice to understand, and that the falsity of the answers would have been readily apparent to him if he had fulfilled his obligation to read the SOFA in its entirety.

The District Court affirmed the finding that the plaintiff exhibited a reckless indifference to the truth, thereby satisfying the fraudulent intent requirement of the statute, and the Bankruptcy Court's conclusion that the plaintiff's reliance on the defendants to accurately prepare the petition did not negate his duty to independently review the petition and correct any errors therein. The plaintiff sought no further review of the District Court's order.

The plaintiff subsequently commenced this action, inter alia, to recover damages for legal malpractice, alleging that the defendants negligently prepared the inaccurate bankruptcy petition and negligently failed to amend the petition once the errors were brought to their attention, thereby causing the denial of his discharge in bankruptcy and requiring him to retain new counsel and incur additional legal fees.

The defendants moved pursuant to CPLR 3211(a) to dismiss the complaint. The Supreme Court granted the defendant's motion, finding that the legal malpractice cause of action was barred by the doctrines of collateral estoppel and in pari delicto. The plaintiff appeals.

"The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers" (*Kirschner v KPMG LLP*, 15 NY3d 446, 464). "[T]he principle that a wrongdoer should not profit from his own misconduct is so strong in New York that . . . the defense applies even in difficult cases and should not be weakened by exceptions" (*id.* at 464 [internal quotation marks omitted]). "The defense requires intentional conduct on the part of the plaintiff" (*Sacher v Beacon Assoc. Mgt. Corp.*, 114 AD3d 655, 657; *see Kirschner v KPMG LLP*, 15 NY3d at 474).

Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same (*see Buechel v Bain*, 97 NY2d 295, 303; *Shifer v Shifer*, 165 AD3d 721, 723). There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling (*see Buechel v Bain*, 97 NY2d at 303-304; *Shifer v Shifer*, 165 AD3d at 723).

Here, the federal courts in the plaintiff's bankruptcy proceeding finally adjudicated a mixed issue of law and fact identical to that raised by the in pari delicto defense asserted by the defendants in the current legal malpractice action, i.e., the plaintiff's culpability in connection with the filing of the inaccurate bankruptcy petition. Those courts found that the plaintiff knowingly and intentionally made a false and fraudulent statement under oath by swearing that he had read the SOFA and that it was true and correct, and that the plaintiff's alleged reliance on the defendants to accurately prepare the bankruptcy submissions did not negate his fraudulent intent. These findings established that the plaintiff was in pari delicto with the defendants to the extent that he alleges they acted negligently in preparing and filing the inaccurate bankruptcy petition. Accordingly, we agree with the Supreme Court's determination granting that branch of the defendants' motion which was to dismiss so much of the legal malpractice cause of action as sought to recover damages for the defendants' preparation and filing of the inaccurate bankruptcy petition based on the doctrines of collateral estoppel and in pari delicto.

However, we disagree with the Supreme Court's determination granting that branch of the defendants' motion which was to dismiss so much of the legal malpractice cause of action as sought to recover damages for the defendants' failure to amend the bankruptcy petition. The findings of the federal courts regarding the knowing and fraudulent conduct on the plaintiff's part related solely to the initial filing; they made no determination that the plaintiff acted knowingly and

fraudulently in failing to file an amended petition. Accordingly, that part of the plaintiff's legal malpractice cause of action is not subject to dismissal on the grounds of collateral estoppel and in pari delicto.

As an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), the defendants contend that the legal malpractice cause of action should have been dismissed in its entirety pursuant to CPLR 3211(a)(7), since the parties' evidentiary submissions on the motion established that the plaintiff hired subsequent counsel who had ample opportunity to rectify their alleged error in this regard (*see e.g. Perks v Lauto & Garabedian*, 306 AD2d 261, 262). This contention lacks merit.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88; *see Nonnon v City of New York*, 9 NY3d 825, 827). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether [she or] he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275).

Here, the record reveals that the plaintiff did not retain the services of new counsel until December 2011. By that time, the bankruptcy trustee had already noted inconsistencies in the petition and requested an accounting relating to the omitted tax refund transfers, and the plaintiff's creditors had commenced the adversary proceeding. Giving the plaintiff the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d at 87-88), this time line suggests that the defendants, not the subsequent attorney, represented the plaintiff at the time when a voluntary amendment to the petition could have significantly reduced the prospect of a finding that the plaintiff made a false and fraudulent statement in the bankruptcy petition (*see In re Tully*, 818 F2d 106, 111 [1st Cir]; *Matter of Kilson*, 83 BR 198, 203 [D Conn]). Accordingly, at this preliminary stage of the litigation, the defendants have failed to conclusively demonstrate that the plaintiff's subsequent attorney had a sufficient opportunity to correct their alleged error in failing to amend the petition, such that they did not proximately cause any damages flowing from that error (*see generally Tooma v Grossbarth*, 121 AD3d 1093, 1096; *Grant v LaTrace*, 119 AD3d 646, 647).

We find unpersuasive the defendants' additional alternative contention that the legal malpractice cause of action was properly dismissed pursuant to CPLR 3211(a)(3) because that cause of action belongs to the bankruptcy estate and the plaintiff lacked standing to assert it. "On a defendant's motion to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing" (*BAC Home Loans Servicing, LP v Rychik*, 161 AD3d 924, 925; *see* CPLR 3211[a][3]; *MLB Sub I, LLC v Bains*, 148 AD3d 881, 881-882). "[T]he motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*U.S. Bank N.A. v Clement*, 163 AD3d 742, 743 [internal quotation marks omitted]; *see MLB Sub I, LLC v Bains*, 148 AD3d at 882).

Here, in response to the defendants' prima facie showing that the plaintiff's legal malpractice cause of action was the property of the bankruptcy estate (*see Wright v Meyers & Spencer, LLP*, 46 AD3d 805; *Williams v Stein*, 6 AD3d 197, 198; *In re Strada Design Assoc., Inc.*, 326 BR 229, 237-240 [SD NY]), the plaintiff raised a question of fact as to whether the bankruptcy trustee had abandoned the cause of action in accordance with Bankruptcy Code (11 USC) § 554(a) and had authorized the plaintiff to pursue it. Accordingly, dismissal of the legal malpractice cause of action for lack of standing is not available at this juncture.

Finally, the defendants' contention that the plaintiff failed to adequately allege damages resulting from their alleged legal malpractice is without merit.

MASTRO, J.P., BALKIN, DUFFY and CONNOLLY, JJ., concur.

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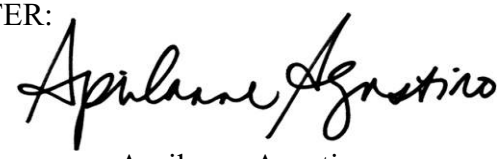

Aprilanne Agostino
Clerk of the Court