

Hill v Cavaliero

2008 NY Slip Op 31567(U)

June 5, 2008

Supreme Court, New York County

Docket Number: 0603898/2007

Judge: Milton A. Tingling

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MILTON A. TINGLING**

Justice

PART 44

Hill, David

- v -

Cavaliero, Harvey

INDEX NO.

603898/07

MOTION DATE

6/5/08

MOTION SEQ. NO.

001

MOTION CAL. NO.

7

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided as per

attached order.

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

Dated: _____

6/5/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

HON. MILTON A. TINGLING
-----X
J.S.C.

DAVID J. HILL,

Plaintiff,

-against-

Index No 603898/07

HARVEY CAVALYERO,

Defendant.

-----X
MILTON TINGLING, J.:

Plaintiff David J. Hill (Hill) commenced this action sounding in legal malpractice by service of a summons and complaint on or about November 27, 2007. Defendant Harvey Cavayero (Cavayero), sued herein as Harvey Cavalero, moves for an order, pursuant to CPLR 3211 (a) (3), dismissing the complaint on the ground that Hill lacks the requisite standing to bring this malpractice action because his claim arose upon the filing of his Chapter 7 bankruptcy petition, but was not listed on the bankruptcy schedule of assets.

It is undisputed that Hill retained Cavayero, an attorney admitted to practice law in the State of New York, to be his personal bankruptcy counsel. More specifically, Hill hired Cavayero to handle the discharge of his consumer debts, as defined in 11 USC § 101 (8), including sums Hill owed to the federal and New York state departments of taxation for the calendar years 2003 and 2004. Cavayero prepared a Chapter 7, voluntary petition for bankruptcy on plaintiff's behalf, which was dated April 5, 2007, and filed the petition in the U.S. Bankruptcy Court, Southern District of New York, on April 10, 2007 (see Notice of Motion, Exhibits B and C).

Apparently, in order to discharge Hill's tax liabilities, the Chapter 7 petition was required

to be filed on or after April 15, 2007. Due to the premature filing on April 10, 2007, the discharge did not cover his 2003 and 2004 federal and state tax liabilities. According to the complaint, as a result of Cavayero's filing error, Hill owes over \$1 million to the IRS, and over \$50,000 to New York State in taxes, interest, and penalties. Hill also claims to have sustained injuries to his employment.

The copy of Hill's bankruptcy petition, annexed to the notice of motion, confirms that Cavayero was the "attorney for debtor" who prepared the subject petition, together with the requisite forms, statements, certificates, and schedules containing Hill's financial and other related data. The accompanying copy of the Docket Sheet from the Electronic Case Filing System of the United States Bankruptcy Court of the Southern District of New York (Exhibit B) pertaining to Hill's petition, states, in relevant part: "**Date filed: 04/10/07 Date discharged: 07/17/2007 Dated terminated: 07/24/07 Date of last filing: 07/26/2007**" (emphasis in the original).

As stated in his complaint, and amplified in his affidavit in opposition, Hill contends that he hired Cavayero for the purpose of handling the discharge of his debts, including federal and state tax liabilities for the calendar years 2003 and 2004, that Cavayero represented him throughout the bankruptcy proceedings, and that it was not until after he received the subject discharge that he learned that neither his federal, nor state, tax liabilities for 2003 and 2004, were included in the discharge because the petition had been filed too early. Believing himself caught in a "Catch-22" dilemma, Hill avers that, because Cavayero did not disclose his filing error at any time during the bankruptcy proceedings, Hill was unaware of the existence of any potential legal malpractice claim and could not have listed any such claim on the schedule of assets filed in the

bankruptcy proceedings.

The crux of the parties' dispute is whether Hill can maintain this action sounding in legal malpractice in his individual capacity or whether it should have been listed as an asset of the bankruptcy estate. Defendant argues that, regardless of when Hill first realized that he had a cause of action for legal malpractice, that claim accrued upon the April 10, 2007-filing of the petition, and was an existing, albeit unlisted, asset of the bankruptcy estate, which consequently cannot now be pursued by Hill in his individual capacity (see Wright v Meyers & Spencer, LLP, 46 AD3d 805 [2nd Dept 2007]; In re Alvarez, 224 F3d 1273 [11th Cir 2000] cert denied 531 US 1146 [2001]).

Pursuant to the United States Bankruptcy Code, 11 USC § 541 (a) [1] and [7]:

[t]he commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

[1] . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

[7] Any interest in property that the estate acquires after the commencement of the case.

Accordingly, the trustee of the bankruptcy estate became vested, as of the date of the filing of the petition, with title to all of Hill's assets and interests, including causes of action for malpractice (11 USC § 541 (a) [1], [7]; Wright v Meyers & Spencer, LLP, 46 AD3d 805, supra; Luna v North Shore Univ. Hosp., 182 Misc 2d 803 [Sup Ct, Nassau County 1999]). Hill, for obvious reasons, neither listed this action as an asset, nor commenced action until after the bankruptcy had been terminated on July 24, 2007. Nevertheless, any claims pertaining to Cavayero's failure to timely file Hill's petition, and subsequent failure to list, or to advise Hill to list, the subject

[* 5]
action as an estate asset, accrued prior to the close of the proceedings.

Therefore, the matter will be stayed pending Hill's application to re-open his bankruptcy proceeding at the United States Bankruptcy Court of the Southern District of New York. If the bankruptcy proceeding is re-opened and it is determined that the subject claims are an asset of the estate, the estate trustee can elect to pursue the claims in a representative capacity. Should the trustee in bankruptcy, with the approval of the bankruptcy court, abandon this asset, title would revert in Hill as the bankrupt party (Scharmer v Carrollton Mfg. Co., 525 F2d 95, 98 [6th Cir 1975]; Bromley v Fleet Bank, 240 AD2d 611 [2nd Dept 1997]).

To the extent that Hill alleges facts consistent with a claim of misrepresentation or fraudulent concealment, which are not duplicative of his claim for legal malpractice, plaintiff (individually or in a representative capacity) will be granted an opportunity to replead the cause of action, with sufficient particularity, following the above-referenced stay.

Settle order by plaintiff in accordance with this decision.

Dated: 6/5/08

ENTER:



J.S.C.
HON. MILTON A. TINGLING
J.S.C.