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

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 108046/2006
FAVORS, LEE
vs.
PAUL ASSOCIATES, LLC
SEQUENCE NUMBER : # 002
DISMISS

INDEX NO. 108046-06
MOTION DATE
MOTION SEQ. NO. #002
MOTION CAL. NO.

read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by defendant for summary judgment of dismissal is granted in accordance with the attached memorandum decision.

FILED
OCT 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

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

Dated: 10/14/08

J.S.C.

Check one: ☑ FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

LEE FAVORS

Plaintiff,

-against-

PAUL ASSOCIATES, LLC

Defendant.

----------X

Index No. 108046/2006

Motion Seq. No. 002

LING-COHAN, J.:

In this personal injury action, defendant Paul Associates, LLC moves for summary judgment dismissing the complaint pursuant to CPLR 3212 and 11 U.S.C.A. § 541 (a) (1).

Plaintiff Lee Favors is a New York State resident. Defendant is a domestic corporation incorporated under the laws of the State of New York that owns, manages and maintains the building and grounds located at 26 Post Street, Yonkers, New York, 10705 (Premises).

The following facts are not in dispute. On July 23, 2005, plaintiff sustained injuries when he was struck by a portion of a collapsed ceiling in the bathroom of apartment 5C at the Premises. On September 9, 2005, plaintiff filed a bankruptcy petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, Southern District of New York. Defendant is listed as a creditor in Schedule F of the bankruptcy petition. On January 26, 2006, the Bankruptcy Court issued an order of discharge. The instant personal injury action was commenced on June 9, 2006. However, plaintiff failed to re-open his bankruptcy petition to include this action as an asset.

Defendant argues that it is entitled to summary judgment because: (1) pursuant to 11 U.S.C.A. § 541 (a) (1) of the Bankruptcy Code, plaintiff lacks the legal capacity to sue in this action because plaintiff commenced this action after his bankruptcy action was filed and

subsequently discharged; (2) plaintiff neglected to disclose his claim as an asset in the bankruptcy petition; and (3) plaintiff neglected to amend or re-open the bankruptcy petition to include this action.

Plaintiff contends that defendant is not entitled to summary judgment because: (1) defendant's attorney received notice of the pending claim on September 23, 2005 and subsequently failed to file a complaint objecting to plaintiff's discharge; (2) plaintiff provided notice of his claim to Albert Togut, the trustee in the bankruptcy proceeding on October 26, 2005; and (3) defendant is estopped from asserting this defense because it had every opportunity to object to plaintiff's discharge but failed to do so.

A party moving for summary judgment, pursuant to CPLR 3212, must demonstrate its entitlement thereto as a matter of law. To defeat summary judgment, the party opposing the motion must show that there is a material question of fact that requires a trial *(Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, defendant has demonstrated its entitlement to summary judgment, and plaintiff has failed to demonstrate that a material question of fact remains.

"It is well settled that the failure to schedule a legal claim as an asset in a bankruptcy proceeding deprives the debtor of standing to raise it in a subsequent legal action" (*Barranco v Cabrini Med. Ctr.*, 50 AD3d 281, 281–82 [1st Dept 2008]. Title 11 of the United States Code Service, also known as the Bankruptcy Code, defines the relationship among creditors, debtors and the estate. Section 541 of the Bankruptcy Code describes what is deemed property of the debtor under the statute as well as what is defined as property of the bankruptcy estate.

11 USCS § 541(a) provides in part:

> "(a) The commencement of a case under section 301, 302, or 303 of this title [*11 USCS § 301, 302, or 303*] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c) (2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. . . .
>
> (6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.
>
> (7) Any interest in property that the estate acquires after the commencement of the case."

It is clear by the above section that, after the filing of a voluntary bankruptcy petition, all property owned or subsequently acquired by a debtor, including a cause of action, becomes property of the bankruptcy estate. (*Hansen v Madani*, 263 AD2d 881, 882 [3d Dept 1999]). Any failure to list a legal claim as an asset in the bankruptcy proceeding causes the claim to remain property of the bankruptcy estate and the debtor can no longer pursue such a claim on his own behalf. (*Id.*)

Here, it is not disputed that plaintiff failed to disclose this personal injury action against defendant in the schedule of assets in his prior bankruptcy proceeding, and that plaintiff knew or should have known of the existence of this cause of action after he filed the bankruptcy petition and before plaintiff was discharged of all of his debts (*see Barranco*, 50 AD3d at 281; *Williams*, 6 AD3d at 197; *123 Cutting Co., Inc. v Topcove Assoc., Inc.*, 2 AD3d 606, 607 [2d Dept 2003]).

Thus, based upon the above, defendant has established its *prima facie* entitlement to judgment of dismissal as a matter of law.

The burden then shifts to plaintiff to raise a triable issue of fact to defeat summary judgment. In opposition, plaintiff argues that defendant had notice of his pending lawsuit following defendant's receipt of a September 23, 2005 letter from plaintiff's attorney Robert A. Hyams that describes Hyam's intent to represent plaintiff in this action (Robert A. Hyams Affirm., dated January 17, 2008; Exh. B). Plaintiff also purports that he orally disclosed this claim in a hearing before the court-appointed trustee on October 26, 2005 (Lee Favors Aff. at ¶¶ 6-7). He further purports that he filled out a questionnaire during the hearing at the request of the court-appointed trustee, but the document did not specifically request any information about any pending claims or accidents (*id.*).

Although plaintiff submitted a transcript from the hearing to demonstrate that defendant had notice of this claim (Hyams Affirm.; Exh. G), there was no record in the document of the above-referenced exchange. Furthermore, plaintiff failed to produce a copy of the questionnaire to support his allegations. Despite these facts, plaintiff maintains that he properly disclosed this claim, and defendant's failure to object to the discharge of his debts results in defendant's abandonment of this claim.

Courts have continually held that "actual knowledge by a trustee of a claim is not a substitute for proper scheduling" (*Rudin v Hosp. for Joint Diseases*, 34 AD3d 376 [1st Dept 2006]; *Burton v 215 East 77th Assoc.*, 284 AD2d 122 [1st Dept 2001]). Moreover, "[a] claim not properly scheduled cannot be abandoned by operation of law and cannot revest in the debtor" (*Donaldson, Lufkin & Jenrette Sec. Corp. v Mathiasen*, 207 AD2d 280, 282 [1st Dept 1994]).

Therefore, the alleged abandonment in this action was "neither intentional, purposeful nor the result of an 'intelligent decision'" (*id.*). It is uncontroverted that this cause of action arose prior to plaintiff filing his bankruptcy petition and six months before his debts were discharged. It is also undisputed that, to date, plaintiff has failed to amend or re-open his bankruptcy petition to include this action within the schedule of assets.

Consequently, the above facts, combined with plaintiff's conclusory allegations that he failed to disclose this personal injury claim against defendant in the schedule of assets of his bankruptcy petition because he only decided to commence this case after the bankruptcy petition was filed and his debts discharged, are insufficient to raise a triable issue of fact; such contention is unavailing since plaintiff was aware of the facts giving rise to the cause of action prior to the filing of the bankruptcy petition. (*See Hansen*, 263 AD2d at 883).

Additionally, since the underlying claim arose prior to plaintiff filing the bankruptcy petition and should have been included on the schedule of assets as part of his bankruptcy estate, the trustee of the estate is the only proper party who could commence this action. (*Williams*, 6 AD3d at 198; 123 *Cutting Co.*, 2 AD3d at 607; *Pinto v Ancona*, 262 AD2d 472, 473 [2d Dept 1999]). Hence, plaintiff lacks standing to institute the present action.

Accordingly, it is

ORDERED that defendant Paul Associates, LLC's motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that pursuant to CPLR 205, a six-month extension is granted so that plaintiff may seek to re-open the bankruptcy proceeding to amend the petition to include this cause of

action and, if the trustee of the bankruptcy estate so chooses, such trustee may commence a new action in a representative capacity on behalf of Lee Favors's bankruptcy estate within six (6) months of termination of this action; and it is further

ORDERED that within 30 days of entry of this decision/order, defendant shall serve a copy upon plaintiff, with notice of entry.

Dated: October 14, 2008

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Favors v Paul Assoc II.carpenteer.updated.wpd