

<b>Daughtry v Hollywood Entertainment Corp.</b>
2009 NY Slip Op 31452(U)
June 23, 2009
Supreme Court, Richmond County
Docket Number: 103581/06
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:103581/06  
Motion No.:003**

**VENUS DAUGHTRY**

*Plaintiff*

*against*

**HOLLYWOOD ENTERTAINMENT  
CORPORATION  
d/b/a HOLLYWOOD VIDEO SUPERSTORES,  
PLAZA REALTY SERVICES, INC., and  
EMPIRE REALTY ASSOCIATES, LLC,**

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

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*Defendants*

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The following items were considered in the review of this motion for leave to renew and reargue

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2, 3
Replying Affidavits	4
Exhibits	Attached to Papers

This motion to renew or reargue arises from a decision of this court dated April 2, 2009, which denied defendant Hollywood Entertainment Corp.'s ("Hollywood") motion to amend its answer to plead the affirmative defense of bankruptcy in order to dismiss the plaintiff's complaint and all counterclaims against Hollywood. Hollywood's motion to renew is denied; Hollywood's motion to reargue is granted.

**Facts**

This action seeks to recover damages for personal injuries allegedly sustained in a fall that took place on December 5, 2003 at 1447 Richmond Avenue, Staten Island, New York.

The plaintiff commenced this action against Hollywood on or about November 22, 2006 by filing a summons and complaint. Issue was joined by Hollywood's service of a Verified Answer on the plaintiff on or about August 17, 2007. Subsequent to its answer, on October 16, 2007, Hollywood filed for bankruptcy under Chapter 11 at the United States Bankruptcy Court for the Eastern District of Virginia ("the Bankruptcy Court"). On or about December 4, 2007 Hollywood, through its counsel, provided the plaintiffs and co-defendant with a Notice of Bankruptcy. Furthermore, the affidavit of Patrick J. Morrow avers that copies of the Notice of Bar dates for filing Proofs of Claims [Docket No. 1130] and Notice of Electronic Filing Procedure [Docket No. 1131] were served on or before January 2, 2008. On April 10, 2008, the Bankruptcy Court confirmed Hollywood's Joint Plan for Reorganization, which became effective on May 20, 2008. The plaintiff never filed a proof of claim with the Bankruptcy Court, nor has she moved the Bankruptcy Court to lift the discharge and permanent injunction imposed on May 20, 2008. Hollywood now moves to renew and reargue this court's decision and order dated April 2, 2009 that denied its application to amend its answer to plead the affirmative defense of bankruptcy, and to dismiss any claims or cross claims against it.

### **Discussion**

*CPLR* § 2221(f) provides in part, "A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made."

#### **Defendant's Motion to Reargue**

To reargue, the party must allege and explain matters of fact or law allegedly overlooked on misapprehended by the court in its prior decision, but shall not present any matters not offered

on the prior motion.<sup>1</sup> This court misapprehended the import of 11 U.S.C. § 1141(d)(1), which provides in part that:

Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(I) of this title, whether or not (I) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title; (ii) such claim is allowed under section 502 of this title; or (iii) the holder of such claim has accepted the plan; and (B) terminates all rights and interests of equity security holders and general partners provided for by the plan.<sup>2</sup>

In this case, the unequivocal language of the statute provides that the confirmation of the plan discharges the debtor from all debts that arose prior to the confirmation. The discharge of a debt pursuant to the bankruptcy laws and the subsequent injunction is within the exclusive jurisdiction of the United States Bankruptcy Court. This court lacks the jurisdiction to open a discharge and injunction of the Bankruptcy Court to permit the filing of claim by a plaintiff alleging a tort claim.

In *Green v. Welsh*, the United States Court of Appeals for the Second Circuit permitted a plaintiff with a tort claim to proceed against a discharged debtor for the limited purpose of recovering against the debtor's insurance policy;<sup>3</sup> however, it did not give the state courts the authority to modify the bankruptcy. The plaintiff in *Green* moved the Bankruptcy Court for a modification of the permanent injunction, which was denied. On appeal to the United States District Court, the Bankruptcy Court's decision was reversed. The Second Circuit, Court of Appeals affirmed the District Court's reversal, but the holding is limited to allowing bankruptcy

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<sup>1</sup> CPLR § 2221(d).

<sup>2</sup> 11 U.S.C. § 1141(d)(1).

<sup>3</sup> *Green v. Welsh*, 956 F.2d 30 [2d Cir 1992]; *see also, Lumbermens Mutual Co. v. Morse Shoe Co.*, 218 AD2d 624 [1st Dept 1995]

courts to open permanent injunctions pursuant to 11 *U.S.C.* § 524 for the purpose of recovering against a debtor's insurance company.

In this case, the plaintiff failed to take any affirmative steps in the Bankruptcy Court to amend its prior order granting a discharge and injunction. Therefore, the plaintiff's cause of action was discharged when the bankruptcy plan was confirmed.

### **Defendant's Motion to Renew**

In a motion to renew, the movant must introduce new facts not offered on the prior motion or demonstrate that there has been a change in the law that would change the court's prior determination. Although renewal generally should be based on newly discovered evidence, a court has discretion to grant the motion upon facts known to the movant at the time of the original motion where the movant offers a reasonable justification for the failure to submit the additional facts on the original motion.<sup>4</sup>

The basis for Hollywood's motion to renew rests on the introduction of Hollywood's insurance policy underwritten by Liberty Mutual. Paragraphs 1 and 2 of the Deductible Liability Insurance Policy provide:

It is agreed that:

1. The Company's obligation to pay damages or 'allocated loss adjustment expense' under any coverage afforded by this policy applies only to the amount of such damages and 'allocated loss adjustment expense' combined that exceeds a deductible amount specified in Item 1 of the Schedule below because of all coverages combined, as the result of any one occurrence. However, the amount of the deductible applicable to this policy for any single occurrence shall be reduced by the amount which the 'named insured' has reimbursed the Company for deductible amounts attributable to the same occurrence under any other policies specified in Item 2 of the Schedule below.

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<sup>4</sup> *Hasmath v. Cameb*, 5 AD3d 438 [2d Dept 2004].

2. The Company shall be liable to pay only an amount equal to the 'each occurrence' limit stated in the policy minus the applicable deductible amount of damages specified under the above Paragraph 1. For the purpose of this Paragraph 2, all amounts paid as, or in lieu of damages shall first be applied as the deductible amount in determining the sum of the damages within the deductible amount.<sup>5</sup>

Hollywood's counsel affirms that he did not learn that Hollywood maintained a liability insurance policy in effect until after the co-defendant, Plaza Realty Services, Inc. ("Plaza") raised it in its opposition. As Hollywood based its initial motion solely on its discharge in bankruptcy, it was not obliged to annex a copy of this newly acquired policy to its initial moving papers. Therefore, this court will grant Hollywood's motion to renew based on the presentation of this insurance policy.

### **Conclusion**

As this court's prior decision and order dated April 2, 2009 misinterpreted certain elements of the law and new evidence was presented to raise an affirmative defense, reargument and renewal is proper. Thus, the decision and order dated April 2, 2009 is set aside and vacated.

Accordingly, it is hereby:

ORDERED, that Hollywood Entertainment Corporation d/b/a/ Hollywood Video Superstores' motion to reargue is granted; it is further

ORDERED, that Hollywood Entertainment Corporation d/b/a/ Hollywood Video Superstores' motion to renew is granted; it is further

ORDERED, that upon reargument this court's decision and order dated April 2, 2009 is

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<sup>5</sup> Defendant's exhibit C.

vacated; it is further

ORDERED, that Hollywood Entertainment Corporation d/b/a Hollywood Video Superstores' motion to amend its answer to include the affirmative defense of a bankruptcy discharge is granted; it is further

ORDERED, that the complaint is dismissed against Hollywood Entertainment Corporation d/b/a Hollywood Video Superstores, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remaining parties shall return to DCM Part 3 on **July 20, 2009 at 9:30 A.M.** for a Compliance Conference.

ENTER,

DATED: June 23, 2009

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Joseph J. Maltese  
Justice of the Supreme Court