

<b>Huminski v Bhupathi</b>
2009 NY Slip Op 32097(U)
September 10, 2009
Supreme Court, New York County
Docket Number: 102068/07
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

**LA** PART 16

Index Number : 102068/2007

**HUMINSKI, RAYMOND**

VS.

**BHUPATHI, SRINIVASA C.,M.D.**

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

**FILED**  
SEP 15 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.

Dated: SEP 10 2009

*Alice Schlesinger*  
**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COUNTY OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 16

-----X  
RAYMOND HUMINSKI,

Index No. 102068/07  
Motion Seq. No. 002

Plaintiff,

-against-

SRINIVASA C. BHUPATHI, M.D., JAYARAM NADUBEETHI, M.D.  
AND SAINT VINCENT'S CATHOLIC MEDICAL CENTERS,

Defendants.

-----X  
SCHLESINGER, J.

**FILED**  
SEP 15 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff Raymond Huminski commenced this medical malpractice action on February 13, 2007, claiming that the defendants improperly treated his left femur fracture during the period from about December 28, 2004 through January 4, 2005. Answers were filed and discovery proceedings commenced. By this motion, made in February 2009, defendant Saint Vincent's Catholic Medical Center moves pursuant to CPLR §3212 to dismiss the action as against it on the ground that the claim has been discharged in bankruptcy. Plaintiff opposes, asserting that St. Vincent's has waived its right to assert such a claim based on its failure to plead the discharge in bankruptcy as an affirmative defense.

The time line for the relevant proceedings is as follows. Plaintiff's malpractice claim accrued when the treatment was completed in January 2005. St. Vincent's filed for Chapter 11 Bankruptcy in the southern District in July 2005. By Order dated January 25, 2006, U.S. Bankruptcy Judge Adlai S. Hardin ordered that, with certain exceptions not applicable here, any party wishing to assert a claim against St. Vincent's that arose prior to July 5, 2005 was obligated to file a written proof of claim by March 30, 2006, the "Bar Date." (See Exh. I to moving papers). The Order further stated that:

any holder of a claim against one or more of the Debtors who is required, but fails to file a proof of such claim in accordance

with this Order on or before the Bar Date shall be forever barred, estopped and enjoined from asserting such claim against the Debtors (or filing a Proof of Claim with respect thereto), and the Debtors and their property shall be forever discharged from any and all indebtedness or liability with respect to such claim ...

Judge Hardin further directed that notice of the Bar Date be mailed to all known creditors, and that supplemental notice should be published in various newspapers. The notices were published on various dated in March 2006 in various newspapers (Exh. K,L,M,N).

This action was commenced in February 2007. Plaintiff alleges that, at that time he was unaware of the bankruptcy filing, and it is undisputed that he never filed a Proof of Claim in the Bankruptcy Court. St. Vincent's alleges that it was unaware of plaintiff's claim until this lawsuit was filed and therefore did not send plaintiff direct notice of the bankruptcy proceedings when notice was given to creditors in March 2006.

Counsel for Dr. Bhupathi filed an answer dated March 20, 2007. (Exh. B). On July 27, 2007, Judge Hardin issued an order confirming St. Vincent's Chapter 11 plan of reorganization and liquidation. Counsel for St. Vincent's filed an answer in this action on or about September 24, 2007. (Exh. C.). Significantly, St. Vincent's did not assert the affirmative defense of discharge in bankruptcy pursuant to CPLR §3018. It appears that counsel for St. Vincent's also represents Dr. Jayaram and presumably filed an answer on his behalf as well, though none was attached to the moving papers. All parties then engaged in discovery until February 2009 when this motion was made.

St. Vincent's has established its right to the requested relief. Whereas known creditors are entitled to specific notice of the bankruptcy filing, notice by publication is sufficient for unknown creditors. *Curatola v Saint Vincent's Catholic Medical Center of New*

York, 2008 WL 1721471 (SDNY 2008). Here, although plaintiff's claim accrued before the bankruptcy proceeding was commenced, this action was not filed until nearly a year after the notice of the Bar Date was sent to creditors, and plaintiff has not pointed to any reason why Saint Vincent's should have been aware of his claim before this medical malpractice was commenced. Accordingly, pursuant to the terms of the discharge order, plaintiff's pre-petition claim was discharged in bankruptcy based on his failure to file a Proof of Claim.

Wholly unavailing is petitioner's claim that Saint Vincent's waived its right to rely on the bankruptcy discharge by failing to assert it as an affirmative defense in this action. Plaintiff has not and cannot establish any prejudice resulting from the hospital's failure to assert the affirmative defense. *Rogoff v San Juan Racing Association*, 54 NY2d 883 (1981). This action was commenced about a year after the Bar Date. While it is true that plaintiff could have sought leave in the Bankruptcy Court to file a late Proof of Claim if made aware of the bankruptcy before the discharge order was issued, Saint Vincent's has cited and provided to the Court countless decisions where the Bankruptcy Court denied such applications in favor of Saint Vincent's. The hospital has also provided a decision where the Bankruptcy Court denied a similar application, made after the issuance of the discharge order. In addition, Saint Vincent's has supplied a decision in which the Bankruptcy Court held that an order by a Kings County Justice allowing a medical malpractice action to proceed was void ab initio because the plaintiff had failed to file a Proof of Claim in the bankruptcy proceeding.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Saint Vincent's Catholic Medical Centers is granted and the complaint is hereby severed and dismissed


as against defendant Saint Vincent's Catholic Medical Centers, and the Clerk is directed to enter judgment in favor of said defendant without costs or disbursements; and it is further

ORDERED that the remainder of the action shall continue and the remaining parties shall appear in Room 222 on September 30, 2009 at 9:30 a.m. for a status conference to ascertain what discovery, if any, remains outstanding.

This constitutes the decision and order of this Court.

Dated: September 10, 2009

SEP 10 2009

  
\_\_\_\_\_  
J.S.C.  
ALICE SCHLESINGER

**FILED**  
SEP 15 2009  
COUNTY CLERK'S OFFICE  
NEW YORK