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SHORT FORM ORDER

INDEX NO. 035868/2007

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

TIFFANY SCIALLO

Plaintiff(s),

-against-

ROBERT TUROFF, M.D., and NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM SOUTHSIDE HOSPITAL

Defendant(s).

ORIG. RETURN DATE: February 1, 2008
FINAL RETURN DATE: March 26, 2008
MTN. SEQ. #: 001-CASEDISP
CROSS MTN SEQ. # 002-CASEDISP
CROSS MTN SEQ. # 003-WDN
CROSS MTN SEQ. # 004-MD

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Upon the following papers numbered 1 to 57 read on this motion and three cross motions: Notice of Motion (001) and supporting papers 1 - 11; Notice of Cross Motion (002) and supporting papers 12 - 19; Notice of Cross Motion (003) and supporting papers 20 - 28; First Affirmation in Opposition/Reply 29 - 43; Second Affirmation in Opposition/Reply and supporting papers 44 - 46; Reply Affirmation and supporting papers 47 - 50; Notice of Cross Motion (004) and supporting papers 51 - 57; it is

ORDERED that the motion (001) by the defendant Robert Turoff, M.D. for summary judgment dismissing the complaint as to him is granted; and it is further

ORDERED that the cross motion (002) by the defendant North Shore-Long Island Jewish Health System, Southside Hospital for leave to amend its answer to include certain affirmative defenses and for summary judgment dismissing the complaint as to it is granted; and it is further

ORDERED that the cross motion (003) by the plaintiff for an order directing the substitution of a trustee in bankruptcy for the named plaintiff or, in the alternative, if dismissal is granted, for said dismissal to be without prejudice to commencing a new action which relates back to the commencement of this action is deemed withdrawn; and it is further

ORDERED that the cross motion (004) by the plaintiff, which seeks the identical relief sought in her prior cross motion (003), is denied and the opposition submitted on said prior cross motion (003) shall be deemed to be submitted to this cross motion (004).

This is a medical malpractice action arising out of a medical procedure performed upon the plaintiff when she was pregnant which allegedly resulted in a miscarriage. The procedure took place in October of 2005. The plaintiff retained the services of counsel in this case that very month and simultaneously signed authorizations for the release of her medical records.

Subsequently, before this action was commenced, the plaintiff moved to Illinois and, about 19 months after the alleged medical malpractice, filed a petition for bankruptcy (Chapter 7) in July of 2007. Up to that time, no medical malpractice action had been commenced. In listing her assets in the context of the bankruptcy proceeding, the plaintiff did not list this cause of action for medical malpractice as a potential asset.

In November of 2007, the plaintiff was discharged from bankruptcy and the bankruptcy proceeding was closed. Within a few days of the bankruptcy proceeding being closed, the instant medical malpractice was commenced (on November 16, 2007). The commencement of this action was about two years and one month after the alleged act of medical malpractice and was within the 2 ½ year statute of limitations period for commencing such an action (*see* CPLR 214-a).

The defendants - Robert Turoff, M.D. (hereinafter Turoff) and North Shore-Long Island Jewish Health System, Southside Hospital (hereinafter NS-LIJ) - are now seeking summary judgment dismissing the complaint on the ground that the plaintiff does not have the legal capacity to bring this action and that, instead, it was the trustee in bankruptcy who had the sole standing to commence this action since the potential medical malpractice action was an asset required to be disclosed in the bankruptcy proceeding.

In NS-LIJ's cross motion (002) it is also asking for leave to amend its answer to include the affirmative defense of lack of capacity since such a ground for dismissal is deemed waived if not brought in a pre-answer motion pursuant to CPLR 3211(a)(3) or included in the answer as an affirmative defense (*see* CPLR 3211[e]).

The plaintiff also cross-moves by way of two cross motions (003 and 004). The relief requested in both of her cross motions is identical, to wit: leave to substitute the trustee in bankruptcy for the plaintiff (notwithstanding that the bankruptcy proceeding has been closed) and, in the alternative, if the court grants the dismissals that such be done expressly without prejudice to the plaintiff filing a subsequent action pursuant to CPLR 205 [1]. The main differences between these two cross motion is that the latter one (004) drops a reference to CPLR 1021 ("Substitution procedure; dismissal for failure to substitute") and the supporting personal affidavit from the plaintiff, which was not signed or sworn to in the earlier cross motion (003) is now re-dated, signed and notarized.

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[1] CPLR 205(a) provides for a timely commenced action to be recommenced after its dismissal, under certain circumstances, within six months after the original action is terminated notwithstanding the expiration of the applicable statute of limitations period.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

With regard to the motion (001) brought by the defendant Turoff, he has met his burden of making a prima facie showing of entitlement to summary judgment. Turoff's submissions clearly show that the plaintiff had an awareness of the potential for a medical malpractice action back in October of 2005 by her retaining an attorney to pursue such a case. Although no medical malpractice action was brought by the time the plaintiff commenced her bankruptcy proceeding (in which she was represented by different counsel), the potential existed for such an action and, as such, was required to be disclosed as a potential asset in the course of the bankruptcy proceeding.

The defendant Turoff argues that the failure to disclose the medical malpractice cause of action during the pendency of the bankruptcy proceeding deprived the plaintiff of her lawful capacity to bring such an action herself; it was and is only the trustee in bankruptcy who has the standing to commence such an action for the benefit of creditors' claims in the bankruptcy proceeding.

In opposition, the plaintiff contends that the omission was explainable and was the product of innocence rather than intent. According to the plaintiff, from the time she visited her attorneys in New York in October of 2005 until February of 2008 (which was about three months **after** this action was commenced), she had not heard from her New York attorneys and had "forgotten about the matter." And when she filed the bankruptcy petition in July of 2007, she had "**no knowledge** that a malpractice claim was still pending" (emphasis in original) at the firm and had "simply assumed that the case had been dropped by the . . . firm because they believed that the case had no merit."

This argument, as a matter of law, is without merit. Here, the plaintiff knew of the medical malpractice claim virtually from the time the underlying act was performed and certainly at the time the bankruptcy proceeding was subsequently commenced. Whether the failure to disclose the claim in the bankruptcy proceeding was innocent or not is immaterial (*see Dynamic Corp. of Am. v Marine Midland Bank-NY,* 69 NY2d 191, 197, 513 NYS2d 91 [1987]). Indeed,

> "If, at the time of the commencement of a bankruptcy proceeding, the debtor either knew or should have known that he or she had a claim against a party, and failed to disclose that claim as an asset, he or she lacks capacity to sue on that claim since the claim became part of the estate in bankruptcy upon the commencement of the bankruptcy proceeding and the proceeds of any recovery on the claim could have been used to satisfy creditors' claims against the debtor (*see Whelan v Longo,* 7 NY3d 821, 822, 855 NE2d, 1165, 822 NYS2d 751; *Dynamic Corp. of Am. v Marine Midland Bank-NY,*

69 NY2d 191, 196-197, 505 NE2d 601, 513 NYS2d 91; *Quiros v Polow,* 135 AD2d 697, 699-700, 522 NYS2d 596)"

(*R. Della Realty Corp. v Block 6222 Constr. Corp.,* 65 AD3d 1323, 887 NYS2d 157 [2d Dept 2009]).

In short, the plaintiff's failure, whether innocent or not, to include the medical malpractice claim as a potential asset in the bankruptcy proceeding deprived her of the capacity to bring this action in her personal capacity. Accordingly, summary judgment is granted to the defendant Turoff and the complaint is dismissed as to him.

Turning now to the cross motion (002) by the co-defendant NS-LIJ, permission is first sought of the court to amend its answer to include the affirmative defense of lack of capacity since the absence of such an affirmative defense would be fatal to a summary judgment motion based upon that ground (*see* CPLR 3211[e]).

In support of the request to amend (*see* CPLR 3025[b]), the defendant NS-LIJ states that it had no knowledge of the Illinois bankruptcy proceeding until it was served with the motion papers by the defendant Turoff. NS-LIJ then expeditiously cross-moved for this relief in its cross motion which also seeks summary judgment.

Leave to amend a pleading should be freely given as long as the amendment "is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*Santori v Met. Life,* 11 AD3d 597, 598, 748 NYS2d 117 [2d Dept 2004] [citations omitted] [allowing an amendment to assert the affirmative defense of lack of capacity to sue due to failure to disclose a claim in a bankruptcy proceeding]).

In support of this request to amend the pleadings, the defendant NS-LIJ explains that it cross-moved for this relief upon learning of the bankruptcy proceeding and that such an affirmative defense is clearly sufficient, has merit and there is no prejudice to the plaintiff. The plaintiff opposes this request to amend but presents no arguments in support of its opposition. Accordingly, permission is granted to the defendant NS-LIJ to amend its complaint to include the affirmative defense of lack of capacity and said amendment is effective forthwith.

Now, in consideration of that part of the cross motion (002) by NS-LIJ seeking summary judgment, this relief is granted for the same reasons as stated herein in the context of the defendant Turoff's motion (001) for summary judgment. Accordingly, summary judgment is granted to the defendant NS-LIJ and the complaint is dismissed as to it.

The remaining cross motions (003 and 004) submitted by the plaintiff seek identical relief, to wit: leave to substitute the trustee in bankruptcy for the plaintiff or, in the alternative, if dismissals are granted, to do so without prejudice to the plaintiff to file a subsequent action pursuant to CPLR 205. The defendants submitted affirmations in opposition to the plaintiff's first cross motion (003) before the plaintiff submitted her second cross motion (004). Since the relief sought in both of these cross motions is identical, the first cross motion (003) shall be deemed withdrawn and the submissions in opposition and

reply to the plaintiff's first cross motion shall be considered as opposition and reply to the plaintiff's second cross motion (004).

On the submissions before the court, the bankruptcy proceeding was closed in November of 2007 and there is no indication that the proceeding has been re-opened let alone that permission was given to add the medical malpractice claim to any re-opened proceeding or that the trustee has been authorized to prosecute such an action. Since there is, as yet, no authorized trustee in bankruptcy to be substituted for the plaintiff, the request by the plaintiff to make such a substitution is premature at best and, thus, is denied.

With regard to asking the court to indicate that the dismissals are without prejudice to the "plaintiff" bringing a subsequent action pursuant to CPLR 205, this too is denied. First of all, it has been established that the plaintiff does not have the legal capacity to bring such an action so it is inappropriate to ask the court, if it grants dismissal, to do so "without prejudice to the filing by the plaintiff of a subsequent action." As to a subsequent filing by a trustee in bankruptcy "pursuant to CPLR 205," such a statement is not necessary since the provisions of CPLR 205 stand on their own. Accordingly, this request is also denied.

This constitutes the decision and order of the court.

Dated: Feb 3, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.