

**Pascazi v Stern**

2010 NY Slip Op 30423(U)

February 22, 2010

Supreme Court, Orange County

Docket Number: 10892-2009

Judge: Lewis Jay Lubell

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PC March 2, 2010

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF ORANGE

-----X  
MICHAEL S. PASCAZI,

Plaintiff(s),

-against -

BRUCE M. STERN,

Defendant(s).

-----X  
LUBELL, J.

**DECISION/ORDER**

Index No. 10892-2009

Motion Date:12/18/09

Plaintiff, an attorney, commenced this action against defendant, another attorney, for malicious prosecution upon the September 29, 2009 filing of a summons and complaint.

Currently before the Court is defendant's motion for summary judgment (CPLR §3212) dismissing the complaint based upon the expiration of the one-year statute of limitations (CPLR §215[3]) applicable to intentional torts and the cross-motion of plaintiff for the imposition of frivolity sanctions against defendant in the amount of \$1,500.00 (see, 22 NYCRR 130-1.1[a]).

Among other things, defendant's motion presents the novel issue of whether one who is the subject of a criminal action which is ultimately dismissed possesses a "contingent claim" within the meaning of 11 USC §101(5) (A)<sup>1</sup> at the time of the initiation of the criminal action such that the one-year period of limitations for malicious prosecution is tolled pursuant to 11 USC §362(a). Although the Court answers the question in the negative, the action

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<sup>1</sup> 11 USC 101(5) (A): "The term 'claim' means-- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, **contingent**, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured [emphasis added];

is still deemed timely for the reasons herein stated.

To the extent relevant to defendant's motion to dismiss on statute of limitations grounds, the underlying complaint alleges the following: In furtherance of the settlement of an earlier action between the parties, the origin of which was a fiercely contested legal fee dispute, plaintiff proceeded to defendant's law office on February 5, 2008 to retrieve files in connection with which defendant had earlier placed a retaining lien which by then had been relinquished as part of the underlying settlement. Following plaintiff's retrieval of two of four marked boxes that had been set aside by defendant for plaintiff, plaintiff attempted to re-enter defendant's office to retrieve the remaining two boxes. Upon attempting to do so, however, defendant barred plaintiff's re-entry. Thereupon, words were exchanged, with defendant vowing to charge plaintiff with larceny.

Keeping to his word, on that same date, February 5, 2008, defendant swore out an accusatory instrument against plaintiff accusing plaintiff of Petit Larceny, a Class A Misdemeanor. In response to the issuance of an attendant warrant of arrest, plaintiff surrendered to the City of Newburgh Police Department on May 20, 2008. That same day, plaintiff was brought before a judge of the City Court of the City of Newburgh for arraignment. Upon application by plaintiff through counsel, the accusatory instrument was dismissed.

More pertinent to the arguments now advanced in connection with defendant's motion to dismiss is the fact that between the February 5, 2008 incident and the September 29, 2009 commencement of the action, defendant twice filed for bankruptcy. Defendant's first petition for bankruptcy, a Chapter 13 petition, was filed with the United States Bankruptcy Court for the Southern District of New York on March 20, 2008 (the "First Bankruptcy Proceeding"), some two months before the May 20, 2008 dismissal of the criminal action. The First Bankruptcy Proceeding terminated on November 20, 2008. Defendant's second petition for bankruptcy, this one under Chapter 7, was filed on March 12, 2009 (the "Second Bankruptcy Proceeding"), some eight and one-half months after the May 20, 2008 dismissal of the accusatory instrument. The Second Bankruptcy Proceeding terminated on June 18, 2009 with a discharge to debtor.

Plaintiff's claim for malicious prosecution accrued on May 20, 2008, the date on which the criminal proceeding terminated in plaintiff's favor upon the dismissal of the criminal action (see, Nunez v. City of New York, 307 A.D.2d 218 [1<sup>st</sup> Dept., 2003] citing Matter of Ragland v New York City Hous. Auth., 201 A.D.2d 7 [1<sup>st</sup> Dept., 1994]). Thus, absent an adequate tolling of the one-year period of limitations for intentional torts (see, CPLR §215[3]), plaintiff had to commence his action by May 20, 2009. It would not be until September 29, 2009, more than four months later, however,

that the summons and complaint would be filed with the County Clerk.

In response to defendant's motion, plaintiff argues that the one-year period of limitations was sufficiently tolled by virtue of defendant's two bankruptcy petitions. The Court disagrees.

At the outset, the Court rejects plaintiff's argument that on February 5, 2008 (the date on which defendant swore out the criminal accusatory instrument), he possessed a "contingent claim" against defendant within the meaning of 11 USC §101(5)(A), such that the one-year period of limitations was tolled as the result of the automatic stay provisions of 11 USC §362(a) from the date of the filing of the petition in the First Bankruptcy Proceeding, March 20, 2008, through and including November 20, 2008, the date on which the First Bankruptcy Proceeding terminated. Upon doing so, the Court concludes that plaintiff's malicious prosecution claim constitutes a post-First Bankruptcy claim against defendant and, as such, is not subject to discharge in connection with the First Bankruptcy Proceeding. Thus, neither a Federal stay<sup>2</sup>, 11 USC 362[A] entitled "Automatic stay" with applicability to pre-petition "claims") nor state statutory stay (see, CPLR §204[a]<sup>2</sup>) prohibited plaintiff from commencing an action for malicious prosecution which accrued on May 20, 2008. Therefore, plaintiff does not enjoy any tolling of the applicable period of limitations in connection with the First Bankruptcy Proceeding.

In contrast to the defendant's First Bankruptcy Proceeding, the second one, filed on March 12, 2009, follows the May 20, 2008 accrual of plaintiff's claim. As such, a different analysis applies. Here, whether by virtue of 11 USC 362(a) or CPLR §204(a), plaintiff enjoys a tolling of the period of limitations. The "duration of the stay" attributed to the Second Bankruptcy Proceeding is 100 days as measured from March 12, 2009, the date of its filing (which is after the May 20, 2008 accrual of the action or "claim") to June 18, 2009, the date of termination of the Second Bankruptcy Proceeding.

Upon adding this 100-day period to what would otherwise be a May 20, 2009 deadline for the commencement of the action, the period of limitations was set to expire on August 28, 2009. Therefore, absent the successful application of yet another section of the Bankruptcy Code, this action must be deemed untimely since it was not commenced until September 29, 2009, which is thirty-two days beyond August 28, 2009, the period of limitations as tolled.

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<sup>2</sup> CPLR §204(a): "Stay. Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced."

In this regard, the Court finds that there is merit to plaintiff's reliance on section 108(c) of the Bankruptcy Code (11 USC 108[c]). Section 108(c) provides, in relevant part:

... [I]f applicable nonbankruptcy law ... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor ... and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of-

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay ... with respect to such claim.

Since there is no dispute that defendant never provided plaintiff with notice of the termination or expiration of the Second Bankruptcy stay and since defendant has failed to persuade this Court that plaintiff, the person against whom defendant had unsuccessfully filed criminal charges, was not entitled to such notice, the Court concludes that the section 108(c)(2) thirty-day extension never began to run. Therefore, even though this action was commenced on September 29, 2009, more than four months after the one-year anniversary of the May 20, 2008 accrual of the action, it is timely.

Accordingly, defendant's motion to dismiss on statute of limitations grounds is denied.

Finally, plaintiff's cross-motion for frivolity sanctions against defendant is denied, in the Court's discretion.

Based upon the foregoing, it is hereby

ORDERED, that the motion and cross-motion are denied for the reasons herein stated; and, it is further

ORDERED, that the parties are directed to appear before the Court at 9:00 A.M. on March 2, 2010 for a Preliminary Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

The following papers were considered by the Court:

| <b>PAPERS</b>                   | <b>NUMBERED</b> |
|---------------------------------|-----------------|
| Motion/Affidavit/Exhibits       | 1               |
| Cross-Motion/Affidavit/Exhibits | 2               |
| Affidavit                       | 3               |
| Sur-Reply Affidavit             | 4               |

Dated: Goshen, New York  
February 22, 2010

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**HON. LEWIS J. LUBELL, J.S.C.**

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