SHORT FORM ORDER

SUPREME COURTS - NEW YORK STATE - NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

----------X

STEVEN L. SOLOVAY,

Plaintiff,

-against-

ALURE HOME IMPROVEMENTS, INC.,

Defendant.

----------X

INDEX NO. 2552/11
XXX
MOTION DATE: 05/12/11
SEQUENCE NO. 001

Notice of Motion, Affs. & Exs.	**1**
Memorandum of Law	**2**
Supplemental Affirmation and Amended Notice	**3**
Affirmation of Kenneth P. Silverman	**4**
Affirmation in Opposition, Affs. & Exs.	**5**
Memorandum of Law	**6**
Reply Memorandum of Law	**7**

Upon the foregoing papers, defendant's motion for an order dismissing plaintiff's complaint is granted, pursuant to CPLR §3211(a)(3) and (a)(5).

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action brought by the plaintiff to recover declaratory and monetary relief based upon the defendant's alleged violations of New York State Human Rights Law and New York Exec. Law §296, and to recover unpaid minimum wages and overtime wages, commissions earned, and retaliatory discharge pursuant to New York State Labor Law §§190 and 215.

Defendant moves to dismiss plaintiff's complaint on the grounds that (1) the plaintiff lacks standing to pursue the instant action, and (2) the doctrine of judicial estoppel bars his claim. In 2010, the plaintiff filed for bankruptcy. On February 8, 2010, during his bankruptcy proceedings, plaintiff testified at a creditor's meeting (at which he was represented by counsel) that he had not filed any claims and did not intend to bring any claims. Plaintiff responded in the negative when asked by the court at the creditor's meeting, "are you suing or thinking about

suing anybody?" One week *prior* to testifying to same, however, on February 1, 2010, plaintiff's counsel sent a demand letter to defendant, Alure Home Improvements, Inc. (hereinafter "Alure"), advising defendant that plaintiff intended to file a lawsuit against it. In addition, while the bankruptcy action was pending and before plaintiff's debts were discharged, on April 7, 2010, plaintiff filed a formal demand for arbitration with the National Arbitration Forum, alleging that Alure violated the New York Human Rights Law and New York Labor Law. Said arbitration claim was pending until February 10, 2011, when the parties agreed to the dismissal of same because the plaintiff wished to pursue his claims against Alure before the Supreme Court. Plaintiff's claim against Alure was never disclosed to the bankruptcy court, which discharged plaintiff's debts on April 12, 2010, without knowledge about the undisclosed claim against Alure.

Defendant argues that plaintiff's action should be dismissed as the plaintiff does not have standing to bring the within action. Defendant contends that in the context of bankruptcy proceedings, the bankruptcy trustee, as the representative of the bankruptcy estate, is the real party in interest and is the only party with the standing to pursue the within cause of action. In addition, the defendant argues that because the plaintiff did not disclose this lawsuit or the earlier arbitration of the same claims, he is barred from pursuing the claims herein under the doctrine of judicial estoppel which prevents a party from prosecuting claims not disclosed in a bankruptcy proceeding which resulted in the party's discharge.

Plaintiff concedes that he did not disclose the within claims during his bankruptcy proceedings due to his confusion and not due to an intent to conceal the potential asset that may result from the successful adjudication of this action. Plaintiff also attests that he understands that "this potential asset belongs to the bankruptcy estate" and also that the Trustee appointed to oversee his bankruptcy estate, Kennety P. Silverman, Esq. "is the proper party Plaintiff who has standing to prosecute this action." Plaintiff opposes the dismissal motion, however, requesting a stay of the action for thirty days to allow the bankruptcy trustee to be substituted into the action and also argues that the doctrine of judicial estoppel does not apply to the plaintiff here, as plaintiff's failure to disclose was not a result of bad faith.

Bankruptcy Trustee, Kenneth P. Silverman, Esq. has submitted an affirmation attesting that the plaintiff failed to disclose his potential claim against Alure and that on February 10, 2010, Mr. Silverman filed a Report of No Distribution "as there appeared to be no assets in Solovay's bankruptcy case that could be realized for the benefit of his creditors." Mr. Silverman attest that on April 12, 2010, "the Bankruptcy Court issued the Discharge and Final Decree, closing Solovay's bankruptcy case." Mr. Silverman also attests that he was contacted by

plaintiff's counsel to the instant matter on April 7, 2011 regarding the pendency of the instant matter. The Court notes that said contact was made only after the defendant filed the instant motion to dismiss. Mr. Silverman attests that "notwithstanding that Solovay's bankruptcy case is closed...the Action is property of Solovay's bankruptcy estate pursuant to 11 U.S.C. §541." He further attests that based upon his review of the pleadings, he intends to make an application to the Bankruptcy Court to reopen plaintiff's Chapter 7 bankruptcy case for the purpose of pursuing this action and investigating why Solovay failed to disclose the potential claim against Alure as an asset. Mr. Silverman attests after reopening plaintiff's bankruptcy case, he will request the appointment of special counsel and then request that counsel move to have him substituted for Solovay as the proper party plaintiff in the action against Alure.

As the plaintiff concedes that he failed to disclose his known claims against Alure during the pendency of his bankruptcy action, and as those claims accrued prior to the closing of plaintiff's bankruptcy action, plaintiff Steven L. Solovay lacks the capacity to sue. *(Whelan v. Longo*, 23 A.D.3d 459, 808 N.Y.S.2d 95 (2d Dept. 2005)(the failure of a plaintiff to disclose a cause of action as an asset in a prior bankruptcy proceeding, the existence of which the plaintiff knew or should have known existed at the time, deprived the plaintiff of the legal capacity to sue subsequently on that cause of action); *Dynamics Corp. of America v. Marine Midland Bank-New York*, 69 N.Y.2d 191, 505 N.E.2d 601 (1987); *Goldman v. Rio*, 20 Misc.3d 1131(A), 872 N.Y.S.2d 690 (Sup. Ct. Nassau Cty. 2008)). When an estate is in bankruptcy under Chapter 7, the trustee is the representative of the estate and retains the sole authority to sue and be sued on its behalf. (*Moses v. Howard Univ. Hosp.*, 606 F.3d 789 (D.C. Cir. 2010)(the commencement of Chapter 7 bankruptcy extinguishes a debtor's legal rights and interests in any pending litigation or pre-petition cause of action, and transfers those rights to the trustee, acting on behalf of the bankruptcy estate, who is the only party with standing)). Accordingly, plaintiff is precluded from bringing the within action, and the action is hereby dismissed. (*Pinto v. Ancona*, 262 A.D.2d 472, 692 N.Y.S.2d 128 (2d Dept. 1999); *Weitz v. Lewin*, 251 A.D.2d 402, 675 N.Y.S.2d 544 (2d Dept. 1998)(court properly dismissed plaintiff's complaint on the ground that the plaintiffs lacked standing to sue because plaintiffs failed to properly list the present claims, which they knew or should have known about, on their bankruptcy petition); *Reynolds v. Blue Cross of Northeastern New York, Inc.*, 201 A.D.2d 619, 620 N.Y.S.2d 164 (3d Dept. 1994)(holding that the failure to disclose a pending cause of action in the schedule of assets in a bankruptcy proceeding leaves plaintiff without capacity to sue and requires dismissal of the complaint); *See also, Dissolution of C & M Plastics, Inc.*, 168 A.D.2d 160, 571 N.Y.S.2d 343 (3d Dept. 1991); *Sotille v. Mullin*, 30 Misc.3d 812, 917 N.Y.S.2d 812 (Sup. Ct. Nassau Cty. 2011).

Further, while the bankruptcy trustee has capacity to sue in his or her own name, substitution is not available to cure the deficiency, as a party with no capacity to sue cannot be replaced with or substituted for one who has capacity in these circumstances. (*Reynolds v. Blue Cross of Northeastern New York, Inc.*, 201 A.D.2d 619, 620 N.Y.S.2d 164 (3d Dept. 1994); *See also*, *Sotille v. Mullin*, 30 Misc.3d 812, 917 N.Y.S.2d 812 (Sup. Ct. Nassau Cty. 2011)(since the commencement of the action in plaintiff's individual capacity was improper, the action does not survive, and the estate may not be substituted *nunc pro tunc*). Instead, the trustee may commence a new action in a representative capacity if he deems same to be appropriate. (*Pinto v. Ancona*, 262 A.D.2d 472, 692 N.Y.S.2d 128 (2d Dept. 1999)).

In addition, the plaintiff is judicially estopped from pursuing the within action. The doctrine of judicial estoppel will be applied when a party has secured a judgment in his or her favor by adopting the prior position, and then has sought to assume a contrary position simply because his or her interests have changed. (*Ferreira v. Wyckoff*, 81 A.D.3d 587, 915 N.Y.S.2d 631 (2d Dept. 2011); *McCaffrey v. Schaefer*, 251 A.D.2d 300, 673 N.Y.S.2d 717 (2d Dept. 1998)). In the bankruptcy context, judicial estoppel prevents a party from prosecuting claims not disclosed in a bankruptcy proceeding that resulted in a party's discharge. (*Popadyn v. Clark Constr. & Property Maint. Srvs., Inc.*, 49 A.D.3d 1335, 854 N.Y.S.2d 626 (4th Dept. 2008); *Goldman v. Rio*, 20 Misc.3d 1131(A), 872 N.Y.S.2d 690 (Sup. Ct. Nassau Cty. 2008); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789 (D.C. Cir. 2010); *Jethro v. Omnova Solutions, Inc.*, 412 F.3d 598 (5th Circ. 2005); *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Circ. 2006); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002)). Plaintiff's argument that his failure to disclose the existence of his claims against Alure during his bankruptcy proceedings was innocent and not done in bad faith is immaterial. (*Dynamics Corp. of America v. Marine Midland Bank-New York*, 69 N.Y.2d 191, 505 N.E.2d 601 (1987); *See also, Sotille v. Mullin*, 30 Misc.3d 812, 917 N.Y.S.2d 812 (Sup. Ct. Nassau Cty. 2011); *Ortega v. Mallilo & Grossman, LLP*, 2011 NY Slip Op 30069U (Sup. Ct. N.Y. Cty. 2011); *See also, Whelan v. Longo*, 23 A.D.3d 459, 808 N.Y.S.2d 95 (2d Dept. 2005); *Becker v. Verizon North, Inc.*, 2007 U.S. App. Lexis 9879 (7th Cir. 2007)(holding that a debtor's subjective intent in failing to disclose an asset during a bankruptcy proceeding does not matter)).

Accordingly, defendant's motion is granted and plaintiff's complaint is dismissed.

Dated: June 24, 2011

Anthony L. Parga, J.S.C.

Cc: Jackson Lewis, LLP
58 South Service Road, Suite 410
Melville, NY 11747

Frank & Associates, LLP
500 Bi-County Blvd., 112N
Farmingdale, NY 11735

Kenneth P. Silverman, Esq.
Silverman Acampora, LLP
100 Jericho Quadrangle, Suite 300
Jericho, NY 11753