Eastland v HWP Dev. LLP

2013 NY Slip Op 31433(U)

June 13, 2013

Supreme Court, New York County

Docket Number: 150421/2011

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN J.S.C. Justice PART 63

Elizabeth Eastland

-v-

HWP Development LLP et al

INDEX NO. 150421/11
MOTION DATE 2/13/13
MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1
Answering Affidavits — Exhibits No(s). 2
Replying Affidavits No(s). 3

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

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

Dated: 6/13/13

[signature], J.S.C.
ELLEN M. COIN J.S.C.

1. CHECK ONE: ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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ELIZABETH EASTLAND,

Plaintiff,

-against-

HWP DEVELOPMENT LLP,
SIX FLAGS ENTERTAINMENT CORP.,
and SIX FLAGS OPERATIONS, INC.,

Defendants.

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Index No.: 150421/2011
Motion Sequence No. 002
DECISION AND ORDER

HON. ELLEN M. COIN, J.:

In this action, plaintiff Elizabeth Eastland alleges that she was injured when she was a visitor at a water recreation park owned, maintained and/or designed by defendants HWP Development LLC (HWP, incorrectly named by plaintiff as HWP Development LLP), Six Flags Entertainment Corp. and Six Flags Operations, Inc. By the instant motion (sequence number 002), defendants (1) seek leave of the court to amend their answer to plaintiff's amended complaint to assert the affirmative defenses of lack of capacity to sue and judicial estoppel, based on plaintiff's failure to list in her bankruptcy petition papers the instant personal injury claim, which she allegedly sustained prior to her bankruptcy filing; (2) request that in the event leave is granted, that their proposed amended answer be deemed filed and served; and (3) upon granting the foregoing relief, seek dismissal of plaintiff's amended complaint.

For the reasons stated herein, the relief sought in the defendants' motion is granted to the extent set forth herein.

Background

Plaintiff, a Virginia resident, alleges that she was injured on June 28, 2009 while she was a visitor at the water recreation park located near Lake George, New York. The instant action was commenced in this court on October 18, 2011. After learning that HWP owned the property where plaintiff's injury occurred, she filed an amended complaint adding HWP as a defendant. Issue was joined when defendants filed their answer to the amended complaint on January 13, 2012. By motion dated February 6, 2012, defendants moved to dismiss the action pursuant to CPLR §3211(a)(7). That motion was denied by an order of this court dated March 27, 2012. On April 25, 2012, pursuant to the preliminary conference order issued by this court, plaintiff was required to serve a bill of particulars and respond to discovery demands on or before May 23, 2012.

During discovery, defendants learned that plaintiff had filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code. The bankruptcy petition was filed on June 25, 2010, and plaintiff received a bankruptcy discharge on September 22, 2010. It is undisputed that plaintiff failed to list in her bankruptcy petition schedules this personal injury

claim as an asset of her bankruptcy estate. The documentary evidence also shows that in or about November 2009, approximately seven months before her bankruptcy filing, plaintiff retained an attorney to assess her personal injury claim.

Discussion

Defendants assert that it was only after filing their answer that they discovered that plaintiff had failed to list the personal injury claim in her bankruptcy schedules. Thus, they contend that they should be permitted to amend their answer, pursuant to CPLR 3025(b), to assert the affirmative defenses of lack of capacity to sue and judicial estoppel, because the discovery of the foregoing fact is a subsequent occurrence.

Under CPLR 3025(b), a party may amend its pleading by setting forth additional or subsequent transaction or occurrence with leave of the court. It is well settled that leave to amend an answer to assert an affirmative defense should be granted if the proposed amendment is not palpably insufficient or patently devoid of merit, and there is no prejudice or surprise to the opposing party. *(McCaskey, Davies & Assoc. v New York City Health & Hosp. Corp.*, 59 NY2d 755, 757 [1983]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Also, the courts have held that leave to amend an answer to assert the affirmative defense of lack of capacity to sue based on a plaintiff's failure to list a claim or ongoing lawsuit in a

bankruptcy petition should be granted. (*See Rivera v Markowitz*, 71 AD3d 449, 450 [1st Dept 2010]; *Hudak v New York Presbyterian Hosp.*, 2011 NY Slip Op 32366[U] [Sup Ct, NY County 2011]).

In this case, defendants' proposed amendment to add the new affirmative defense is neither palpably insufficient nor devoid of merit, and plaintiff does not dispute that the basis for the amendment was unknown to defendants at the time they served their original answer. Accordingly, that branch of defendants' motion seeking leave to amend their answer is granted, and the proposed amended answer annexed to their papers is deemed filed and served.

Notwithstanding the foregoing, in her opposition papers, plaintiff argues that under Virginia state law, the instant personal injury claim is exempt from creditor process, and thus such claim is not an asset that must be disclosed or listed in her bankruptcy schedules. Specifically, plaintiff points to a Virginia statute which provides, in relevant part, that "all causes of action for personal injury or wrongful death and the proceeds ... shall be exempt from creditor process against the injured person." Virginia Code §34-28.1. Plaintiff's argument must be analyzed in several steps, because it involves the examination of relevant state laws and the federal Bankruptcy Code.

As an initial matter, under the Bankruptcy Code, upon the

filing of a bankruptcy petition, a bankruptcy estate is created by operation of law and a trustee is appointed to administer it. (11 USC § 541). With limited exceptions that are inapplicable to the facts of this case, the estate is comprised of all legal and equitable interests in property that the debtor has before the petition is filed. *Id.* Therefore, when plaintiff filed for Chapter 7 bankruptcy relief on June 25, 2010, her personal injury claim that arose on June 28, 2009 became an asset of her estate pursuant to section 541 of the Bankruptcy Code, and such claim could only be asserted by the trustee in bankruptcy. Indeed, New York courts have held that when a debtor failed to disclose a cause of action as an asset of the bankruptcy estate in the petition schedules, such failure deprived the debtor of the legal capacity to later sue on that cause of action. *(See Whelan v Longo*, 23 AD3d 459, 460 [2d Dept 2005], *affd* 7 NY3d 821 [2006]).

However, there are two methods pursuant to which the assets of a bankruptcy estate may be restored to a debtor after the bankruptcy petition is filed. The first method involves the trustee's abandonment of the assets, pursuant to section 554 of the Bankruptcy Code, if such assets are burdensome to the estate or of inconsequential value. (11 USC § 554(a)). Here, the facts do not indicate that any abandonment has occurred and plaintiff does not assert otherwise.

The second method permits the debtor to claim that certain assets are exempt from the estate, pursuant to section 522 of the

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Bankruptcy Code, if the debtor's state of domicile has "opted out" of the federal exemption statutes. (11 USC § 522(b)). As noted above, the State of Virginia has "opted out" of the federal exemption scheme, as evidenced by Virginia Code §34-28.1.

Importantly, under Virginia law, in order to claim exemption under state law, "the debtor must list the cause of action as an asset in his schedule B and then claim it as exempt property on his schedule C using forms prescribed by the bankruptcy rules." (*Kocher v Campbell*, 282 Va 113, 117-18, *cert denied* ___ US ___, 132 S Ct 847 [2011]). "If the debtor fails to follow this procedure, the cause of action, having become a part of the bankruptcy estate by virtue of 11 U.S.C. §541, remains so, and is enforceable solely by the trustee." (*Id.* [citation omitted]).

In this case, it is undisputed that plaintiff failed to follow the proper procedure, which is listing the personal injury claim as an asset and then declaring it as exempt, in accordance with the bankruptcy rules and in the proper bankruptcy schedules. Thus, even though the personal injury claim may be treated as an exempt asset, plaintiff's failure to list it in her bankruptcy schedules deprived her of the requisite standing to prosecute such claim. Indeed, Virginia's Supreme Court has held that in such a scenario the claim is enforceable solely by the trustee. Plaintiff's contention that her personal injury action filed in New York should not be dismissed because her bankruptcy petition was filed in Virginia and was governed by Virginia law

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(Plaintiff's Opposition Brief at 4) is erroneous. Indeed, based on the undisputed facts of this case, plaintiff's action can be dismissed under the laws of both Virginia and New York. (*See Mathus v Bouton's Bus. Machs. Inc.*, 78 AD3d 476, 476 [1st Dept 2011] [plaintiff's failure to include claim in bankruptcy petition deprived him of the legal capacity to sue]). Accordingly, that branch of defendants' motion seeking dismissal of the amended complaint, based on the lack of standing to sue, is granted.

Notably, after the instant motion was filed, plaintiff moved in the bankruptcy court where her chapter 7 case was previously filed for an order to reopen the bankruptcy case. By order dated July 5, 2012, the bankruptcy court reopened her bankruptcy case for the purpose of allowing plaintiff to amend her schedules; the court also reappointed the former trustee. (*See* Defendants' Reply Brief, Exhibit A [attaching Order On Motion To Reopen and amended bankruptcy schedules B and C dated July 30, 2012]). In fact, the docket maintained in her reopened bankruptcy case reflected that a notice to creditors of the need to file proofs of claim, due to the potential recovery of assets, was entered on August 22, 2012.

Defendants now argue that plaintiff's amended complaint should be dismissed with prejudice because apart from the fact that plaintiff lacks capacity to sue, the doctrine of judicial estoppel requires that the instant action be dismissed on the

merits and with prejudice. (Defendants' Reply Brief at 5-6). Specifically, defendants argue that plaintiff's excuse that her failure to list this claim in her prior bankruptcy schedule was "inadvertent" is immaterial, because the doctrine applies to prevent plaintiff from taking inconsistent positions in her bankruptcy proceedings and in bringing this action. (*Id.*).

The argument is unpersuasive. "[T]he doctrine of judicial estoppel bars a party who took a certain position in a prior legal proceeding, and who secured a favorable judgment from assuming a contrary position in another action simply by reasons of a change in interests." (*Stop & Shop Supermarket Co. v Vornado Realty Trust*, 35 AD3d 241, 243 [1st Dept 2006]). A defense of judicial estoppel does not trigger dismissal with prejudice here because plaintiff has reopened the bankruptcy proceeding, listed this action in the schedule of assets, and a bankruptcy trustee is currently available to take any action the trustee deems appropriate to prosecute plaintiff's personal injury claim and to distribute its proceeds or permit an exemption thereof. Thus, defendants cannot establish the "prior success" element.

In *Rivera, supra*, the First Department modified, on the law, the trial court's order that dismissed the plaintiff's complaint with prejudice, "to the extent of dismissing the complaint without prejudice so that it may be commenced by the trustee pursuant to CPLR §205(a)." (71 AD3d at 450 [citations omitted]). The appellate court also noted that because

plaintiff's failure to list the claim as an asset in the bankruptcy petition deprived him of the capacity to sue, the trustee could not simply be substituted for plaintiff in light of such defect. (*Id.*). In other words, the trustee was required to commence a new action against the defendant within the time frame provided for in CPLR §205(a). (*Accord Hudak,* 2011 NY Slip Op 32366 at *__ ["the trustee must commence a new action in a representative capacity on behalf of [plaintiff's] bankruptcy estate, and in doing so, [the trustee] will receive the benefit of the 6-month extension embodied in CPLR 205"][internal citations omitted, parentheses in original]).

Accordingly, based on all of the foregoing, it is hereby

ORDERED that the branch of defendants' motion for leave to amend their answer is granted and that their proposed amended answer is deemed filed and served; and it is further

ORDERED that the branch of defendants' motion seeking dismissal of plaintiff's amended complaint is granted, without prejudice to plaintiff's bankruptcy trustee's commencement of a new action in a representative capacity pursuant to CPLR §205 (a); and it is further

ORDERED that the Clerk of Court shall enter judgment accordingly.

Dated: June 13, 2013

ENTER:

Ellen M. Coin, A.J.S.C.