

**Levin v Adler**

2015 NY Slip Op 31988(U)

October 9, 2015

Supreme Court, New York County

Docket Number: 805303/2013

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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STEPHEN LEVIN and LOURDES JIMENEZ-  
LEVIN,

Plaintiffs,

-against-

Index No. 805303/2013

**Decision, Order, and  
Judgment**

DANIEL ADLER, SAMMY CHITAYAT, STEVEN  
BRANDEIS, LORI GOFFNER, KAREN WAGNER,  
MARC LIEBESKIND, COLON AND RECTAL  
SURGERY OF MANHATTAN, P.C., LENOX HILL  
RADIOLOGY AND MEDICAL IMAGING  
ASSOCIATES, P.C., PARK AVENUE  
RADIOLOGISTS, P.C., and NEW YORK  
UNIVERSITY MEDICAL CENTER,

Defendants.

-----X  
**JOAN B. LOBIS, J.S.C.:**

This medical malpractice action arises from defendants' alleged failure to properly diagnose and treat plaintiff Stephen Levin's (plaintiff) acute diverticulitis. Defendants Dr. Steven Brandeis (Dr. Brandeis) and Colon and Rectal Surgery of Manhattan P.C. (CRS), defendants Lenox Hill Radiology and Medical Imaging Associates, P.C. (LHR), and defendants Dr. Daniel Adler (Dr. Adler) and Sammy Chitayat, move separately for leave to amend their answers to include lack of capacity to sue, lack of standing to bring suit, and judicial estoppel as affirmative defenses, and for an order dismissing the complaint or alternatively granting summary judgment. Defendants also move for an order deeming their amended verified answers to be served nunc pro

tunc<sup>1</sup>. Plaintiffs oppose each motion. The motions are consolidated for purposes of disposition.<sup>2</sup> For the reasons stated below, the motion is granted in part and the complaint is dismissed in part.

Plaintiffs commenced this action on August 23, 2013. In the complaint, plaintiff and his wife, co-plaintiff, Lourdes Jimenez-Levin (Ms. Jimenez-Levin), allege that defendants were negligent in their medical treatment of plaintiff between approximately November 15, 2010 and December 28, 2011. Plaintiffs allege that defendants improperly recommended surgical resection of plaintiff's colon, which was performed on July 20, 2011, when they should have recommended a more conservative treatment. As a result of defendants' negligence, plaintiffs contend, plaintiff suffered continued damages and required additional treatment. Plaintiffs also allege that defendants did not obtain informed consent to the procedure, and Ms. Jimenez-Levin claims loss of services. Defendants' answers generally deny the allegations in the complaint. Plaintiff was deposed on December 11, 2014 and December 18, 2014. During his deposition he testified that he previously filed for bankruptcy. According to the record, plaintiff filed for bankruptcy on September 20, 2012, and the proceedings ended on December 26, 2012. After the deposition was complete, defendants filed the motions currently before the Court.

Defendants argue that plaintiff was required under the Bankruptcy Code to schedule his medical malpractice cause of action as an asset on his bankruptcy petition. Because he did not do so, they argue, he lacks the capacity to sue and lacks standing to bring the action now that the

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<sup>1</sup> For the purpose of brevity, the Court does not distinguish between which individual defendants make each argument.

<sup>2</sup> The Court mistakenly disposed of motion sequence three as duplicative of motion sequence five. Motion sequence three is restored and consolidated for disposition. Motion sequence four is duplicative of motion sequence five, and accordingly is dismissed.

bankruptcy is discharged. Further, defendants argue that judicial estoppel bars the action because plaintiff is attempting to adopt a conflicting position to the one he assumed in his bankruptcy proceeding, where he implicitly asserted that this medical malpractice cause of action did not exist, and the bankruptcy was subsequently discharged. Defendants next argue that they should be permitted to amend their answers to include lack of capacity and standing and judicial estoppel as affirmative defenses because they did not know plaintiff had filed for bankruptcy when they originally answered, and because the amendments would not prejudice plaintiffs. Finally, defendants argue that if the complaint is dismissed, Ms. Jimenez-Levin's claim for loss of services must also be dismissed as it is derivative of the malpractice claim.

In opposition, plaintiffs argue that plaintiff did not know and had no reason to know about his medical malpractice claims during his bankruptcy filing. They contend that plaintiff did not consider a medical malpractice claim until May of 2013, when he read an article about the prevalence of infections in intensive care units in hospitals. Even then, they claim, he was unaware that defendants inappropriately treated his underlying condition of diverticulitis, and he did not learn of their alleged malpractice until he consulted with his attorney in July of 2013. Plaintiffs argue that in medical malpractice cases, knowledge of the facts underlying a claim and knowledge of the potential for a claim are often equivalent. Plaintiffs assert that any other interpretation would require a bankruptcy petitioner to list a potential medical malpractice claim for every prior treatment that did not result in an immediate and inconsequential resolution. Plaintiffs also argue that plaintiff's testimony that he was upset about the installation of a colostomy bag does not demonstrate that he was aware of the facts underlying his claim because their lawsuit is not based on use of a colostomy bag but on defendants' failure to provide more appropriate treatment to

potentially avoid surgery. Plaintiffs aver that in cases where failure to list a cause of action has resulted in lack of capacity, the plaintiffs' claims were already pending or the negligent treatment at issue was apparent at the time of their bankruptcy proceedings, and thus they are distinguishable from the current claim. Plaintiffs argue that plaintiff made good faith representations about his lack of a potential cause of action and thus judicial estoppel does not apply. Should the court dismiss the complaint, he argues, it must do so without prejudice so the trustee may recommence the action in the capacity of representative of the bankruptcy estate. Finally, plaintiffs argue that Ms. Jimenez-Levin's claim is not subject to dismissal because she was not a party to the bankruptcy proceeding and dismissal of a direct claim does not require dismissal of a derivative claim where the main action was not dismissed on the merits.

In reply, defendants argue that it is irrelevant whether plaintiff knew that defendants' treatment was actionable at the time of his bankruptcy proceeding and that plaintiffs cite to cases that actually support dismissal of the complaint. Defendants argue that plaintiff's representation that he did not know he had a cause of action until he met with a lawyer is disingenuous because he attempted to commence an action pro se before he met with his attorney. Defendants assert that Ms. Jimenez-Levin's right to recover is contingent on plaintiff's right to recover and that plaintiffs are drawing an artificial distinction between when a primary cause of action is dismissed on the merits and otherwise. Defendants contend that the case to which plaintiffs cite does not apply because the main action in that case was withdrawn, not dismissed. Defendants argue that because both plaintiffs lack capacity to sue, they cannot request a conditional dismissal or enforce the right of a third party trustee.

Under Section 3211(a)(3) of the Civil Practice Law and Rules, a party may move to dismiss if that party has no legal capacity to sue. “It is well settled that the failure to schedule a legal claim as an asset in a bankruptcy proceeding deprives the debtor of standing to raise it in a subsequent legal action.” Barranco v. Cabrini Med. Ctr., 50 A.D.3d 281, 281-82 (1<sup>st</sup> Dep’t 2008). While ignorance of the law and mistake do not remedy a debtor’s failure to schedule a claim, the debtor may have standing if he did not know or have reason to know of the facts allegedly giving rise to his claim. See Hutchinson v. Chana Weller, DDS, PLLC., 93 A.D.3d 509 (1<sup>st</sup> Dep’t 2012). Here, plaintiff has not established that he did not know of the facts allegedly giving rise to his malpractice claim. Contrary to plaintiffs’ assertion, knowledge of underlying facts is distinct from knowledge of the potential for a claim. Plaintiff knew he experienced ongoing complications following his treatment by defendants, which is enough to require him to include a potential malpractice claim as an asset in bankruptcy. Whether plaintiff actually considered that a malpractice claim existed or thought that defendants incorrectly treated his underlying condition is inconsequential.

Ms. Jimenez-Levin is not a party to the bankruptcy proceeding and therefore her husband’s failure to list the claim during the bankruptcy proceeding does not deprive her of standing. See Pinto v. Ancona, 262 A.D.2d 472, 473 (2d Dep’t 1999). Consequently, the motions are denied to the extent they request dismissal of Ms. Jimenez-Levin’s derivative cause of action which can proceed upon the recommencement of the action by the trustee. The remainder of the complaint is dismissed without prejudice. This does not, as defendants suggest, constitute a substitution of the trustee into this action or cure plaintiff’s incapacity to sue. It allows the bankruptcy trustee to commence a new action pursuant to CPLR § 205(a). The Court has considered the rest of the parties’ arguments and they do not change the result.

Accordingly, it is

ORDERED that the defendants' motions for leave to amend the answers herein are granted, and the amended answers in the proposed forms annexed to the moving papers shall be deemed served nunc pro tunc as of the date of service of the motion papers.

ORDERED that Motion Sequence 3 is restored and decided herein; and it is further

ORDERED that Motion Sequence 4 is dismissed as duplicative; and it is further

ORDERED that the first and second causes of action of the complaint are severed dismissed; and it is further

ORDERED that the third cause of action of the complaint shall remain active; and it is further

ORDERED that the caption of the action is amended to reflect the dismissal.

The Clerk is directed to enter judgment accordingly.

Dated: *Oct 9*, 2015

ENTER:

*JBL*  
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JOAN B. LOBIS, J.S.C.