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

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ROY F. ROMANO and LEE A. ROMANO,

Index No.
805024/2016

Plaintiffs,

- v -

DECISION and ORDER

Mot. Seq. 004 & 005

BON SECOURS COMMUNITY HOSPITAL, TALAT HMOUD, M.D., CRAIG VAN ROEKENS, M.D., KEITH W. CARTMILL, M.D., ROBERT LEHMANN, M.D., GOSHEN MEDICAL ASSOCIATES, P.C., LABORATORY CORPORATION OF AMERICA, and TRI-STATE EMERGENCY PHYSICIANS, PLLC

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for medical malpractice. Plaintiff Roy F. Romano ("Roy") commenced this action by summons and verified complaint on January 15, 2016. Roy alleges that Defendants Bon Secours Community Hospital ("Bon Secours"), Talat Hmoud, M.D., Craig Van Roekens, M.D., Keith W. Cartmill, M.D., Robert Lehmann, M.D. ("Dr. Lehmann"), Goshen Medical Associates, P.C. ("Goshen"), Laboratory Corporation of America, and Tri-State Emergency Physicians, PLLC failed to timely diagnose and treat Roy's Lyme Disease and Lyme Carditis from July 15, 2013 through August 1, 2013. Roy also alleges that the Defendants failed to procure his informed consent. Lastly, Roy's wife, Lee A. Romano ("Lee"), claims that she was deprived of Roy's services and companionship.

Motion Sequence 004

Defendant Bon Secours now moves pursuant to CPLR 8501 for an order directing the plaintiffs to post security for costs. Bon Secours asserts that Roy and Lee testified that their residence is 118 Morgan Court, Milford, Pennsylvania.

(affirmation of Hashkins at 2) Because their residence is not within the state of New York, Bon Secours requests that the Court issue an Order requiring Roy and Lee to post security for costs in the amount of $5,000. (affirmation of Hashkins at 2)

Motion Sequence 005

For the same reasons, Dr. Lehmann and Goshen also move pursuant to CPLR 8501 for an order directing the plaintiffs to post security for costs in the amount of $5,000. (affirmation of Ryu at 1)

Roy and Lee oppose because they are debtors in a bankruptcy proceeding[1] before the Honorable John J. Thomas in the United States Bankruptcy Court for the Middle District of Pennsylvania (the "Bankruptcy Court"). (plaintiff's exhibit C) According to the plaintiffs, "[a]fter the malpractice at issue in this case, the plaintiffs filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. On May 23, 2014, the plaintiffs received a discharge." (affirmation of Combs at 2) However, "[t]he malpractice claim was omitted from the debtor's schedule of assets." (affirmation of Combs at 2) When plaintiffs' counsel learned of the bankruptcy action, he contacted the plaintiffs' bankruptcy trustee, Mark Conway, Esq. ("Mr. Conway"). (affirmation of Combs at 2) The Bankruptcy Court then reopened the plaintiffs' Chapter 7 proceeding on February 13, 2017. (plaintiff's exhibit C) On February 28, 2017, the Bankruptcy Court issued an order permitting Mr. Conway to retain counsel and litigate this medical malpractice action on behalf of the bankruptcy estate. Roy and Lee served the defendants with a copy of this order "[o]n March 3rd, 2017[.]" (affirmation of Combs at 2)

Roy and Lee contend that the bankruptcy estate does not have the cash to post security for costs. (affirmation of Combs at 2) The liabilities of the bankruptcy estate exceed the assets by "approximately $60,000." (affirmation of Combs at 2) Plaintiffs also argue that 11 USC § 362 automatically stays all proceedings against them. (affirmation of Combs at 3) Therefore, this Court cannot order Roy and Lee to post security for costs. (affirmation of Combs at 5) The plaintiffs further contend that Bon Secours, Dr. Lehmann and Goshen failed to meet their burden under CPLR 8501 because "it could be argued that the real party in interest is the Chapter 7 Trustee, Mark J. Conway, Esq., who is bringing this matter on behalf of the bankruptcy estate." (affirmation of Combs at 6) However, the moving defendants "presented no evidence as to the residency of Mr. Conway . . ." (affirmation of Combs at 6) Lastly, Roy and Lee assert that the moving defendants are not entitled to a $5,000 security

[1] The case number is 5: 14-bk-00520-JJT. (plaintiff's exhibit C)

because they did not make the requisite showing for a security in excess of the $500 statutory minimum. (affirmation of Combs at 8)

CPLR 8501 Standard

CPLR 8501 (a) provides,

> "Except where plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made."

"Security for costs is a 'device ordinarily used against a nonresident plaintiff to make sure that if he loses the case he will not return home and leave defendant with a costs judgment that can be enforced only in plaintiff's home state." (*Clement v Durban*, 147 AD3d 39, 42 [2d Dept 2016]) "By directing a nonresident to post a bond, the defendant is protected from frivolous suits and is assured that, if successful, he will be able to recover costs from the plaintiff." (*id.*) "Security for costs shall be given by an undertaking in an amount of five hundred dollars in counties within the city of New York . . . or such greater amount as shall be fixed by the court that the plaintiff shall pay all legal costs." (CPLR 8503)

Automatic Stay

11 USC § 362 (a) (1) provides that a petition in bankruptcy,

> "[O]perates as a stay, applicable to all entities, of-
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor . . . or to recover a claim against the Debtor that arose before the commencement of the case under this title . . ."

11 USC § 362 (a) (1) only stays proceedings against the debtor. (*Katz v Robinson Silverman Pearce Aronsohn & Berman LLP,* 277 AD2d 70, 73 [1st Dept 2000]) In *Katz v Robinson Silverman Pearce Aronsohn & Berman LLP,* the First Department of the Appellate Division stated, "The claim in this action is prosecuted *by*, not *against*, the debtor, whose assets are not threatened. (*id.*) In the absence of any counterclaim asserted by defendant . . . against plaintiff, the automatic stay provision is inapposite." (*id.*)

Standing

"The law is clear that the trustee of the estate of a bankrupt is vested with title to all of the bankrupt's property." (*Coastal Mechanical Corp. v Energists, Inc.*, 225 AD2d 347, 348 [1st Dept 1996]) "The only property that may revest in the debtor in its individual capacity at the conclusion of the proceeding is property that was 'dealt with' in the bankruptcy." (*Dynamics Corp. of America v Marine Midland Bank-New York*, 69 NY2d 191, 195-196 [1987]) "[P]roperty is 'dealt with' when it has been listed in the debtor's schedule of assets, administered by the bankruptcy court for the benefit of creditors . . ." (*id.* at 196) When causes of action have not been "dealt with" because a debtor fails to disclose them in the schedule of assets, the debtor cannot subsequently "pursue" these claims in his or her individual capacity. (*id.* at 197) As the First Department of the Appellate Division has stated, "[T]he 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." (*Hutchinson v Chana Weller, DDS, PLLC*, 93 AD3d 509, 510 [1st Dept 2012]) "[E]ven if the omission was innocent," (*Gray v City of New York*, 58 AD3d 448, 449 [1st Dept 2009]) and regardless of "[w]hether the claim asserted in the complaint arose prior to the filing of the bankruptcy petition or afterward." (*Barranco v Cabrini Medical Center*, 50 AD3d 281, 282 [1st Dept 2008]) Should the debtor raise these claims without standing in a subsequent legal action, the defect cannot be cured by substituting the bankruptcy trustee for the debtor. (*Gazes v Bennett*, 38 Ad3d 287, 288 [1st Dept 2007]) For this reason, the Second Department of the Appellate Division stated in *Pinto v Ancona* that the trustee "who re-opened the bankruptcy proceeding, could not be substituted for [the plaintiff.]" (*Pinto v Ancona*, 262 AD2d 472, 473 [2d Dept 1999]) Instead the trustee must commence a new action on behalf of the bankruptcy estate. (*see Rivera v Markowitz*, 71 Ad3d 449, 450 [1st Dept 2010])

"The power of a nisi prius court to dismiss an action sua sponte should be used sparingly and only in extraordinary circumstances." (*Grant v Rattoballi*, 57 AD3d 272, 273 [1st Dept 2008]) However, in *Stark v Golderg,* the First

Department of the Appellate Division stated, "Plaintiffs may not proceed in the absence of standing . . . 'Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute' . . . Therefore, the . . . action is properly subject to *sua sponte* dismissal despite the lack of any assertion by defendants of an objection to plaintiffs standing[.]" (*Stark v Golderg*, 297 AD2d 203, 204 [1st Dept 2002])

Discussion

Preliminarily, Roy and Lee's contention that 11 USC § 362 automatically stays all proceedings against them is without merit. Like *Katz v Robinson Silverman Pearce Aronsohn & Berman LLP,* "[t]he claim in this action is prosecuted *by*, not *against*, the debtor[s], whose assets are not threatened. (*Katz v Robinson Silverman Pearce Aronsohn & Berman LLP,* 277 AD2d 70, 73 [1st Dept 2000]) In the absence of any counterclaim asserted by defendant[s] . . . against plaintiff[s], the automatic stay provision is inapposite." (*id.*)

Although Bon Secours, Dr. Lehmann and Goshen move for an order directing the plaintiffs to post security for costs, the issue here is that the plaintiffs do not have standing to sue. Roy and Lee's tort claims vested in Mr. Conway when the Bankruptcy Court appointed Mr. Conway as the plaintiffs' trustee. (*see* (*Coastal Mechanical Corp. v Energists, Inc.*, 225 AD2d 347, 348 [1st Dept 1996]) However, these tort claims did not revest in the plaintiffs because the claims were not "dealt with" in bankruptcy. (*see Dynamics Corp. of America v Marine Midland Bank-New York*, 69 NY2d 191, 195-196 [1987]) Roy and Lee filed for "bankruptcy protection under Chapter 7" "after the malpractice at issue in this case," but "[t]he malpractice claim was omitted from [their] schedule of assets." (affirmation of Combs at 2) Because Roy and Lee failed to disclose these claims in the schedule of assets, they cannot subsequently pursue these claims in this action. (*see Dynamics Corp. of America v Marine Midland Bank-New York*, 69 NY2d 191, 197 [1987]) Their failure to schedule the legal claims as assets in the bankruptcy proceeding deprives them of standing to raise the claims now. (*see Hutchinson v Chana Weller, DDS, PLLC*, 93 AD3d 509, 510 [1st Dept 2012]) It is irrelevant whether their "omission was innocent." *(Gray v City of New York, 58 AD3d 448, 449 [1st Dept 2009])* Or "[w]hether the claim asserted in the complaint arose prior to the filing of the bankruptcy petition or afterward . . ." *(Barranco v Cabrini Medical Center,* 50 AD3d 281, 282 [1st Dept 2008])

This defect in standing cannot be cured by substituting the trustee Mr. Conway for the plaintiffs despite the Bankruptcy Court's February 28, 2017 order permitting Mr. Conway to litigate this action on behalf of the bankruptcy estate. (*see Gazes v Bennett*, 38 Ad3d 287, 288 [1st Dept 2007]) Furthermore, the defect cannot be cured because it can "be argued that the real party in interest is the Chapter 7 Trustee, Mark J. Conway, Esq., who is bringing this matter on behalf of the bankruptcy estate." (affirmation of Combs at 6) Like the trustee in *Pinto v Ancona*, Mr. Conway "who re-opened the bankruptcy proceeding, [cannot] be substituted for [the plaintiff.]" (*Pinto v Ancona*, 262 AD2d 472, 473 [2d Dept 1999]) Instead, Mr. Conway must commence a new action on behalf of the bankruptcy estate. (*see Rivera v Markowitz*, 71 Ad3d 449, 450 [1st Dept 2010])

The power of this Court to dismiss an action *sua sponte* should be used sparingly and only in extraordinary circumstances. (*Grant v Rattoballi*, 57 AD3d 272, 273 [1st Dept 2008]) Here, Roy and Lee lacked standing to commence this action on January 15, 2016 because they did not schedule their claims in the bankruptcy proceeding that was discharged on May 23, 2014. As the First Department noted, "Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute . . . Therefore, [this] . . . action is properly subject to *sua sponte* dismissal despite the lack of any assertion by defendants of an objection to plaintiffs standing[.]" (*Stark v Golderg*, 297 AD2d 203, 204 [1st Dept 2002])

This case also presents extraordinary circumstances. As the Court of Appeals explained, a debtor in bankruptcy must schedule any legal claims as an asset to be "administered by the bankruptcy court for the benefit of creditors." (*Dynamics Corp. of America v Marine Midland Bank-New York*, 69 NY2d 191, 196 [1987]) Roy and Lee availed themselves of the benefits of Chapter 7 and in exchange their claims became the property of Mr. Conway. (*see Coastal Mechanical Corp. v Energists, Inc.*, 225 AD2d 347, 348 [1st Dept 1996]) These claims should have been evaluated by Mr. Conway and perhaps administered by the Bankruptcy Court for the benefit of Roy and Lee's creditors. As the plaintiffs note, their liabilities exceed their assets by "approximately $60,000" indicating that they still have outstanding creditors who have yet to be repaid. Had the plaintiff's scheduled their claims as assets when they filed for bankruptcy, these creditors who are owed $60,000 might have been repaid. However, as this case is postured now, the plaintiffs may directly recover funds that should rightfully be recovered by Mr. Conway and distributed to the plaintiff's creditors. To permit the plaintiffs to maintain this action without consequence would create a perverse incentive for future debtors in bankruptcy who are debating whether or not to schedule their claims as assets.

Wherefore, it is hereby,

ORDERED that Motion Sequence 004 and 005 wherein Defendants Bon Secours Community Hospital, Robert Lehmann, M.D., and Goshen Medical Associates, P.C. move for an order directing Plaintiffs Roy and Lee Romano to post security for costs in the amount of $10,000 pursuant to CPLR 8501 is denied; and it is further

ORDERED that Plaintiffs Roy and Lee Romano's causes of action for medical malpractice, failure to procure informed consent and loss of services and companionship are dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 14, 2017

EILEEN A. RAKOWER, J.S.C.