Schonbrun v DeLuke
2017 NY Slip Op 32928(U)
March 27, 2017
Supreme Court, Albany County
Docket Number: 5612-15
Judge: Christina L. Ryba
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

DAVID SCHONBRUN, as Parent and Natural Guardian of ANDREW SCHONBRUN and BRENDAN SCHONBRUN,
Plaintiffs,

-and-

BRIGITTE A. DELUKE and CAPITAL DISTRICT TRANSPORTATION AUTHORITY (CDTA) and EDWARD MORAN,
Defendants.

DECISION/ORDER
Index No. 5612-15
RJI No. 01-15-119587
Hon. Christina L. Ryba

APPEARANCES:

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RYBA, J.,

Plaintiff David Schonbrun, individually and on behalf of his infant children, commenced this action seeking to recover damages resulting from an accident that occurred when the infant plaintiffs disembarked from a CDTA bus operated by defendant Edward Moran and were then struck by a vehicle operated by defendant Brigitte DeLuke as they crossed the street. As alleged in the complaint and bill of particulars, plaintiffs claim that Moran was negligent in stopping the bus in a location that obstructed the view of oncoming motorists and that defendant CDTA was negligent in hiring and retaining Moran

as an employee. After the action was commenced, Schonbrun filed for voluntary chapter 7 bankruptcy but failed to disclose this lawsuit as an asset in the bankruptcy proceeding. Defendants CDTA and Edward Moran (hereinafter defendants) now move for an order granting permission to amend their answer to include as an affirmative defense that Schonbrun lacks capacity to assert claims in his individual capacity due to his failure to disclose this action in the bankruptcy proceeding, and for an order dismissing those individual claims on that ground. Defendants also seek an order compelling Schonbrun to provide an authorization permitting disclosure of the non-privileged portions of his bankruptcy attorney's file. In addition, plaintiffs move for an order compelling CDTA to produce all accident reports involving Moran that pre-date the incident in question.

Initially, inasmuch as plaintiffs consent to the amendment of the answer to include the affirmative defense of lack of capacity to sue, defendants' motion to amend the answer to include this defense is granted. As for defendants' request for dismissal of Schonbrun's individual claims due to his failure to disclose this action in the bankruptcy proceeding, it is well settled that "upon the filing of a voluntary bankruptcy petition, all property which a debtor owns or subsequently acquires, including a cause of action, vests in the bankruptcy estate" (DeLarco v DeWitt, 136 AD2d 406, 408 [1988]), Such a cause of action "can only revert to the debtor to be pursued in his or her individual capacity if the claim is 'dealt with' in the bankruptcy, which necessitates it being listed as an asset and either abandoned by the bankruptcy trustee or administered by the bankruptcy court for the benefit of the creditors" (Mehlenbacher v Swartout, 289 AD2d 651, 652 [2001]; see, Cent. Nat. Bank v Scotty's Auto Sales, Inc., 138 AD3d 1263, 1264 [2016], lv dismissed 28 NY3d 1044 [2016]). Thus, "a debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on

his or her own behalf" (Strokes Elec. & Plumbing v Dye, 240 AD2d 919, 920 [1997]; see, Thruway Investments v O'Connell & Aronowitz, P.C., 3 AD3d 674, 677 [2004]; Mehlenbacher v Swartout, 289 AD2d at 651–52 [2001]).

Here, plaintiffs do not dispute that Schonbrun is precluded from asserting claims in his individual capacity due to his failure to list this lawsuit as an asset in his bankruptcy proceeding. Instead, plaintiffs merely contend that dismissal of their claims for medical expenses and nursing services is not warranted because those claims are personal to the infant plaintiffs rather than to Schonbrun. Inasmuch as a parent is entitled to recover compensation for nursing services provided to his or her child as a result of an injury (see, Auer v State of New York, 289 AD2d 626, 628 [2001]), the Court finds that any claim for nursing services is individual to Schonbrun and must therefore be dismissed. Likewise, any claim for medical expenses incurred by Schonbrun on behalf of his children is a derivative cause of action belonging to Schonbrun individually (see, Moore v Ewing, 9 AD3d 484 [2004]; Kramer v Twin County Grocers, 151 AD2d 722 [1989]), and is accordingly dismissed.

Finally addressing defendants' request for an order compelling Schonbrun to provide an authorization permitting disclosure of the non-privileged portions of his bankruptcy attorney's file, defendants contend that the file is relevant to the issue of whether Schonbrun lacks capacity to assert individual claims on his own behalf. Inasmuch as the Court granted that portion of defendants' motion which sought dismissal of Schonbrun's individual claims, Schonbrun's bankruptcy file is no longer relevant to any issue raised in this case. Accordingly, this aspect of defendants' motion is denied.

Turning to plaintiffs' motion to compel the production of Moran's accident reports, evidence

of an employee's prior acts of negligence are admissible to establish the employer's negligent retention of the employee (see, Travis v United Health Servs. Hosp. Inc., 23 AD3d 884, 841-842 [2005]; Steinborn v Himmel, 9 AD3d 531 [2004]). Contrary to defendants' contention, plaintiffs' complaint and bill of particulars clearly plead a cause of action for CDTA's negligent hiring and retention of Moran. Inasmuch as defendants have failed to demonstrate why disclosure of Moran's accident reports would be inappropriate, plaintiffs' cross motion is granted.

For the foregoing reasons, it is

ORDERED that the motion by defendants CDTA and Edward Moran is granted in part, without costs, to the extent that the motion to amend the answer and to dismiss the individual claims of plaintiff David Schonbrun is granted, and the motion is otherwise denied, and it is further

ORDERED that the motion by plaintiffs is granted, without costs.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the defendants CDTA and Edward Moran. The below referenced original papers are being transferred to the Albany County Clerk. The signing of this Decision and shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

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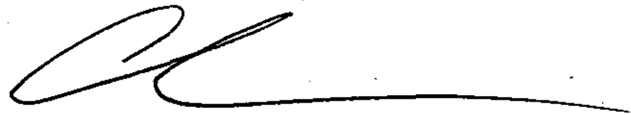

Dated: March 27, 2017

HON. CHRISTINA L. RYBA
Supreme Court Justice