Comunale v Rackover
2020 NY Slip Op 31184(U)
April 8, 2020
Supreme Court, New York County
Docket Number: 160094/2017
Judge: Robert David Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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PATSY COMUNALE,

Plaintiff,

- v -

JAMES RACKOVER, LAWRENCE DILIONE, and MAX GEMMA,

Defendants.

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INDEX NO. 160094/2017

MOTION DATE 03/05/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Motion by Gemma Max Gemma ("Gemma") for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint—which is filed by plaintiff Patsy Communale ("Plaintiff"), individually and in his capacity as administrator of the estate of his son Joseph A. Communale ("Joseph" or "Communale"), deceased, against defendants Gemma, James Rackover ("Rackover"), Lawrence Dilione ("Dilione") (collectively, "Defendants")—as against him is granted for the reasons herein.

BACKGROUND

I. Procedural History

Plaintiff alleges that on November 13, 2016, his son Joseph was brutally murdered by Defendants in Rackover's apartment in the early morning hours of November 13, 2016 in New York, New York. (Affirm in Supp ¶¶ 1, 12, 16, 22, 25, Ex A, NYSCEF No 76 [Amended Complaint].) Plaintiff further alleges that after murdering Joseph, Defendants attempted to dispose of him in a shallow grave in Oceanport, New Jersey. (*Id.* ¶¶ 2-7, 81.)

The Court takes judicial notice that Rackover was prosecuted and convicted of one count of Murder in the Second Degree, two counts of Hindering Prosecution in the First Degree, and Concealment of a Human Corpse. Dilione pled guilty to Manslaughter in the First Degree. Gemma pled guilty to Hindering Prosecution in the First Degree. (*See Comunale v Gemma*, 18-CV-12104 (ALC), 2020 WL 635554, at *1 [SDNY Feb. 11, 2020].)

On November 10, 2017, Plaintiff filed his complaint, later amended, asserting four causes of action against the Defendants. Namely, Plaintiff asserted conscious pain and suffering, wrongful death, violation of the right of sepulcher, and intentional infliction of emotional distress. (Affirm in Supp, Ex A at 17 ¶¶ 83-89, at 18 ¶¶ 90-96, at 19 ¶¶ 97-106, at 21 ¶¶ 107-113, respectively, NYSCEF 76 [Amended Complaint]; *see also* NYSCEF No 1 [Complaint].)

On June 15, 2018, this Court entered an order (Seq 001), stipulated by the parties, staying discovery in this action pending final determination of the criminal proceeding known as *The People of the State of New York v James Rackover*, et al., Indictment # 0161617 (Sup Ct, NY County 2017). (NYSCEF No 18 [Stay Order dated June 15, 2018].) Discovery remains stayed because the criminal proceedings have not terminated, as Dilione is appealing his plea bargain and sentence. (Memo of Law in Opp (Seq 003) at 6, NYSCEF No 65.)

On August 6, 2019, Gemma filed a voluntary petition for Chapter 7 bankruptcy with the United States Bankruptcy Court for the District of New Jersey. (Affirm in Supp, Ex C, NYSCEF No 76 [Bankruptcy Forms 101, 107, and 106E/F filed with the United States Bankruptcy Court for the District of New Jersey on August 6, 2019, September 19, 2019, and August 9, 2019, respectively].)[1]

Gemma asserts that on September 9, 2019, Plaintiff and his counsel both appeared at the creditors' hearing scheduled by the court trustee and questioned Gemma. Gemma asserts that Plaintiff's attorney did not ask about any insurance coverage at this hearing. Plaintiff allegedly did not thereafter file any objection to the petition of Gemma to discharge all debts including the claims of Plaintiff. (Memo of Law in Supp (Seq 003) ¶ 7, NYSCEF No 48; *see also id.* at 6.)

On November 15, 2019, the United States Bankruptcy Court for the District of New Jersey entered an order of discharge granting Gemma's petition for discharge pursuant to 11 USCA § 727. (Affirm in Supp, Ex D, NYSCEF No 76 [Order of Discharge].)

On December 9, 2019, Gemma moved for a summary judgment (Seq 003) seeking dismissal of the claims against him, asserting that Plaintiff would be unable to collect any potential monetary award from him. (Memo in Supp (Seq 003) at 5, NYSCEF No 48.) Gemma argued that the Order of Discharge "includes any potential monetary award arising from the instant lawsuit." (*Id.* ¶ 7.)

In opposition to the motion (Seq 003), Plaintiff did not dispute that the Order of Discharge effectively prevented him from personally recovering damages as against Gemma and that "Gemma is entitled to a fresh start pursuant to applicable sections of the Bankruptcy Code." (Affirm in Opp (Seq 003) ¶ 4, NYSCEF No 59.) However, Plaintiff argued that Gemma's motion should nonetheless be denied because he might be able to recover if "Gemma,

[1] Form 101 is a voluntary petition for individuals filing for bankruptcy. Form 107 is a statement of financial affairs for individuals filing for bankruptcy and identifies the instant lawsuit. Form 106E/F identifies creditors who have unsecured claims and identifies the instant lawsuit as a disputed and unliquidated tort claim pending against Gemma. (Affirm in Supp, Ex C, NYSCEF No 76, Bankruptcy Form 107 at 3; Bankruptcy Form 106E/F at 3, 4.)

individually, or a third-party, had insurance that would provide coverage for his tortious acts, or if another third-party [might] be liable for Defendant Gemma's tortious acts." (*Id.* ¶ 6.) Plaintiff further argued that, because discovery had been stayed pending the resolution of the related criminal litigations against Gemma, Rackover, and Dilione, Plaintiff has not had the opportunity to find out whether such a policy might exist. (*Id.*)

In addition, Plaintiff argued that regardless of whether there was an insurance policy covering the tortious conduct in question, the action should not be dismissed against Gemma because—even though Plaintiff could not recover against Gemma—if Gemma is found liable, co-Defendants Rackover and Dillione might become liable to Plaintiff by virtue of Gemma's cross-claims against them. (*Id.* ¶ 8.)

In reply, Gemma's counsel argued that Plaintiff had an opportunity to question Gemma about the nature of his assets at the September 9, 2019 creditors' hearing scheduled by the court trustee. (Reply Memo at 2, NYSCEF No. 67.) In addition, Gemma's counsel stated that Gemma did not have "renter's insurance coverage nor any other type of liability insurance at the time of the alleged incident." (*Id.* at 2.) Moreover, Gemma's counsel argued that no insurance policy would cover the kinds of intentional tortious conduct that is alleged in the Amended Complaint. (*Id.* at 3.)

On January 15, 2020, this Court denied Gemma's prior motion (Seq 003) with leave to renew. The Court gave Gemma permission to submit "either an affidavit regarding the existence of insurance on the date of incident or a copy of any insurance policy of movant in effect on the date of incident." (NYSCEF No 71 [Order dated January 15, 2020].) The Court lastly added that "this matter shall remain stayed pursuant to this Court's July 13, 2018 order in motion sequence number 001." (*Id.*)

II. The Instant Motion (Seq 004)

In his renewed motion for summary judgment, Gemma asserts, in sum and substance, that regardless of whether he is liable to Plaintiff in this action, the absence of any applicable insurance coverage and the discharge of liability effected by the bankruptcy court's order warrant this Court's dismissal of the complaint as against him. (Affidavit in Supp ¶ ¶ 4-9, NYSCEF No 74 [Gemma Sworn Affidavit].) Further, Gemma asserts, under penalty of perjury, "at the time of the alleged incident, [he] did not have homeowner's insurance . . . nor renter's insurance nor any other type of personal liability insurance[;]" but, he had an automobile insurance policy. (*Id.* ¶ ¶ 5, 6, 8.) Gemma argues that this automobile policy only covered an automobile that he owned at the time of the incident and would have insured operators of that vehicle in the event of an automobile accident. (*Id.* ¶ 8; *see also* Affirm in Supp, Ex A at 3, 11, 18, 22. NYSCEF No 75 [Automobile Insurance Policy].)[2]

[2] The Automobile Insurance Policy covers an insured when "an insured becomes legally obligated to pay because of: Bodily injury, sustained by a person, and Property damage, arising out of the ownership, maintenance or use of the owned or non-owned auto." (Automobile Insurance Policy at 3.)

Plaintiff, in opposition, does not disagree that the automobile insurance submitted would not "provide coverage in connection with this matter." (Affirm in Opp ¶ 17, NYSCEF 79.) Nevertheless, Plaintiff argues that Gemma's sworn affidavit fails to address "the existence, if any, of insurance coverage owned or in control of a third party which may provide coverage in connection with this matter; and his domicile at the time of this incident." (*Id.*) Plaintiff adds, "[i]f and when the Court grants discovery and permission to conduct depositions of Gemma and, if necessary and appropriate, third parties, we expect not only to confirm Gemma's liability but also conform that there are one or more third parties who may be obligated to provide coverage and/or payment on behalf of Gemma." (*Id.* ¶ 19.)

Gemma, in reply, argues again that "no insurance policy could cover the allegations made in this case" and states that he "does not have any personal liability insurance" and "no other policy to provide this Court for review." (Reply Memo of Law in Further Supp at 1-2, NYSCEF No 80; *see also* Sworn Affidavit of Max Gemma in Further Support of Renewed Motion for Summary Judgment ¶ 2, NYSCEF No 81.)

DISCUSSION

I. Standard of Review

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [interpreting CPLR 3212 (f)]; *see also Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338, 340 [1st Dept1987].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff . . . the court on a summary judgment motion must indulge all available inferences . . . ." (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

Subsection (f) of CPLR 3212 states, in relevant part, that if "facts essential to justify opposition [to the motion] may exist but cannot . . . be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." (CPLR 3212 [f]).

Subsection (f) however "should not be employed as a means of embarking upon a 'fishing expedition' to explore the 'possibility' of fashioning a defense against plaintiff." (*Citibank, N.A. v. Furlong*, 81 A.D.2d 803, 803 [1st Dept 1981].) The subsection "does not countenance the postponement of summary disposition where, in opposing the defendants' motion, the plaintiff merely speculates that discovery might uncover . . . that [the injuries sued upon] resulted from the defendant's negligence." (*Agoglia v. Sterling Foster & Co. Inc.*, 237 AD2d 549, 655 [2d Dept 1997] [internal quotations and citations omitted]; *see also* 2PT1 West's McKinney's Forms Civil Practice Law and Rules § 5:166.) "A party claiming ignorance of critical facts must first demonstrate that his or her ignorance is unavoidable, and that reasonable attempts were made to discover the facts which would give rise to a triable issue." (*Lumbsy v Gershwin Theater*, 282 AD2d 578, 578 [2d Dept 2001]; *see also Nascimento v Bridgehampton Const. Corp.*, 86 AD3d 189, 192 [1st Dept 2011] ["[A] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence[.]"] [internal citations and quotations omitted]; *Pina v Merolla*, 34 AD3d 663, 664 [2d Dept 2006] [affirming the grant of the motion for summary judgment where the party opposing the motion due to incomplete discovery failed to "offer an evidentiary basis to suggest that discovery might lead to relevant evidence and that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant."] [internal citations omitted].)

II. Applicable Law

A bankruptcy discharge "frees the debtor from personal liability for his or her debts. Indeed, for individual debtors, the main purpose of a Chapter 7 bankruptcy is to obtain a 'fresh start' through the discharge of debts incurred before bankruptcy." (A N.Y. Prac., Enforcing Judgments and Collecting Debts § 5:97.)

"To ensure that a discharge will be completely effective, [11 USCA 524] operates as an injunction against enforcement of a judgment or the commencement or continuation of an action in other courts to collect or recover a debt as a personal liability of the debtor." (*Matter of Edgeworth*, 993 F2d 51, 53 [5th Cir 1993] [cited by *Minafri v United Artists Theatres, Inc.*, 5 Misc 3d 474, 477 [Sup Ct, Westchester County, 2004]].)

"When a bankruptcy debtor has no right to the proceeds of an insurance policy from a claim, and therefore the proceeds cannot benefit the debtor's estate or its creditor, the insurance policy proceeds are not property of the bankruptcy estate." (*Calleja v AI 229 W.*, 2016 N.Y. Slip Op. 32326[U], 3 [N.Y. Sup Ct, Bronx County 2016], *affd*, *Calleja v AI 229 W. 42nd St. Prop. Owner, LLC*, 157 AD3d 558 [1st Dept 2018] [internal citations omitted].)

In New York, "a bankruptcy discharge does not bar a pending lawsuit where the defendant has liability insurance coverage for the events forming the basis of the lawsuit." (*Calleja*, 2016 N.Y. Slip Op. 32326[U], 3 [internal citations omitted].) A tort claimant may proceed against a bankruptcy debtor for the purpose of recovering against an insurer. (*Minafri*, 5 Misc 3d at 477 [citing 11 USCA § 524 (e), which provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such

debt."].) Additionally, state courts usually retain the power to determine the effect of a discharge in bankruptcy. (*In re Gianopolous*, 584 BR 598, 608 [Bankr SDNY 2018].)

III. Analysis

Although a "willful and malicious injury" is not discharged by a bankruptcy order pursuant to 11 USCA § 523(a)(6), Plaintiff's counsel does not argue that Gemma remains personally liable pursuant to this exception. Rather, Plaintiff argues that he understands that the injuries alleged in the present case are discharged by the Order of Discharge and that "Gemma is entitled to a fresh start pursuant to applicable sections of the Bankruptcy Code." (Affirm in Opp Seq 003 [NYSCEF No 59] ¶ 4.) As such, the only issue on this motion is whether there is an insurance policy from which Plaintiff can recover.

On this motion, Gemma has made a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to show that he did not have any insurance that would have covered the November 13, 2016 incident. Gemma submits an affidavit, under penalty of perjury, stating that any insurance that he had did not cover the incident. (Gemma Sworn Affidavit in Supp ¶ 8, NYSCEF No 74 ["While it remains true that I did not have any form of personal liability insurance at the time of the incident, I did have an auto insurance policy. That policy however only covered an automobile I owned at the time of the incident, and would have insured operators of that vehicle in event of an 'automobile accident' – something clearly not relevant to the allegations of this case since that vehicle was not involved in any manner with this incident."].)

The burden thus shifts to Plaintiff to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d at 562.) Plaintiff's counsel, in response to Gemma's sworn affidavit, submits a four-page affirmation asserting in conclusory fashion that "[i]f and when the Court grants discovery and permission to conduct depositions of Gemma and, if necessary and appropriate, third parties, [Plaintiff] expect[s] not only to confirm Gemma's liability but also confirm that there are one or more third parties who may be obligated to provide coverage and/or payment on behalf of Gemma." (Affirm in Opp ¶ 19, NYSCEF 79.)

Gemma, in further support of the summary judgment motion, states, under penalty of perjury, that there is "no policy to provide this Court for review." (Gemma Sworn Affidavit in Further Supp ¶ 2, NYSCEF No 81.)

Plaintiff's request for further discovery is denied. Plaintiff has failed to come forward with any specific evidence or specific reason as to how discovery may reveal an insurance policy that covers the incident and alleged tortious conduct. (*See Pina*, 34 AD3d at 664 ["The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion."]; *see also Michael S. Oakley, M.D., PC v Main St. Am. Group*, 40 Misc 3d 1204(A), 6 [Sup Ct, Suffolk County, 2013] ["It has been held that public policy precludes a party from obtaining insurance

against intentional torts and the punitive liability that may arise from them."] [internal citations omitted].) As such, while having compassion for Plaintiff's considerable loss, this Court simply cannot allow additional discovery that would only lead to a useless fishing expedition. (*See Citibank, N.A.*, 81 A.D.2d at 803; *see also Am. Country Ins. Co. v Umude*, 56 Misc 3d 1204(A) [Sup Ct, Bronx County 2017] [granting summary judgment in favor defendant automobile insurance carrier in declaratory judgment action where defendant opposed motion on ground that he did not have opportunity to depose owner on issue of whether he consented to operator's use], *affd*, 176 AD3d 542 [1st Dept 2019].)

Notwithstanding this Court's inconsistent statements regarding the status of Gemma's cross-claims in Seq 002 and Seq 003, to the extent that Plaintiff asserts that the instant motion should be denied because of said cross-claims, the Court finds that argument to be unavailing and contrary to the Order of Discharge. (*See Klinger v Dudley*, 41 NY2d 362, 369 [1977].)

Lastly, given the role Gemma played in covering up Joseph's murder, this Court finds that, pursuant to CPLR 8101, it would be inequitable to award costs and disbursements to Gemma.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendant Max Gemma ("Gemma"), pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted, and the complaint is dismissed as against Gemma, WITHOUT costs and disbursements, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the counsel for Gemma shall serve, via NYSCEF, a copy of the instant decision and order with notice of entry within twenty (20) days after Governor Cuomo's Executive Order 202.8 or any order modifying it is lifted; and it is further

ORDERED that compliance with this order is subject to the Administrative Orders of the Chief Administrative Judge of the Courts, dated March 20 and 22, 2020 (AO/71/20; AO/78/20).

The foregoing constitutes the decision and order of this Court.

4/08/2020
DATE

ROBERT DAVID KALISH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE