Sullivan v City of New York
2020 NY Slip Op 33295(U)
October 6, 2020
Supreme Court, New York County
Docket Number: 151221/2018
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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BRENDAN SULLIVAN,

Plaintiff,

-against-

CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY (CAPTIAL CONSTRUCITON COMPANY) and TUTOR PERINI BUILDING CORP.,

Defendants.

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DECISION AND ORDER

Index Number

151221/2018

FRANK P. NERVO, J.S.C.

Defendants move for an order, pursuant to CPLR § 3025, granting them leave to amend their answer to include, inter alia, the affirmative defense of lack of capacity to sue and, upon amendment, dismissing the action against them due to plaintiff's lack of capacity to maintain this action for his failure to list this action as an asset on his bankruptcy schedule. Plaintiff opposes defendants' motion and cross-moves to amend the caption, pursuant to CPLR § 3025, adding the bankruptcy trustee in his stead.

The Court has not considered defendants' "reply affirmation," NYSCEF Doc. No. 111, as it is an improper sur-reply. Likewise, the Court does not entertain unsolicited letters on motion practice and has not considered the letters submitted by counsel on this motion beyond their identifying NYSCEF Doc. No. 111 as an improper sur-reply. Alternatively, if the Court were to consider these letters or affirmation, it would not reach a determination contrary to its decision herein.

Defendants' Motion to Amend and Dismiss

A bankrupt plaintiff's title to his or her action, as an interest in property, vests in the trustee in bankruptcy upon filing a voluntary bankruptcy petition (11 USC § 541[a][7]; *Rivera v. Markowitz,* 71 AD3d 449 [1st Dept 2010]; *see also Stich v. Oakdale Dental Center, P.C.*, 157 AD2d 1011 [3d Dept 1990]).[1] Consequently, the plaintiff-debtor must list the pending action in his or her schedule of assets filed with the bankruptcy court (*id.*). Failure to properly list a pending action renders the debtor-plaintiff without capacity to sue, post discharge, as title to the action remains with the estate (11 USC § 554; *Whelan v. Longo*, 7 NY3d 821 [2006]; *see also DeLarco v. DeWitt*, 136 AD2d 406 [3d Dept 1988]). A plaintiff-debtor may not cure this defect by substituting the bankruptcy trustee as plaintiff in the pending undisclosed action (*Gazes v. Bennett*, 38 AD3d 287 [1st Dept 2007]; *National Fin. Co. v. Uh,* 279 AD2d 374 [1st Dept 2001]). "Actual knowledge by a trustee of a claim is not a substitute for proper scheduling" (*Burton v. 215 E 77th Assoc.*, 284 AD2d 122 [1st Dept 2001]). Under such circumstances, leave to amend a defendant's answer to assert the affirmative defense of lack of capacity is proper [*Rivera v. Markowitz*, 71 AD3d at 450; *Rudin v. Hospital for Joint Diseases*, 34 AD3d 376 [1st Dept 2006]).

Plaintiff filed for bankruptcy in U.S. Bankruptcy Court for the Southern District after beginning this action. As part of those bankruptcy proceedings, he was required to complete a schedule of his assets, and there is no dispute he failed to list this action as an asset. Consequently, plaintiff lacked capacity to continue this action and defendants

[1] Disclosure requirements for Chapter 7 and Chapter 11 bankruptcy are identical (see 11 USC § 541[a][1][7] and *DeLarco v. DeWitt*, 136 AD2d at 408).

should be granted leave to amend their answer to plead this affirmative defense (*see e.g. Rivera v. Markowitz*, 71 AD3d 449, supra).

This would usually end the inquiry and the matter would be dismissed, pursuant to CPLR § 3211 (*see id.*; *Rudin v. Hospital for Joint Diseases*, 34 AD3d at 376). That plaintiff contends the omission was, in essence, a good faith error is of no moment, as the appropriate standard does not account for such error (*see e.g. Gazes v. Bennett*, 38 AD3d 287, *supra*; *Burton v. 215 E 77th Assoc.*, 284 AD2d 122, *supra*). However, plaintiff was granted a reopening of his bankruptcy matter in May of this year by the U.S. Bankruptcy Court for the Southern District in order to add this matter to the schedule as an asset. Thereafter, and while the bankruptcy action was pending, defendants filed the instant motion seeking to dismiss the action for plaintiff's failure to list this action in his schedule of assets. Dismissal, as urged by defendants, at that time was premature, as the bankruptcy matter remained pending. However, the instant dismissal motion was adjourned, during which time the Bankruptcy Court approved plaintiff's application, without opposition, and appointed special litigation counsel to the trustee of plaintiff's estate for the instant matter (*see* August 1, 2020 Order United States Bankruptcy Court, Southern District of New York, 18-12826 [Garrity, J.] NYSCEF Doc. No. 107).

It is beyond cavil that bankruptcy is a matter reserved solely for the Federal Courts and as this Court has previously explained, where a matter is solely reserved for the federal branch of government, "[j]udges in every State shall be bound thereby" (*Matter of Condon v Inter-Religious Found. for Community Org., Inc.*, 18 Misc.3d

874 [Gische, J. Sup. Ct. 2008]; *see generally* 11 USC § 105, et, seq.). Thus, this Court may not question the Bankruptcy Court's findings as they relate to adding this matter to the schedule of plaintiff's assets.

As the Bankruptcy Court has appointed litigation counsel for the instant matter, and added it to plaintiff's schedule of assets, defendants motion seeking dismissal for failure to list this matter as an asset on plaintiff's bankruptcy schedule must be denied.

Plaintiff's Cross-motion to Amend

Plaintiff's cross-motion seeking to add the trustee in his stead was likewise premature at the time notice of cross-motion was served, as the Bankruptcy Court had not yet reached a determination. However, as discussed above, the Bankruptcy Court issued a decision during this motion's adjournment and appointed special counsel to plaintiff's bankruptcy trustee for this action. Thus, the issue is now ripe.

CPLR § 3025(b) governs permissive leave to amend a pleading upon terms which are just. Leave is to be freely given absent a showing that amendment would cause surprise or prejudice (*170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *Lanpont v. Savvas Cab Corp., Inc.*, 244 AD2d 208 [1st Dept 1997]).

Defendants contend that any amendment must be made pursuant to CPLR § 205; however, that section applies to actions that have been terminated "in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final

judgment upon the merits." Here, the action has not been terminated and CPLR § 205 is inapplicable, therefore amendment shall be evaluated under CPLR § 3025 (*see e.g. Family Finance Corp. v. Secchio*, 65 Misc. 2d 344 [NY Civ. Ct. 1970]; *see also* CPLR § 3025 Practice Commentaries - C3025:17).

Defendants, in opposing plaintiff's cross-motion, have failed to point to any prejudice they would suffer by amending the caption to reflect plaintiff's bankruptcy trustee as plaintiff; general claims related to plaintiff's counsel's failure as setting dangerous precedent or undermining the bankruptcy system do not amount to prejudice in the instant matter (*see e.g.* NSYCEF Doc. No. 103 at ¶ 19). Likewise, the substitution of a bankruptcy trustee cannot be said to surprise defendants, as they have been aware of plaintiff's bankruptcy since at least February 2019 (NYSCEF Doc. No. 103 at p. 5 ¶ 11 & FN 1). Defendants' opposition seeks to have this Court improperly invade the province of the Federal Bankruptcy Courts to determine the best interests of plaintiff's estate and relitigate the issues decided by the Bankruptcy Court (see *id. passim*). This Court is bound by the supremacy clause, and thus the Bankruptcy Court's determination (see *Matter of Condon v Inter-Religious Found. for Community Org., Inc., supra*).

Accordingly, it is

ORDERED that defendant's motion is denied; and it is further

ORDERED that plaintiff's cross-motion is granted; and it is further

ORDERED that within ten days of its entry by the Clerk, Plaintiff shall serve a copy of this order with notice of entry on defendant, the County Clerk and the Clerk of the Trial Support Office, and it is further

ORDERED that upon service on the County Clerk and Clerk of the Trial Support Office, the County Clerk and the Clerk of the Trial Support Office shall amend their records to reflect the new caption, which shall read:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SALVATORE LAMONICA, As Trustee for the Bankruptcy Estate of BRENDAN SULLIVAN,

Index No. 151221/2018

Plaintiff,

-against-

CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY (CAPITAL CONSTRUCTION COMPANY) and TUTOR PERINI CORPORATION,

Defendants

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THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: October 6, 2020

ENTER:

Hon. Frank P. Nervo, J.S.C.