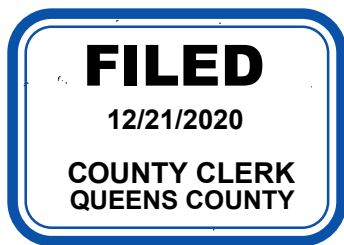


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| Singh v Law Off. of Hector Roman, PC |
| 2020 NY Slip Op 34430(U) |
| December 21, 2020 |
| Supreme Court, Queens County |
| Docket Number: 706101/2019 |
| Judge: Ulysses B. Leverett |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
Davinder Pal Singh

Plaintiff,

-against-

The Law Office of Hector Roman, PC,

Defendant.
-----X

Index No.: 706101/2019

Motion Seq. No.003

Decision and Order

Present: **HONORABLE ULYSSES B. LEVERETT:**

Papers Numbered

Notice of Motion-Affirmation-Exhibits.....
Affirmation in Opposition-----
Memorandum of Law.....

EF-68-83
EF-85
EF-84

Upon the foregoing papers, it is ordered that defendant's motion pursuant to CPLR § 3211 (a)(1)(5) and (7) dismissing plaintiff's amended complaint against defendant The Law Office of Hector M. Roman, P.C. for legal malpractice, and breach of a fiduciary duty and punitive damages is granted.

Plaintiff Davinder Pal Singh brings this action to recover damages for alleged legal malpractice and breach of fiduciary duty, arising from the defendant's representation of plaintiff, pursuant to a written retainer agreement, in connection with a Chapter 7 bankruptcy proceeding in the United States District Court, Eastern District of New York, Docket No. 1-16-41529-ccc.

Plaintiff's amended complaint herein alleges that the "Decision of the bankruptcy judge denying the Plaintiff's discharge was the direct result of the Defendant's gross negligence, malfeasance, and malpractice in the financial analysis of the Plaintiff's financial situation, the careless negligent, reckless, and defective preparation of the Plaintiff's Chapter 7 Petition by the numerous mistaken inclusions, erroneous listings, blatant important omissions and failures to properly amend the Plaintiff's petition, among other defects and errors all resulting in the Plaintiff's having been denied his discharge of debts resulting in financial loss and injury to Plaintiff."

Plaintiff was a 26 year old immigrant from India at the time he filed the Chapter 7 Bankruptcy Petition in 2016 through defendant Roman's law firm. Plaintiff immigrated from India in 2004 and dropped out of high school in the United States in 2008. He started driving a taxi cab in 2008 through present. In 2012, plaintiff purchased a taxi medallion for \$720,000 and borrowed \$120,000 from his father, Sham Singh. In September 2013, plaintiff/debtor executed a loan agreement for \$840,000 with First Jersey Credit Union to refinance the medallion. The loan was later assigned to Capital One Equipment Finance Corp. dba Capital One Taxi Finance, (Capital One) as a secured creditor of plaintiff, Davinder Singh.

Plaintiff filed a voluntary petition for Chapter 7 Bankruptcy in April 2016. After the 5/20/2016 initial meeting of creditors pursuant to § 341 of the Bankruptcy Code, plaintiff/debtor Singh through defendant's firm filed an amended schedule on 6/8/2016. Creditor Capital One Taxi

Medallion Finance conducted an examination of the debtor Singh pursuant to Rule 2004 of the Federal Rule of Bankruptcy Procedure. One day prior to the 2004 examination, debtor provided his bank statement that disclosed a previously unreported \$55,000 in debtor's account within one year of filing the bankruptcy petition. Creditor Capital One filed a complaint against the debtor in September 2016. The plaintiff/debtor Singh answered the complaint in October 2016. Creditor Capital One deposed debtor's father Sham Singh in March 2017 whereby Capital Taxi discovered the \$120,000 loan from Sham Singh to debtor Singh and that repayments were made within one year of the bankruptcy petition.

In April 2017, Creditor Capital One filed summary judgment motions against debtor Singh pursuant to 11 U.S. Code § § 727(a)(2) A & B and 727 (a)(4)(A) alleging plaintiff/debtor filed false oaths and accounts with reckless disregard for the truth and with an intent to conceal relevant information from the Court and creditors. In July 2017, Singh's attorney filed opposition to Capital Taxi's motion and filed second amended schedules which included a homestead exemption for Singh's investment property.

Plaintiff Singh alleges that because of certain errors and omissions by defendant's firm, the Bankruptcy Court denied his petition for bankruptcy for material misstatements. Plaintiff claims that defendant firm failed to explain to him questions in the Statement of Financial Affairs (SOFA) and that defendant erroneously listed plaintiff's residence as 130-03 122nd Street, South Ozone Park, NY instead of his father and brother's house at 135-39 122nd Street, South Ozone Park, NY.

On May 29, 2018, Bankruptcy Judge Hon. Carla E. Craig granted the creditor's motion to deny the debtor a discharge of his debts. The Bankruptcy Court determined that the records support the conclusion that debtor filed schedules and statements of financial affairs which at a minimum were a reckless disregard for the truth.

Defendant firm asserts that plaintiff's amended complaint should be dismissed because the documentary evidence presented in the underlying bankruptcy case and the Bankruptcy Court's decision demonstrates that plaintiff Singh on culpable conduct was the proximate cause for the denial of the bankruptcy discharge. Defendant states that plaintiff made false statements to the firm during the preparation of plaintiff's bankruptcy petition. Plaintiff also made false sworn statements to the bankruptcy trustee, Debra Kramer and false statements to the Creditor, Capital One.

Pursuant to the pertinent parts in CPLR § 3211, a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or... (5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment release, res judicata, or ...(7) the pleading fails to state a cause of action,...

In a motion to dismiss pursuant to CPLR § 3211, the Court must accept facts alleged in the complaint as true and accord plaintiff the benefit of every possible inference and determine whether the facts alleged fit any cognizable legal theory. The Court, however, is not required to accept factual allegations or accord favorable inferences where the factual assertions are plainly

contradicted by documentary evidence. See *Meyer v. Guinta*, 262 A.D. 2d 463 (2d dept. 1999) and *Bishop v Maurer*, 33 A.D.3d 497 (1st Dept 2006).

To recover damages for legal malpractice, the plaintiff must prove four elements of its prima facie claim that (1) the parties have privity (2) the attorney departed from the exercise of a degree of care, skill and diligence commonly possessed and exercised in the legal community (3) the attorney departed from the standard of care was the proximate cause of loss sustained by plaintiff (4) plaintiff incurred damages as a direct result of the attorney's actions. See *Schottland v Brown Harriss Stevens Brooklyn, LLC* 147 AD 3d 995 (2d Dept 2016) and *Edward v Haas, Greenstein, Samson, Cohen & Gerstein, P.C.* 17 A.D. 3d 517 (2d Dept 2005).

Defendant presents documentary evidence of the parties signed retainer agreement which established privity of contract. The retainer agreement provided in pertinent part: "FULL DISCLOSURE REQUIRES- I have discussed with my attorney the nature of my case and I completely understand that I must disclose ALL of my assets and liabilities to the Bankruptcy Court. This means that everything that I own including my clothes, my jewelry, my furniture, my cars, my cash, my utility deposits, my bank accounts, my tax refund, my home, all monies owned to me and all other real and personal property and assets I possess (no matter how I obtained them) must be valued and disclosed to the Court and made subject to the disposition of the Bankruptcy Court. I understand that I may keep only those assets exempted by Bankruptcy Law or allowed by the Trustee or Court; AND THAT I CANNOT TRANSFER ASSETS TO THIRD PARTIES TO ESCAPE DISCLOSURES. I know that my attorney CANNOT promise me what assets I may keep as this depends upon information not available to my attorney at this time. I further understand that I must list all of my debts, even those I will continue to pay." (Bold caps in original).

The retainer agreement advised the plaintiff to disclose all assets, liabilities and that he could not transfer assets to third parties to escape disclosure. The defendant firm also prepared the voluntary bankruptcy petition, together with schedules and the Statement of Financial Affairs (SOFA). Plaintiff in responding to "yes or no" questions asked by the defendant firm to prepare bankruptcy filings, plaintiff stated he (1) had not transferred assets to anyone in the last 6 years (2) had not received loans from any friend or relative that was repaid in the past 12 months (3) had not made payments on debts to insiders such as relatives or partners within 1 year of the bankruptcy filing (4) did not make payment or transfer any property on account of debt that benefit an insider/family member within 1 year before bankruptcy filing (5) did not within 2 years of bankruptcy filing transfer any property to anyone.

Plaintiff swore to the truth and accuracy of the petition and executed the SOFA which stated "I have read the answers on this Statement of Financial Affairs and any attachments, and I declare under penalty of perjury that the answers are true and correct. I understand that making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$25,000, or imprisonment for up to 20 years, or both."

The bankruptcy petition was filed on April 11, 2016. Plaintiff reaffirmed the content of the bankruptcy petition on 5/20/2016 at the 341 meeting of the creditors conducted by Trustee Debra Kramer. Plaintiff acknowledged that he had read filings, was personally familiar with the information which was true and correct to the best of his knowledge but that there was one error. Plaintiff's attorney from defendant firm explains that question 16b should state plaintiff's debts are business debts and not consumer debts, and that plaintiff's real property corrected address is

130-03 122nd Street, South Ozone Park, NY. Plaintiff adopted the petition amendment statements by his attorney and stated he did not wish to make any other amendments to the petition.

Plaintiff, thereafter, provided inconsistent statements during the Rule § 2004 examination by Capital One regarding the origin and transfer of \$55,000 from an unknown source into plaintiff's account to hold for plaintiff's brother. The unknown source was subsequently identified as cousins. The transfer was made within one year of bankruptcy filing. Additionally, the Rule 2004 examination of plaintiff's father disclosed that plaintiff had borrowed \$120,000 for the purchase of plaintiff's medallion and that plaintiff had been repaying the loan within one year of bankruptcy filing. Plaintiff had not disclosed the information in his bankruptcy petition. In a January 2017 deposition, plaintiff revealed that he borrowed five thousand dollars from his brother instead of the less than one thousand dollars plaintiff previously disclosed. Plaintiff also revealed that he had borrowed money from several friends and made payments on the loans within 90 days immediately preceding the bankruptcy filing. Plaintiff also transferred \$29,000 to his brother, Harjinder Singh within the one year period prior to filing the bankruptcy petition despite having denied such transfer in question 7 and 8 on the SOFA. The Bankruptcy Court subsequently denied discharge based on plaintiff's material misstatements with fraudulent intent.

Plaintiff in opposition to defendant's motion to dismiss the complaint asserts that he was unsophisticated and that his attorney failed to make timely amendments. However, plaintiff's business acumen was sophisticated enough to obtain a \$840,000 loan to purchase a taxi medallion, acquire 1/4 interest in other real property valued at more than \$500,000, obtain other loans from friends and family and transfer at least \$55,000 to family members. Plaintiff affirmed his understanding of documents in support of the petition and did not indicate a language barrier requiring an interpreter during prior proceedings.

Additionally, Judge Craig concluded that plaintiff had knowledge of the falsehood of his statements; and so knowing, willfully, and intentionally swore to what was false. The Court noted that denial of bankruptcy is an extreme penalty and must be construed strictly against the objector and liberally in favor of the debtor. However, the Court noted that discharge in bankruptcy is a privilege, not a right and is reserved only for the honest but unfortunate debtor. citing *Christy v Kowalski*, 316 B.R. 596.600-01 (Bankr ED. NY 2004).

Judge Craig stated that the Court could deny a debtor discharge if "the debtor knowingly and fraudulently, in or connection with the case made a false oath or account. U.S.C. 747(a)(4) A. The Bankruptcy Court found that plaintiff Capital One established that (1) the debtor made a false statement under oath (2) the statement was false, (3) the debtor knew the statement was false (4) the debtor made the statement with intent to deceive and (5) the statement related materially to the bankruptcy case. The debtor Singh, thereafter, failed to provide evidence that the false statements were unintentional or provide a credible explanation.

In addition to a false homestead exemption claim where debtor Singh did not own the initial identified property or reside in the subsequent property that he owned, the Court found that debtor Singh made multiple false statements by failing to disclose transfers to family members and made undisclosed payments on loans to family members which denied the trustee an opportunity to determine whether the payments were recoverable as preferential transfers under 11U.S.Code § 547 including the transfer of \$55,000 for debtor Singh's bank account to his brother

as a preferential transfer or fraudulent conveyance.

While the debtor's attorney made amendments to submitted schedules, these corrections were made after the defects were uncovered. Judge Craig citing In the *Matter of Kilson*, 83 B.R. 198, 203 (D Conn 1988) stated ("[a]lthough amendments can cure defects in petitions, they are not evidence of innocent intent in a § 727 action where the debtor has changed his testimony or amended his when the change in testimony or amended schedules are precipitated by the trustee's persistence in uncovering the truth...). Nor has plaintiff alleged that defendant firm counseled him to testify falsely or hide assets. Judge Craig's decision noted that "the debtor is not exonerated by pleading that he or she relied on patently improper advice".

The Court finds that the documentary evidence shows that plaintiff's culpable conduct was the proximate cause of the denial of his bankruptcy discharge. Plaintiff's factual assertions of defendant's legal malpractice breach of duty is plainly contradicted by the factual evidence determined in the Judge Craig's decision of May 29, 2018 .

The Court also finds that plaintiff has not established that but for the defendant firm's alleged omission of unknown facts in the petition that he would have prevailed in the underlying bankruptcy proceeding. See *Betz v Blatt*, 160 AD 3d 696 (2nd Dept 2018). The Bankruptcy Court's decision found debtor's failure to disclose transfers to his brother and father is an example of classic fraud, citing *In re Kaiser*, 772 F. 2d 1574 (2d Cir 1983) and was part of an aggregate of false oaths that materially related to possible recovery of assets for the estate. Plaintiff "has not established its but for "case within a case" for damage review. See *DiPlacidi v Walsh*, 243 AD 2d 335 (1st Dept 1997) and *Katsoris v Bodner & Milone, LLP* 186 AD 3d 1504 (2020).

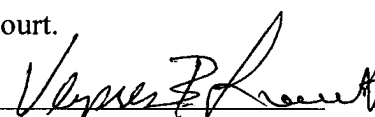
The Court further finds that the doctrine of collateral estoppel precludes the finding of plaintiff's culpable conduct in the bankruptcy case from being re-litigated in this legal malpractice action. See *Eighth Ave Garage Corp v Kaye Scholer, LLP*, 93 AD 3d 611 (1st Dept 2012) and *Gobindram v Ruskin Moscov Faltischek, PC*, 173 AD 3d 586 (2019). Judge Craig's May 29, 2018 decision was not appealed by plaintiff after he obtained new counsel in June 2018. Plaintiff's new counsel filed a motion to reconsider Judge Craig's decision. However, plaintiff's motion was subsequently withdrawn with prejudice on April 2, 2019. Judge Craig's decision and finding that plaintiff's "reckless disregard for the truth" and that "material misstatements with fraudulent intent" caused the denial of his discharge.

Plaintiff's cause of action for breach of fiduciary duty is dismissed as duplicative of plaintiff's legal malpractice cause of action. See *Antonelli v Guastamacchia*, 131 AD 3d 1078 (2nd Dept 2015).

Accordingly, based upon the documentary evidence presented including the decision of the Hon. Carla E. Craig dated May 29, 2018, defendant's motion to dismiss the complaint pursuant to CPLR §§ 3211(a)(1)(5) and (7) is granted.

This is the decision and order of this Court.

Dated: December 21, 2020


Ulysses B. Leverett, JSC

