SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH **PART** 12
Justice

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ROBERT GERRISH,

Plaintiff,

- v -

COLLAVINO CONSTRUCTION COMPANY LIMITED, COLLAVINO CONSTRUCTION COMPANY U.S.A., COLLAVINO STRUCTURES LLC,COLLAVINO CORP., NAVALIS COMPANY, INC.,NAVALIS CONSTRUCTION SERVICES, INC.,56 LEONARD LLC,LEND LEASE (US) CONSTRUCTION LMB INC,

Defendant.

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INDEX NO. 159408/2013

MOTION DATE 5/2/23

MOTION SEQ. NO. 005

DECISION AND ORDER ON MOTION

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COLLAVINO STRUCTURES LLC

Plaintiff,

-against-

NAVILLUS TILE INC. D/B/A NAVILLUS CONTRACTING

Defendant.

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Third-Party
Index No. 596090/2019

The following e-filed documents, listed by NYSCEF document number (Motion 005) 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207

were read on this motion to/for DISMISS.

Plaintiff filed a summons and complaint in this Labor Law action on October 11, 2013.[1] Through the course of discovery, counsel for defendants 56 Leonard LLC (56 Leonard), Lendlease (US) Construction LMB Inc. (Lendlease) and third-party defendant Navillus Tile Inc., d/b/a Navillus Contracting (Navillus Tile) (collectively, the moving defendants) recently learned that

[1] This matter has had a protected history, including to an unrelated appeal to the Court of Appeals, which has delayed its resolution.

plaintiff filed a Chapter 13 bankruptcy petition on January 25, 2019. *See* NYSCEF doc. no. 189, *In Re Gerrish*, Case No.19-22134.

In his bankruptcy petition, plaintiff affirmed that he does not have any claims against third parties. Plaintiff also omitted this action when listing the lawsuits to which he was a party within one year prior to filing the bankruptcy. On June 16, 2020, Justice Sean H. Lane issued an order confirming plaintiff's Chapter 13 bankruptcy plan. *See* NYSCEF doc. 190. Although the plan was scheduled to span approximately five years, the Court takes judicial notice that an order of discharge was entered on June 30, 2023, following the briefing and argument on this matter. *See In Re Gerrish*, Case No.19-22134, doc. no. 67.

Counsel for moving defendants affirms that plaintiff did not disclose his bankruptcy filing or exchange any information regarding the bankruptcy during the pendency of this action. Consequently, the moving defendants bring the instant motion to dismiss pursuant to CPLR 3211 (a) (1), (3), and (5) for plaintiff's failure to disclose this Labor Law lawsuit in his bankruptcy proceeding. Defendant/third-party plaintiff Collavino Structures LLC joins in the motion and adopts the moving defendants' arguments.

Plaintiff opposes the motion.

I. Lack of Capacity: CPLR 3211 (a) (3)

The gravamen of the moving defendants' motion is that plaintiff does not have the capacity to maintain this action because he did not disclose it in his bankruptcy proceeding. In opposition, plaintiff argues that the moving defendants failed to raise the affirmative defense of lack of capacity in their responsive pleadings and did not move to amend their answers, and, therefore, such defense is waived. Plaintiff also argues that, even if such defense has not been waived, he retains capacity to sue as a Chapter 13 debtor.

A. Waiver of Capacity Defense

Pursuant to CPLR 3211 (a) (3), an action may be dismissed on the ground that the party asserting the cause of action does not have capacity to sue. The First Department has held that, "[p]laintiff's failure to include the claims herein in his bankruptcy petition, when he knew or should have known of them at that time, deprives him of the legal capacity to sue...." *Mathus v Bouton's Bus. Machines, Inc.*, 78 AD3d 476 (1st Dept 2010).[2] However, any defense based on lack of capacity or standing to sue is waived by a party's failure to assert it in the answer or in a pre-answer motion to dismiss. *See* CPLR 3211 (e); *Symphony Fabrics Corp. v Creations By Aria, Inc.*, 111 AD2d 650, 651 (1st Dept 1985).

The first-party defendants have all failed to raise the defense of capacity or standing in their answers, have not moved to amend their answers, and did not avail themselves of a pre-answer motion to dismiss. Accordingly, they have all waived the affirmative defense of lack of capacity.

B. Lack of Capacity and Chapter 13 Bankruptcy

Unlike the first-party defendants, third-party defendant Navillus Tile does assert and preserve the defense that the claims against it cannot be maintained "pursuant to a discharge in bankruptcy."[3] See NYSCEF doc. no 104 at ¶ 13. Nevertheless, plaintiff's selection to file for Chapter 13 (payment plan) bankruptcy protection, rather than under Chapter 7 (liquidation) or Chapter 11 (reorganization) of the bankruptcy code, does not strip him of capacity to bring this action.

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[2] The nuances between a plaintiff's capacity to sue under Chapter 7, Chapter 11, and Chapter 13 of the bankruptcy code are discussed in subsection B herein.

[3] The first-party action was discontinued against Navillus Tile, although the change in caption was never effectuated to reflect such discontinuance. *See* NYSCEF doc. no. 22.

The Second, Third, and Fourth Departments have ruled that litigants in a Chapter 13 bankruptcy proceeding possess the requisite capacity to maintain an action not listed in the bankruptcy petition. *See Nicke v Schwartzapfel Partners, P.C.*, 148 AD3d 1168, 1170 (2d Dept 2017), citing *Olick v Parker & Parsley Petroleum Co.*, 145 F3d 513, 515 (2d Cir 1998) ("Although this Court has not previously ruled on the issue, we conclude that a Chapter 13 debtor, unlike a Chapter 7 debtor, has standing to litigate causes of action that are not part of a case under title 11"); *see also Collins v Suraci*, 110 AD3d 1214, 1215 (3d Dept 2013). Such rationale "...derives, in part, from the fact that, in a Chapter 13 proceeding, 'the creditors' recovery is drawn from the debtor's earnings, not from the assets of the bankruptcy estate; [hence,] it is only the [c]hapter 13 debtor who stands to gain or lose from efforts to pursue a cause of action that is an asset of the bankruptcy estate.'" *Collins v Suraci*, 110 AD3d 1214, 1215 n 1 (citation omitted).

Further, the Second Circuit "has unequivocally held that a Chapter 13 debtor may pursue litigation even if the action was not listed as an asset in the bankruptcy proceeding." *Taylor v City of New York*, 28 Misc 3d 1225(A) (NY County, Sup Ct 2010), citing *Olick v Parker & Parsley Petroleum Co.*, 145 F3d 513, 515 (2d Cir 1998). It is well settled law in the Appellate Division, First Department that when issues arise under the Bankruptcy Act, federal decisions are controlling "...even if they are in conflict with our own decisions." *Brenen v Dahlstrom Metallic Door Co.*, 189 AD 685, 688 (1st Dept 1919). Defendants cite to *Gray v City of New York*, 58 AD3d 448, 449 (1st Dept 2009) for the proposition that a bankruptcy debtor cannot sue on a cause of action not listed as an asset no matter under which chapter of the bankruptcy law he filed. However, the Second Circuit's holding in *Olick*, 145 F3d 513, and its progeny are controlling, despite the apparent conflict with the First Department's own decisions.

Accordingly, a Chapter 13 debtor has capacity to sue on a cause of action even if that claim was not listed as an asset in the bankruptcy proceeding. *See Taylor v City of New York*, 28 Misc 3d 1225(A) (NY County, Sup Ct 2010); *Olick v Parker & Parsley Petroleum Co.*, 145 F3d 513, 515 (2d Cir 1998). Thus, Navillus Tile's defense that the claims against it cannot be maintained pursuant to a discharge in bankruptcy is unavailing, as plaintiff, as a Chapter 13 debtor, retained his capacity to sue.[4]

II. Documentary Evidence: CPLR 3211 (a) (1)

Similarly, the documentary evidence pertaining to plaintiff's bankruptcy filing does not utterly refute the allegations in the complaint. *See* CPLR 3211 (a) (1). A motion pursuant to CPLR 3211 (a) (1) may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *See Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 (2002).

The moving defendants argue that plaintiff's bankruptcy petition and the confirmation of his bankruptcy conclusively demonstrate that the claims should be dismissed for plaintiff's lack of capacity. However, as discussed *supra*, the first party defendants have not preserved such affirmative defense nor is such defense meritorious. Therefore, the complaint is not dismissed on such ground.

III. Judicial Estoppel: CPLR 3211 (a) (5)

Lastly, moving defendants assert that CPLR 3211 (a) (5) bars plaintiff's recovery, arguing that his causes of action may not be maintained because of judicial estoppel. They argue that because plaintiff did not disclose his personal injury lawsuit as an asset in his bankruptcy petition, he is precluded from pursuing this action. Essentially, moving defendants argue that plaintiff

[4] The same rationale would apply to the first-party defendants if they had preserved their defense of capacity or standing, rendering any proposed amendment to include these defenses futile.

cannot disavow the existence of this action while also actively pursuing it. The moving defendants further argue that the Chapter 13 plan, which was judicially confirmed, failed to take into account any potential monies recovered in this suit, and, so, this action cannot survive.

In opposition, plaintiff argues that judicial estoppel does not yet inure here because no final determination has been made by the bankruptcy judge. Further, plaintiff asserts that he has amended his bankruptcy schedule, wherein he now lists the instant action. *See* NYSCEF doc. no. 200.

In the bankruptcy context, the doctrine of judicial estoppel "...bars a party from pursuing claims not listed in a bankruptcy proceeding that resulted in the party's discharge." *Koch v National Basketball Ass'n, Inc.*, 245 AD2d 230 (1st Dept 1997) (citations omitted). Judicial estoppel "...does not apply in the absence of a final determination in the bankruptcy proceeding endorsing the party's inconsistent position concerning his or her assets." *Id. at* 231.

Here, the final determination in the bankruptcy proceeding does not endorse the plaintiff's allegedly inconsistent position in both pursuing this action and failing to list it in his bankruptcy petition. Although plaintiff seemingly abandoned this action by failing to list it, he later amended his petition to include this matter. *See* NYSCEF doc. no. 200, Amended Schedule A/B, filed July 12, 2022. The bankruptcy court issued an order of discharge nearly a year later, on June 30, 2023. *See In Re Gerrish*, Case No.19-22134, doc. no. 67. Such discharge constitutes the final determination and does not endorse plaintiff's inconsistent positions, given his amended petition. Therefore, the moving defendants' motion to dismiss on the basis of judicial estoppel is denied.

IV. Conclusion

Accordingly, it is

ORDERED that the motion to dismiss of 56 Leonard LLC, Lendlease (US) Construction LMB Inc., and third-party defendant Navillus Tile Inc., d/b/a Navillus Contracting is denied; and it is further

ORDERED that such denial is without prejudice to seek redress through bankruptcy court, if available; and it is further

ORDERED that counsel are directed to e-file a proposed status conference order with respect to all outstanding discovery on or before October 31, 2023. A courtesy copy of such proposed order shall also be e-mailed directly to sfc-part12-clerk@nycourts.gov; and it is further

ORDERED that if counsel are unable to consent to a discovery schedule, counsel shall file a joint letter with the Court via NYSCEF on or before October 31, 2023 requesting a discovery conference and outlining the reasons that an agreement could not be reached. A courtesy copy of such letter shall also be e-mailed directly to sfc-part12-clerk@nycourts.gov; and it is further

ORDERED that the matter is to be scheduled for a control date on October 31, 2023, with no appearances necessary.

This constitutes the decision and order of the Court.

9/27/2023
DATE

LESLIE A. STROTH, J.S.C.

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