

Kavouras v Steel-More Contr. Corp.

2024 NY Slip Op 31643(U)

April 26, 2024

Supreme Court, Kings County

Docket Number: Index No. 25295/11

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of April, 2024.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.
-----X

ALEXANDROS KAVOURAS,
Plaintiff,

DECISION AND ORDER

-against-

Index No. 25295/11 (converted to e-filing)

STEEL-MORE CONTRACTING CORP.,
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,
MTA BRIDGES AND TUNNELS,
CCS CONSULTING SERVICES, INC., and
AMMANN & WHITNEY CONSULTING ENGINEERS, P.C.,

Mot. Seq. No. 14

Defendants:
-----X

The following e-filed papers read herein:

NYSCEF Doc No.:

Order to Show Cause, Supporting Affirmations, and Exhibits Annexed _____	<u>7-41</u>
Affirmations (Affidavits) in Opposition _____	<u>42; 43-47</u>
Reply Affirmations _____	<u>48</u>
Other Submissions _____	<u>48, 50-55, 56-57, 58-59, 60</u>

On March 3, 2014, plaintiff Alexandros Kavouras (plaintiff) and his nonparty spouse (collectively with plaintiff, the debtors) filed a joint voluntary petition for relief under chapter 13 of the Bankruptcy Code (the chapter 13 case) in the United States Bankruptcy Court for the Northern District of Ohio (the Bankruptcy Court). At the time, the debtors failed to list the instant (and then-already pending) action in their 11 USC § 521(a)(1) schedules of assets and liabilities (collectively, the “§ 521[a][1] schedule”). Thereafter, the debtors, in the course of their chapter 13 case, proposed and thereafter made

all payments (as well as fulfilled all their other obligations) under their confirmed chapter 13 plan. On June 28, 2019, the statutory trustee issued his final report and account stating that the chapter 13 case was fully administered, and that the confirmed chapter 13 plan paid a total of \$37,700 to satisfy the debtors' pre-bankruptcy claims. On July 2, 2019, the debtors obtained their bankruptcy discharge. By final decree, dated July 12, 2019, the chapter 13 case was closed.

Three years later, defendants herein, Triborough Bridge and Tunnel Authority and MTA Bridges and Tunnels, joined by codefendant Ammann & Whitney Consulting Engineers, P.C. (collectively, defendants), moved by order to show cause, dated December 14, 2022 (Kennedy, J.),¹ for leave, pursuant to CPLR 3025(b), to interpose their respective proposed amended answers and, upon granting such leave, for an order dismissing this action for lack of standing/capacity to sue, inasmuch as (and this fact was undisputed) the debtors' bankruptcy counsel had failed to include this action on the § 521(a)(1) schedule.

By order, dated January 11, 2023, the Court (Knipel, J.) held defendants' motion in abeyance – and stayed the instant action – “pending resolution of further proceedings in [the] Bankruptcy Court.”

By order, dated February 7, 2023, the Bankruptcy Court, after a hearing, reopened the chapter 13 case, pursuant to 11 USC § 350(b).

¹ Although the order to show cause expressly applied to defendants Triborough Bridge and Tunnel Authority and MTA Bridges and Tunnels, the Court treats it as encompassing codefendant Ammann & Whitney Consulting Engineers, P.C. as well.

On February 14, 2023, the debtors amended their § 521(a)(1) schedule by listing the instant action as plaintiff's (co-debtor's) asset.

Thereafter, defendants renewed – and plaintiff, likewise, reiterated his objection to – the instant motion for leave to amend and an order to dismiss (Motion Seq. No. 14).

Leave to amend is denied as palpably insufficient and devoid of merit. Contrary to defendants' contention, the doctrine of judicial estoppel is inapplicable here (*see Goodman v Skanska USA Civ., Inc.*, 169 AD3d 1010, 1013 [2d Dept 2019]). “The doctrine of judicial estoppel, which, in a bankruptcy context, bars a party from pursuing claims not [scheduled] in a bankruptcy [case] that resulted in the party's discharge, does not apply in the absence of a final determination in the bankruptcy [case] endorsing the party's inconsistent position concerning his or her assets” (*Koch v Natl. Basketball Assn., Inc.*, 245 AD2d 230, 230-231 [1st Dept 1997] [internal citation omitted]). Here, the Bankruptcy Court's revival of the original chapter 13 case pursuant to its order of reopening under 11 USC § 350(b) – together with the debtors' ensuing amendment of the § 521(a)(1) schedule to include the instant action as plaintiff's asset – nullified the original (but no longer) final determination upon which a judicial estoppel could have been (but upon which it can no longer be) predicated (*see Koch*, 245 AD2d at 231).

In addition, pursuant to 11 USC § 554(c), unless the Bankruptcy Court orders otherwise (which is not the instance here), “any property scheduled under section 521(a)(1) of this title [*i.e.*, title 11 of the United States Code, known as the Bankruptcy Code] not otherwise administered at the time of the closing of a case is *abandoned to the debtor* and administered for purposes of section 350 of this title” (emphasis added). Further,

“a Chapter 13 debtor . . . has standing to litigate causes of action that are *not* part of a case under title 11” (*Olick v Parker & Parsley Petroleum Co.*, 145 F3d 513, 515 [2d Cir 1998] [emphasis added]; *see also Maines v Last Chance Funding, Inc.*, 2018 WL 4558408, *7 [ED NY 2018], *amended on other grounds* 2018 WL 4610898 [ED NY 2018]).

Finally, “[t]o hold the Plaintiff[] accountable for [his] bankruptcy attorney’s mistake [in failing to initially list the instant action on the § 521(a)(1) schedule] – and to bar the Plaintiff[] from asserting claims against Defendants [in this action] because of an attorney error – would contradict the demands of justice” (*Leahey v SP Ctr., LLC*, 579 BR 13, 19 [SD NY 2017]).

Accordingly, it is

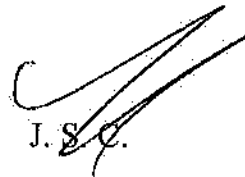
ORDERED that in Seq. No. 14, defendants’ motion is *denied in its entirety*; and it is further

ORDERED that plaintiff’s counsel shall electronically serve a copy of this decision and order with notice of entry on defendants’ respective counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the parties shall appear in Person in JCP on June 12, 2024 at 10:00 for Pre-trial Conference.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE