

Priola v Plan C 576, LLC
2024 NY Slip Op 35669(U)
November 20, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 624808/2019
Judge: George Nolan
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Short Form Order

Index No. 624808/2019

SUPREME COURT – STATE OF NEW YORK
PART 55 – SUFFOLK COUNTY**P R E S E N T:****Hon. George Nolan**

Justice Supreme Court

-----x
SUSAN PRIOLA,

Plaintiff,

-against-

PLAN C 576, LLC, MOREWOOD ASSOCIATES
OF MELVILLE, LLC, JOYMAR ASSOCIATES OF
MELVILLE, LLC AND DEROSA 576 LLC, AND
AMERICAN STORAGE AND TRANSPORT, INC.,
AL-LEE INSTALLATIONS, INC., AVISON
YOUNG PROJECT MANAGEMENT (USA), LLC,
AVISON YOUNG-NEW YORK, LLC,
AFFORDABLE INTERIOR SYSTEMS, INC., and
AIS, INC.,Defendants.
-----xMot. Seq. No. 004 – MD
Orig. Return Date: 02/13/2024
Mot. Submit Date: 08/15/2024Mot. Seq. No. 006 – MD
Orig. Return Date: 02/13/2024
Mot. Submit Date: 08/15/2024Mot. Seq. No. 007 – MD
Orig. Return Date: 02/13/2024
Mot. Submit Date: 08/15/2024Mot. Seq. No. 008 – MD
Orig. Return Date: 02/15/2024
Mot. Submit Date: 08/15/2024Mot. Seq. No. 010 – MD
Orig. Return Date: 04/18/2024
Mot. Submit Date: 08/15/2024Mot. Seq. No. 011 – MD
Orig. Return Date: 04/18/2024
Mot. Submit Date: 08/15/2024Mot. Seq. No. 012 – MD
Orig. Return Date: 04/19/2024
Mot. Submit Date: 08/15/2024Mot. Seq. No. 013 – XMG
Orig. Return Date: 06/27/2024
Mot. Submit Date: 08/15/2024**PLAINTIFF'S ATTORNEY**
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Upon the e-filed documents numbered 208 through 237, 241 through 258, 287 through 321, 323 through 326, 328 through 381 and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

ORDERED that the following motions and cross-motion are consolidated solely for purposes of this decision and order and, as so consolidated, are determined as set forth hereinafter; and it is further

ORDERED that the motion by defendant American Storage and Transport, Inc., (motion sequence no. 004) for an order dismissing plaintiff's complaint pursuant to the Doctrine of Judicial Estoppel; dismissing plaintiff's complaint pursuant to CPLR 3211(a)(1); granting leave to amend its answer pursuant to 3025(b) to assert the affirmative defenses of bankruptcy, lack of capacity, lack of standing and deeming the amended verified answer served; for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(3) for lack of legal capacity and/or legal standing; and for costs pursuant to CPLR 8303-a, is denied; and it is further

ORDERED that the motion by defendant Affordable Interior Systems, Inc. d/b/a AIS i/s/h/a AIS, Inc., (motion sequence no. 006) for an order granting leave to amend its answer pursuant to 3025(b) to assert the affirmative defenses of bankruptcy, lack of capacity, lack of standing and deeming the amended verified answer served; for an order dismissing plaintiff's complaint pursuant to the Doctrine of Judicial Estoppel; for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(1); for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(3) for lack of legal capacity and/or legal standing; and for costs pursuant to CPLR 8303-a, is denied; and it is further

ORDERED that the motion by defendant Studio Office Solutions LLC (motion sequence no. 007), for an order dismissing plaintiff's complaint pursuant to the Doctrine of Judicial Estoppel; for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(1); granting leave to amend its answer pursuant to 3025(b) to assert the affirmative defenses of bankruptcy, lack of capacity, lack of standing and deeming the amended verified answer served; for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(3) for lack of legal capacity and/or legal standing, is denied; and it is further

ORDERED that the motion by defendant AL-LEE Installations, (motion sequence no. 008) for an order granting leave to amend its answer pursuant to 3025(b) to assert the affirmative defenses of lack of capacity and judicial estoppel; for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(3) for lack of capacity to sue; for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(1), (7) based on judicial estoppel, is denied; and it is further

ORDERED that the motion by defendant Plan C 576, Morwood Associates of Melville, LLC, Joymar Associates of Melville, LLC and Derosa 576, LLC, (motion sequence no. 010) for an order granting leave to amend its answer pursuant to 3025(b) to assert the affirmative defenses of lack of capacity, lack of standing, judicial estoppel and the defense that the complaint should be dismissed based on the fact that the plaintiff failed to disclose the instant lawsuit in her Bankruptcy Petition prior to the bankruptcy discharge and deeming the amended verified answer served; for a further order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(1), CPLR

3211(a)(3) and CPLR 3211(a)(5) for lack of legal capacity and/or legal standing, judicial estoppel and for failure to disclose the instant lawsuit in her Bankruptcy Petition; is denied; and it is further

ORDERED that the motion by defendant PPT Management LLC, (motion sequence no. 011) for an order pursuant to CPLR 3211(a)(1), (3) dismissing plaintiff's complaint as well as any and all third-party actions and any cross claims against defendant PPT Management LLC; granting leave to amend its answer pursuant to 3025(b) to assert the affirmative defenses of bankruptcy, lack of capacity lack of standing and deeming the amended verified answer served is denied; and it is further

ORDERED that the motion by defendant Avison Young Project Management (USA) LLC and Avison Young-New York LLC., (motion sequence no. 012) for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(3) for lack of legal capacity and/or legal standing; dismissing plaintiff's complaint pursuant to the Doctrine of Judicial Estoppel; dismissing plaintiff's complaint pursuant to CPLR 3211(a)(1) upon documentary evidence; granting leave to amend its answer pursuant to 3025(b) to assert the affirmative defenses of lack of capacity, lack of standing and judicial estoppel and deeming the amended verified answer served; and for costs pursuant to CPLR 8303-a, is denied; and it is further

ORDERED that the plaintiff's cross motion (motion sequence no. 013) for an order pursuant to CPLR 3025 and CPLR 2001 granting leave to amend and serve a fourth supplemental summons and verified complaint is granted.

Plaintiff commenced this action by filing a summons and verified complaint on December 22, 2019. According to the submissions, plaintiff claims personal injury damages resulting from an alleged trip and fall accident that occurred on May 28, 2019, at 576 Broadhollow Road in Melville, New York. On October 1, 2021, plaintiff filed for Chapter 7 Bankruptcy in the Eastern District of New York but failed to list the instant action as a potential asset in the bankruptcy filing. On January 4, 2022, United State Bankruptcy Court Judge Alan S. Trust entered an Order of Discharge and Final Decree granting plaintiff a discharge. On January 17, 2024, plaintiff's bankruptcy attorney moved to reopen the bankruptcy case to add the within personal injury action as an asset. On March 13, 2024, Judge Alan S. Trust granted plaintiff's application to re-open the bankruptcy case and add the personal injury case as an asset and directed that the United States Trustee's office appoint an interim trustee and R. Kenneth Barnard was appointed. By order dated April 12, 2024, Judge Alan S. Trust ruled that the plaintiff's personal injury action constitutes property of the bankruptcy estate and "shall be continued in the name of the estate." Further, the order directed that the trustee be named or substituted as the plaintiff in the personal injury action.

Defendants move to dismiss the complaint pursuant to, *inter alia*, CPLR 3211(a)(3), alleging that plaintiff does not have legal capacity to sue because this action was not originally listed in her Chapter 7 bankruptcy petition.

"Capacity to sue concerns a litigant's power to appear and bring a grievance before the court" (*Nicke v. Schwartzapfel Partners, P.C.*, 148 AD3d 1168, 51 NYS3d 121 [2d Dept 2017], citing *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 NY2d 148, 615 NYS2d 644 [1994]). The commencement of a bankruptcy proceeding creates an "estate" that is comprised of

all legal or equitable interests of the debtor in property as of the commencement of the case. Upon filing a voluntary bankruptcy petition, all property which a debtor owns, including a cause of action, vests in the bankruptcy estate (*Nicke v. Schwartzapfel Partners, P.C.*, 148 AD3d 1168, 51 NYS3d 121 [2d Dept 2017]). [A] debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on his or her own behalf (*Burbacki v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, 172 AD3d 1300, 99 NYS3d 671 [2d Dept 2019] [internal citations and quotation marks omitted]).

Here, plaintiff commenced the instant action on December 22, 2019, prior to filing her bankruptcy petition. Defendants contend that plaintiff lost her capacity to sue when she failed to disclose this action on her October 1, 2021, bankruptcy filing. Defendants argue since the plaintiff had an interest in this negligence action as of the commencement of the bankruptcy petition, the action is property of the bankruptcy estate, and the plaintiff lacks the legal capacity to sue.

However, an order was issued by the Eastern District Bankruptcy Court on April 12, 2024, permitting plaintiff to amend her petition to include the instant action and authorizing the retention of plaintiff's attorney to continue to pursue this case on behalf of the bankruptcy trustee. It is axiomatic that bankruptcy matters are reserved solely for the Federal Courts and 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 Misc3d 874, 850 NYS2d 841 [Gische, J. Sup. Ct. 2008]; *see generally* 11 USC § 105, et. seq.). As the bankruptcy court has appointed litigation counsel for the instant matter, and added this case to plaintiff's schedule of assets, and as this court is bound by the decision of the bankruptcy court, the defendants' motions seeking dismissal for failure to list this matter as an asset on plaintiff's bankruptcy schedule must be denied and plaintiff's cross motion to amend and serve a supplemental summons and complaint must be granted.

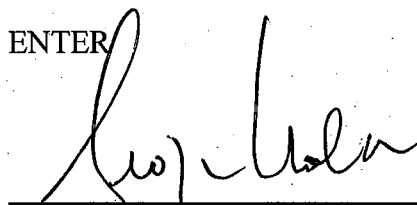
Lastly, moving defendants assert that CPLR 3211(a)(5) bars plaintiff's recovery, arguing that her causes of action may not be maintained based on judicial estoppel. Defendants contend that plaintiff's failure to disclose her personal injury lawsuit as an asset in her bankruptcy petition precludes her from pursuing this action. Essentially, moving defendants argue that plaintiff cannot disavow the existence of this action while also actively pursuing it. While it is true, in the bankruptcy context, the doctrine of judicial estoppel "...bars a party from pursuing claims not listed in the bankruptcy proceeding that resulted in the party's discharge" (*Koch v. National Basketball Ass'n, Inc.*, 245 AD2d 230, 666 NYS2d 630 [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, inasmuch as the bankruptcy court permitted plaintiff to re-open her case, this Court finds that plaintiff is not judicially estopped from bringing the instant action. Although judicial estoppel may bar a party from pursuing claims not previously listed, there must be a final determination from the bankruptcy court (*Goodman v. Skanska USA Civ., Inc.*, 169 AD3d 1010, 95 NYS3d 243 [2d Dept 2019]) and a reopening of the bankruptcy proceeding nullifies "the final determination upon which. . . judicial estoppel could be predicated" (*id.*).

Accordingly, defendants' motions for leave to amend are denied as palpably insufficient and devoid of merit as contrary to defendants' contention, the doctrine of judicial estoppel is inapplicable here (see *Goodman v. Skanska USA Civ., Inc.*, 169 AD3d 1010, 95 NYS3d 243 [2d Dept 2019]).

The parties are reminded that this matter is scheduled for a further compliance conference before the undersigned on December 5, 2024, at 9:30 a.m.

The foregoing constitutes the decision and Order of the Court.

ENTER



HON. GEORGE NOLAN, J.S.C.

DATE: November 20, 2024
Riverhead, NY

 FINAL DISPOSITION

 X NON-FINAL DISPOSITION