To be Argued by:
DIMITRIOS KOUROUKLIS
(Time Requested: 30 Minutes)

APL-2020-00024
Queens County Clerk's Index No. 12550/14
Appellate Division–Second Department Docket No. 2018-02637

Court of Appeals

of the

State of New York

CHANTAL JEAN-PAUL,

Plaintiff-Appellant,

– against –

67-30 DARTMOUTH ST. OWNERS CORP.,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

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Date Completed: May 15, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Regulations

PRELIMINARY STATEMENT

This brief is submitted by Plaintiff-Appellant Chantal Jean-Paul in support of her appeal from the Order of the Appellate Division, Second Department, dated July 31, 2019 (R. 392-393).[1], which affirmed the Order of the Supreme Court of the State of New York, Queens County (Raffaele, J.), dated November 3, 2017 and entered with the Supreme Court, Queens County Clerk's Office on December 14, 2017, which improvidently granted the prong of Defendant-Respondent 67-30 Dartmouth St. Owner's Corp's ("Dartmouth") motion which sought summary judgment and dismissal of the Plaintiff-Appellant's complaint. (R. 4-8).

The issue in this case is whether a personal injury action, which was not listed on the schedule of assets in a bankruptcy petition, revested back to the plaintiff upon dismissal of her bankruptcy proceeding where there was never any assessment, administration or restructuring of the bankruptcy estate prior to the dismissal of the bankruptcy action. The crux of this issue focuses on the application of the clear and unambiguous statutory language of 11 U.S.C. § 349 and its application within the legislative intent of Congress.

Plaintiff-Appellant seeks this Court's guidance because various New York tribunals have applied 11 U.S.C. § 349 differently, which has resulted in inconsistent

[1] References to the Record on Appeal are denoted as (R. __).

rulings. The Appellate Division, First Department and the United States Court of Appeals for the Second Circuit have issued rulings, which properly apply 11 U.S.C. § 349, within the clear and unambiguous language of the statute. The Appellate Division, Second Department and the trial courts within this jurisdiction handle this very issue in a different manner. These courts have either added additional language to 11 U.S.C § 349 that Congress never intended to be include or misapplied different bankruptcy principles in reaching its holding. The terms dismissal versus discharge in the context of Chapter 7 and Chapter 11 bankruptcy proceedings have different meanings. It is also important that when interpreting and applying actions from a related bankruptcy proceeding to a case before a court that there is a proper identification of the type of bankruptcy proceeding was commenced and what the final outcome was in that proceeding . A dismissal in a Chapter 7 bankruptcy action can be significantly different from a dismissal in a Chapter 11 bankruptcy action because in a Chapter 11 bankruptcy action a dismissal can result after a debtor's debts have been reorganized or paid off. *See* pp. 19-20 n. 2-4. In a Chapter 7 bankruptcy proceeding, the action may be dismissed, as is the case here, before there was any administration of the bankruptcy estate. Proper identification of the underlying bankruptcy proceeding and its outcome is thus paramount when determining whether a litigant has the standing to pursue a cause of action,

counterclaim, or cross-claim, which was inadvertently not listed as an asset in the bankruptcy action, in a separate action.

Here, Plaintiff-Appellant challenges the lower court and the Appellate Division, Second Department's interpretation of the 11 U.S.C. § 349(b)(3). It is respectfully submitted that these courts failed to properly interpret the clear and unambiguous language of 11 U.S.C. § 349, which revests property of the estate back to the owner of said property upon the dismissal of a bankruptcy proceeding. Instead, the Appellate Division, Second Department and the trial court improperly determined that Plaintiff-Appellant lacked standing to pursue her personal injury action because the lawsuit was not listed as an asset in a bankruptcy proceeding, which was dismissed before the holding of the creditors meeting, before the estate could be administered and before the trustee could object to the discharge of the debtor. Accordingly, Plaintiff-Appellant's personal injury action was dismissed.

The Appellate Division, Second Department and the trial court are conditioning the revestment of assets back to its owner on the asset being listed in the schedule of assets in the bankruptcy proceeding prior to the dismissal of the bankruptcy action. In doing so, these courts have misapplied complex bankruptcy principles and provided for their own interpretation of 11 U.S.C. § 349(b)(3) rather than properly apply the clear and unambiguous language of the statute in accordance with the Congress' legislative intent. It is respectfully submitted that in cases, such

as the instant matter, where the underlying bankruptcy action has been dismissed before there was any assessment of the bankruptcy estate or administration of the estate or the debtor's debts, the asset revests back to the owner as if the bankruptcy action never occurred, irrespective of whether or not the asset was listed on the schedule of assets in the bankruptcy proceeding, in accordance with the provisions set forth in 11 U.S.C. § 349(b)(3), which does not contain any condition for the revestment of debtor assets after a bankruptcy proceeding has been dismissed.

In addition, the other issue before this Court is whether the doctrine of judicial estoppel precludes Plaintiff-Appellant from pursuing her personal injury action. This issue was never addressed by the trial court or the Appellate Division, Second Department. If this Court considers this issue, Plaintiff-Appellant respectfully submits that this doctrine is not applicable to the case at bar because there was never a final determination made in the bankruptcy action prior to the dismissal of the bankruptcy proceeding.

It is respectfully submitted that this Court should reverse the lower court's Order and the Appellate Division, Second Department's Order, and permit Plaintiff-Appellant to proceed with her personal injury action against Defendant-Respondent Dartmouth. The Plaintiff-Appellant's personal injury lawsuit revested back to her, pursuant to 11 U.S.C. § 349(b)(3), when her bankruptcy action was dismissed before there was ever an assessment of the bankruptcy estate by the trustee in that

bankruptcy proceeding. As Hon. Justice Raffaele stated in his November 3, 2017 Order, "this court deems it unfair that to allow a defendant who may have caused or failed to remove a dangerous condition which caused plaintiff's injury to walk away without responsibility." (R. 8).

JURISDICTION

The Appellate Division, Second Department Decision and Order appealed from was entered on July 31, 2019 and served with notice of entry on August 5, 2019. (R. 391-394). On or about September 26, 2019, Plaintiff-Appellant filed a motion in the New York State Court of Appeals seeking leave to appeal to the New York State Court of Appeals. On February 18, 2020, Plaintiff-Appellant's motion was granted. (R. 390). This Court has jurisdiction to entertain the appeal pursuant to CPLR § 5602(a)(1)(i). The questions presented are questions of law reviewable by this Court.

QUESTIONS PRESENTED

1. Does a cause of action, which was not listed as an asset in a Chapter 7 bankruptcy proceeding, revest back to the litigant, pursuant to 11 U.S.C. § 349(b)(3), when the Chapter 7 bankruptcy action is dismissed prior to the administration of the bankruptcy estate or before any restructuring of the debtor's debts occurs?

2. Is the Plaintiff-Appellant judicially estopped from pursuing her personal injury action after her bankruptcy action was dismissed and before there was any administration or assessment of the bankruptcy estate?

STATEMENT OF THE CASE

A. PLAINTIFF-APPELLANT'S PERSONAL INJURY ACTION

Plaintiff-Appellant was involved in a slip and fall accident that occurred on April 23, 2013 at 67-30 Dartmouth Street, Forest Hills, New York. (R 27-28). The subject property is owned by the Defendant-Respondent Dartmouth. (R. 27 and 31-34). Plaintiff-Appellant's accident was caused by a wet condition that existed on the steps of the subject premises. As a result of her accident, Plaintiff-Appellant sustained an acute meniscal tear in her left knee. (R. 36). Ms. Jean-Paul underwent arthroscopic surgery on her left knee. (R. 358). On July 8, 2016, Plaintiff-Appellant underwent total left knee replacement surgery. (R. 184).

Plaintiff-Appellant commenced this action by filing a Summons and Complaint. (R. 26-29). Defendant-Respondent interposed an Answer to the Complaint. (R. 31-34).

B. PLAINTIFF-APPELLANT'S 2015 BANKRUPTCY ACTION

On October 1, 2015, Plaintiff-Appellant filed an individual petition for Chapter 7 bankruptcy in the Bankruptcy Court for the Eastern District of New York. (R. 276-331). The bankruptcy petition was prepared by Stephen Flynn, Plaintiff-

Appellant's bankruptcy attorney. (R. 276-331 and 375). Plaintiff-Appellant did not physically sign the Chapter 7 bankruptcy petition. (R. 276-331).

On January 28, 2016, the trustee filed a motion to dismiss the bankruptcy action pursuant to 11 U.S.C. § 707 (b) because of Plaintiff-Appellant's failure to appear at the meeting of creditors as mandated under 11 U.S.C. § 341(a) and the trustee was thus unable to effectively administer the case. (R. 332). On May 10, 2016, United States Bankruptcy Judge Elizabeth S. Strong issued an Order dismissing the Plaintiff-Appellant's Chapter 7 bankruptcy action. (R. 333). On May 31, 2016, the bankruptcy trustee was discharged. *Id.*

C. BANKRUPTCY STATUTE AT ISSUE

11 U.S.C. § 349(b)(3) states "(b) [u]nless the court, for cause, orders otherwise, a dismissal of the case other than under section 742 of this title – (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title."

D. DEFENDANT-RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On or about February 6, 2017, Defendant-Respondent filed a motion with the Supreme Court, Queens County Clerk's Office. (R. 9-340) which sought various relief. Defendant-Respondent's motion sought to restore the case to the active calendar, to amend the Answer to assert the affirmative defenses of lack of capacity to sue, lack of standing to sue, and judicial estoppel, and for summary judgment. (R.

9-24). With regard to the summary judgment prong of Defendant-Respondent's motion, Dartmouth argued that Plaintiff-Appellant lacked standing and legal capacity to further litigate her personal injury action because the personal injury action was not listed as an asset in Plaintiff-Appellant's bankruptcy proceeding. *Id.* Defendant-Respondent also argued that Plaintiff-Appellant was judicially estopped from litigating this action because such action would constitute an inconsistent position from the position in the bankruptcy action.

Plaintiff-Appellant submitted opposition papers to Defendant-Respondent's motion for summary judgment. (R. 341-376). In her opposition, Plaintiff-Appellant argued that Ms. Jean-Paul had the capacity to sue Dartmouth and was not barred by the doctrine of judicial estoppel. Plaintiff-Appellant argued that the doctrine of judicial estoppel did not apply because a final determination was never reached in the bankruptcy action. Plaintiff-Appellant further argued that the dismissal of the bankruptcy proceeding revested the property of the estate back to the Plaintiff. (R. 341-352).

Defendant-Respondent submitted reply papers in further support of its motion for summary judgment. (R. 377-386). Defendant-Respondent argued that Ms. Jean-Paul was judicially estopped from suing Dartmouth and that this action should be dismissed. Defendant-Respondent further argued that it was entitled to summary judgment because Plaintiff-Appellant never acted in good faith because she did not

list the instant action as an asset on her bankruptcy petition. It should be pointed out that it was the Plaintiff-Appellant's bankruptcy attorney who prepared the bankruptcy petition using boilerplate and pre-printed forms and filed same with the Bankruptcy Court.

Hon. Justice Thomas D. Raffaele issued a decision, dated November 3, 2017, and entered with the Supreme Court, Queens County Clerk's Office on December 14, 2017, which improperly granted Defendant-Respondent's motion. (R. 4-8). Despite all of the case law that supports Plaintiff-Appellant's position that she had standing and the capacity to maintain the instant personal injury action, Hon. Justice Raffaele dismissed Plaintiff-Appellant's personal injury action on these grounds. Hon. Justice Raffaele did not address Defendant-Respondent's argument that Plaintiff-Appellant was barred from suing Dartmouth under the doctrine of judicial estoppel. *Id.*

Plaintiff-Appellant timely served and filed a Notice of Appeal of Hon. Justice Raffaele's November 3, 2017 Order. (R. 3-8).

E. THE APPELLATE DIVISION SECOND DEPARTMENT'S AFFIRMED THE TRIAL COURT'S NOVEMBER 3, 2017 ORDER

On September 28, 2018, Plaintiff-Appellant perfected her appeal of Hon. Justice Raffaele's November 3, 2017 Order by filing her appellant's brief and record on appeal with the Clerk's Office at the Appellate Division, Second Department.

The appeal was fully briefed by all parties and oral argument was held on May 9, 2019. (R. 392).

On July 31, 2019, the Appellate Division, Second Department issued a Decision and Order, which affirmed the November 3, 2017 Order of Hon. Justice Raffaele. (R. 392-393). In its holding, the Appellate Division, Second Department agreed with the trial court's determination that the Plaintiff-Appellant lacked the legal capacity to sue because her personal injury action was not listed as an asset in her bankruptcy petition, even though this bankruptcy proceeding was dismissed in May of 2016. *Id.*

F. PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

On September 26, 2019, Plaintiff-Appellant filed a motion, which was served on September 9, 2019, seeking leave from the New York State Court of Appeals to appeal the Appellate Division, Second Department's July 31, 2019 Decision and Order (R. 392-393), which affirmed the trial court's decision, which had granted the Defendant-Respondent's motion for summary judgment. In her motion, Plaintiff-Appellant argued that the New York State Court of Appeals should grant leave to consider her appeal because there was no uniformity amongst New York Courts with respect to the interpretation of 11 U.S.C § 349(b)(3) after a bankruptcy proceeding is dismissed. The issue that needs to be addressed by this Court was does a plaintiff have the capacity to sue or, in this case, to continue a legal action against a party

when the personal injury action was not listed as an asset in a bankruptcy proceeding, which was dismissed before there was any discharge of the debtor's debts or before any administration of the assets or restructuring of the debts could occur. Plaintiff argued in her motion that the Appellate Division, First Department and the United States Court of Appeals for the Second Circuit both follow the statutory language of 11 U.S.C. § 349 in accordance with Congress' legislative intent while the Appellate Division, Second Department provided its own interpretation of the aforementioned statute.

Defendant-Respondent submitted opposition to Plaintiff-Appellant's motion arguing that that the motion should be denied because Plaintiff-Appellant failed to raise an issue of law or conflict amongst New York Courts to warrant review of the issue of standing by this Court.

On February 18, 2020, this Court issued an Order granting Plaintiff-Appellant leave to appeal the Appellate Division, Second Department's July 31, 2019 Order to the New York State Court of Appeals. (R. 390.)

ARGUMENT

THE LOWER COURT AND THE APPELLATE COURT ERRED IN FINDING THAT THE PLAINTIFF-APPELLANT LACKED STANDING OR THE LEGAL CAPACITY TO SUE DEFENDANT-APPELLANT DARTMOUTH

A. THE STANDARD FOR INTERPRETATION OF A STATUTE

Statutory construction is the function of the courts. *Mounting & Finishing Co.* v. *McGoldrick,* 294 N.Y. 104 (1945). The courts are responsible for definitively resolving the legal question of the applicability of a statute to a particular situation *(Meier* v. *Ma-Do Bars,* 106 A.D.2d 143, 484 N.Y.S.2d 719 (3d Dep't. 1985)) and are constitutionally bound to give effect to the expressed will of the Legislature *(Finger Lakes Racing Assoc.* v. *New York State Racing* & *Wagering Bd.,* 45 N.Y.2d 471, 410 N.Y.S.2d 268 (1978)).

It is well settled that rules of construction, including those that call for reference to legislative history, are to be invoked only where the language of the statute leaves its purpose and intent uncertain. N.Y. Stat. Law § 76 (McKinney 2020). Where statutes are framed in plain language, an attempt to construe them is superfluous, and should be avoided. *Matter of Auerbach v. Board of Educ. of City Sch. Dist. of City of N.Y.*, 86 N.Y.2d 198, 204, 630 N.Y.S.2d 698 (1995). In such an instance, the function of the court is to enforce the statute, and not to usurp the power of the Legislature. *Rochester Community Sav. Bank v. Board of Assessors*, 248 A.D.2d 949, 950, 669 N.Y.S.2d 1008 (4th Dep't 1998). "To interpret a statute where

there is no need for interpretation, to conjecture about or to add or to subtract from words having a definite meaning, or to engraft exceptions where non exist are trespasses by a court upon the legislative domain." N.Y. Stat. Law § 76, cmt. (McKinney 2020); *see also Oneida Sav. Bank of Oneida v. Tese*, 108 A.D.2d 1042, 1043, 485 N.Y.S.2d 614 (3d Dep't 1985).

Courts should construe statutes to avoid objectionable, unreasonable, or absurd consequence. When presented with a question of statutory interpretation, the Court's primary consideration is to ascertain and give effect to the intention of the legislature. *Samiento v. World Yacht, Inc.*, 10 N.Y.2d 70, 77-78, 854 N.Y.S.2d 83 (2008); *see also Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966 (1998). The clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. *Majewski*, 91 N.Y.2d at 583; *see also Matter of Avella v. City of New York*, 29 N.Y.3d 425, 434, 58 N.Y.S.3d 236 (2017).

This Court has repeatedly held that "courts should construe unambiguous language to give effect to its plain meaning." *Matter of DaimlerChrysler Corp.*, 7 N.Y.3d 653, 660, 827 N.Y.S.2d 88 (2006). "Absent ambiguity the courts may not resort to rules of construction to [alter] the scope and application of a statute" because no such rule "gives the court discretion to declare the intent of the law when

the words are unequivocal." *Bender v. Jamaica Hosp.*, 40 N.Y.2d 560, 562, 388 N.Y.S.2d 269 (1976). It has been understood that "[t]he Legislature is presumed to mean what it says." *Kuzmich v. 50 Murray St. Acquisition LLC*, 34 N.Y.3d 84, 92, 108 N.Y.S.3d 431 (2019).

Here, the language in 11 U.S.C. § 349 is clear and unambiguous. The provision of 11 U.S.C. § 349 for revesting of assets is broad because it makes no distinction between those that were listed in the debtor's schedule of assets and those that were not; what is revested in the immediately-pre-petition owner or owners is the property of the estate. *Crawford v. Franklin Credit Mgmt.*, 758 F.3d 473, 484 (2d Cir. 2014).

The legislative intent makes clear that Congress intended that a dismissal would undo the bankruptcy. Specifically, "[s]ubsection (b) specifies that the dismissal [inter alia] revests the property of the estate in the entity in which the property was vested at the commencement of the case … The basic purpose of the subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case." *Id.* at 485 *citing* H.R. Rep. No. 95-595 at 338 (1977). Since a dismissal undoes the bankruptcy case, there is, upon dismissal, no longer any bankruptcy estate; and hence, there is no longer any property of the estate. *Id.*; *see also SEC v. Great White Marine & Recreation, Inc.*, 428 F.3d 553,556 (5th Cir. 2005). Thus, it is self-evident

that there is no "estate" and hence no "property of the estate" unless there is an existing position. *In re De Jesus Saez*, 721 F.2d 848, 851 (1st Cir. 1983).

Here, when the Plaintiff-Appellant's bankruptcy action was dismissed, pursuant to clear and unambiguous language of 11 U.S.C. § 349, the personal injury action revested back to the Plaintiff-Appellant. When the personal injury action revested back to Ms. Jean-Paul, she now had the legal standing and capacity to proceed with her personal injury action like she did prior to the commencement of the Chapter 7 bankruptcy proceeding.

Moreover, it is also important to note that in the Plaintiff-Appellant's bankruptcy proceeding the initial meeting of creditors as mandated under 11 U.S.C. § 341(a) was never held. There was never an assessment of Ms. Jean-Paul's estate by the bankruptcy trustee. Accordingly, the trustee was thus unable to effectively administer and/or assess the case and the Plaintiff-Appellant's estate. No debt was restructured or dealt with in the Plaintiff-Appellant's bankruptcy proceeding. No objection was filed by the trustee with regard to the discharge of the debtor.

Presented below is an analysis of holdings from different jurisdictions in New York State. The Appellate Division, First Department and the United States Court of Appeals for the Second Circuit strictly apply 11 U.S.C. § 349. The cases from the Appellate Division, Second Department and the trial courts within this jurisdiction misapply different bankruptcy terms and misapply the facts and holdings

from other cases, which causes a great deal of confusion and thus results in inconsistent case law. In addition to misapplying different holdings, the Appellate Division, Second Department improperly adds conditional language to 11 U.S.C. § 349. There is no such language in the aforementioned statute stating that a litigant loses their standing or legal capacity to pursue a claim if the claim is not listed in the schedule of assets nor is there reference to a bankruptcy code statute that directs same.

B. THE APPELLATE DIVISION, FIRST DEPARTMENT AND THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT APPLY 11 U.S.C. § 349 AS DRAFTED BY CONGRESS AND IN ACCORDANCE WITH CONGRESS' LEGISLATIVE INTENTIONS.

The Appellate Division, First Department and the United States Court of Appeals for the Second Circuit have issued rulings wherein these courts properly interpreted and applied 11 U.S.C. § 349 strictly based upon the language of the statute. Moreover, these courts did not insert any other language or conditions when issuing their rulings.

In *B.N. Realty Assoc. v. Lichtenstein*, 21 A.D.3d 793, 801 N.Y.S.2d 271 (1st Dep't 2005), the Appellate Division, First Department affirmed the portion of the trial court's decision which denied the plaintiff's motion for summary judgment on the issue of standing. The defendant had failed to list his counterclaims, setoffs, or affirmative defenses against the plaintiff in his bankruptcy petition. The Appellate Division, First Department held that the defendant had legal standing to pursue his

counterclaims, setoffs, and affirmative defenses because his bankruptcy action was dismissed before there had been any administration of the assets or restructuring of the defendant's debts. The Appellate Division, First Department further held that since the defendant did not obtain "the functional equivalent of a discharge" as a result of the bankruptcy filing, the dismissal of the bankruptcy action had the effect of restoring defendant's standing to assert his counterclaims, defenses and offsets in this action for rental arrears. *Id.* at 798. The holding in *B.N. Realty Assoc.* is directly on point to the instant case because the Plaintiff-Appellant's bankruptcy action was dismissed before there had been any administration of the assets or restructuring of Ms. Jean-Paul's debts.

In *Crawford*, the Court of Appeals for the Second Circuit reversed the district court's holding which found that plaintiff Crawford lacked standing to bring causes of action against the defendants for fraudulently procuring a mortgage on her home and thereafter sought foreclosure on her home. The district court held that the plaintiff's claims against the defendants did not revest back to her when the 2006 bankruptcy action was dismissed because the plaintiff failed to list these claims as an asset in the bankruptcy action. However, the Court of Appeals for the Second Circuit held that the unscheduled assets revested back to the plaintiff upon the dismissal of the bankruptcy action by operation of law pursuant to 11 U.S.C. § 349. The Court of Appeals ruled that "[t]he provision of § 349 for the revesting of the

assets is similarly broad: It makes no distinction between those that were listed in the debtor's schedule of assets and those that were not; what is revested in the immediately-pre-petition owner or owners is 'the property of the estate.'" *Crawford*, 758 F.3d at 484-485. The Court of Appeals further noted that it was Congress' intention that a dismissal of a bankruptcy action would undo the bankruptcy case. *Id*. at 485.

Here, when the Plaintiff-Appellant's bankruptcy action was dismissed, pursuant to 11 U.S.C. § 349, the personal injury action revested to the Plaintiff-Appellant and at that point she had the legal standing and capacity to proceed with her personal injury action like she did prior to the commencement of the bankruptcy proceeding. It is respectfully submitted that this Court should following the holdings in *B.N. Realty Assoc.* and *Crawford* and reverse the trial court and the Appellate Division, Second Department's decisions.

C. THE APPELLATE DIVISION, SECOND DEPARTMENT MISINTERPRETS THE STATUTE BY INAPPROPRIATELY APPLYING THE STATUTE AND CASE LAW.

The case law that has been issued by the Appellate Division, Second Department and by the trial courts within this jurisdiction show a clear misapplication of bankruptcy terms, a misapplication of the outcomes of bankruptcy proceedings and a misapplication of 11 U.S.C. § 349 in situations where a cause of action or counterclaim was not listed as an asset in a bankruptcy action and said bankruptcy action was actually dismissed and not discharged. These

misapplications have resulted in confusion with the case law issued by courts in this jurisdiction. It is respectfully submitted that this issue needs to be addressed by this Court. Moreover, it is respectfully submitted that the inconsistent case law that has been issued in the Appellate Division, Second Department and by trial courts in its jurisdiction is due to a misrepresentation of vital facts and properly applying critical bankruptcy terms by the movants who are filing the applications seeking dismissal of an adversary's cause of action, a counter-claim, or a cross-claim. The instant appeal allows this Court to set the record straight so that there is uniformity amongst New York Courts. Below Plaintiff-Appellant provides a breakdown analysis of the cases cited to in Hon. Justice Raffaele's Order (R. 4-8) and in the Decision and Order of the Appellate Division, Second Department (R. 392-393) to show how the inconsistent case law can and did arise.

In its July 31, 2019 Decision and Order (R. 392-393), the Appellate Division Second Department improperly relied on the holdings from *Potruch & Daab, LLC v. Abraham*, 97 A.D.3d 646, 949 N.Y.S.2d 396 (2d Dep't 2012) and *Nationwide Assoc., Inc. v. Epstein*, 24 A.D.3d 738, 809 N.Y.S.2d 118 (2d Dep't 2005) to affirm the trial court's November 3, 2017 Order, which dismissed the Plaintiff-Appellant's personal injury action. As discussed below, each of these cases represents an example of where the Appellate Division, Second Department improperly took a

position as to a party's cause of action or counterclaim that was not expressly provided for by the statutory language of 11 U.S.C. § 349.

In *Potruch & Daab*, the Appellate Division, Second Department affirmed the lower court's decision which had dismissed the defendant's counterclaims on the basis that the defendant lacked the capacity to assert those counterclaims. The defendant had filed two bankruptcy petitions. The first petition, which was a Chapter 11 bankruptcy proceeding[2], did not disclose his legal malpractice counterclaim as an asset, was dismissed by the Bankruptcy Court.[3] The defendant filed a second Chapter 11 bankruptcy proceeding[4], wherein he listed the legal malpractice counterclaim as an asset. The finding of lack of standing was premised on the defendant's failure to submit any evidence to the lower court that showed the

[2] The defendant, Gideon Abraham, was a named defendant in another lawsuit, *Marcus & Co., LLP v. Abraham*, which was pending in Supreme Court, Nassau County bearing index number 2864/09. The plaintiff in this action moved to dismiss the defendant Abraham's counterclaim because he failed to raise the counterclaim as an asset in a voluntary Chapter 11 bankruptcy petition, which was filed in the United States Bankruptcy Court for the Southern District of New York bearing Docket Number 07-12965-SMB ("Abraham Bankruptcy Action #1").

[3] Mr. Abraham's Chapter 11 bankruptcy action was dismissed after Mr. Abraham's debts were paid. *See* Abraham Bankruptcy Action #1 Document No. 108. The paying off of debts by Mr. Abraham makes the dismissal of his Chapter 11 proceeding equivalent to a discharge.

[4] Mr. Abraham commenced a second Chapter 11 proceeding in the United States Bankruptcy Court for the Southern District of New York, bearing Docket Number 10-10998-JMP ("Abraham Bankruptcy Action #2"). The action was dismissed with prejudice on February 24, 2011. *See* Abraham Bankruptcy Action #2 Document No. 76. During the pendency of this second Chapter 11 proceeding Mr. Abraham made payments to his ex-wife in order to satisfy his domestic support obligations. *See* Abraham Bankruptcy Action #2 Document No. 75. The paying off of debts by Mr. Abraham makes the dismissal of his second Chapter 11 proceeding equivalent to a discharge. There was nothing noted in the docket history showing that the legal malpractice counterclaim was dealt with or abandoned by the trustee.

ultimate disposition of the second bankruptcy petition and that the status of the legal malpractice counterclaim. By not providing the lower court with the final disposition as to the second bankruptcy petition, the defendant could not establish that he had standing to raise the counterclaim for legal malpractice. Although both of the defendant's Chapter 11 bankruptcy actions were dismissed, Mr. Abraham had his estate assessed in those actions and paid off debts that he owed. It is respectfully submitted that the dismissal of these bankruptcy proceedings was the functional equivalent of a discharge.

In *Nationwide Assoc. Inc.*, the Appellate Division, Second Department affirmed the lower court's decision, which dismissed the plaintiff's legal malpractice causes of action because the plaintiff failed to disclose these causes of action in a prior bankruptcy proceeding.[5] The plaintiff's Chapter 11 bankruptcy proceeding was dismissed.[6] Based on the review of the docket history, it appears that the Nationwide Associates, Inc. bankruptcy estate was assessed, three operating reports were filed with the Court, deficiency notices were filed with the Court. There was substantial activity in this Chapter 11 proceeding. It is not clear what the basis for

[5] Nationwide Associates, Inc. filed a voluntary Chapter 11 petition on April 13, 2003 in the United States Bankruptcy Court for the Eastern District of New York bearing Docket Number 03-82417-DTE ("Nationwide Bankruptcy Action"). Nationwide Associate, Inc.'s bankruptcy petition was dismissed on September 16, 2003. *See* Nationwide Bankruptcy Action Document No. 27.

[6] According to the Docket History in the Nationwide Bankruptcy Action, certain creditors moved to either dismiss the Chapter 11 proceeding or in the alternative to convert the matter to a Chapter 7 proceeding. *See* Nationwide Bankruptcy Action Document No. 13. Typically, such a motion is made by a creditor if the motion is in their best interest.

the dismissal of the bankruptcy proceeding was based upon because access to the record is restricted. However, when compared to the instant appeal, Plaintiff-Appellant never had her estate assessed, there was no meeting with the creditors and her debt was not administered or restructured. Moreover, there was no liquidation of any of her assets.

In the trial court's decision (R. 4-8.), Hon. Justice Raffaele stated that the trial court was constrained to follow the line of cases decided by the Appellate Division, Second Department. (R. 8). In addition to *Potruch & Daab* and *Nationwide*, the trial court cited to the following cases: *Keegan v. Moriarty-Morris*, 153 A.D.3d 683, 59 N.Y.S.3d 779 (2d Dep't 2017), *Whelan v. Longo*, 23, A.D.3d 459, 808 N.Y.S.2d 95 (2d Dep't 2005); *Weitz v. Levin*, 251 A.D.2d 402, 675 N.Y.S.2d 544 (2d Dep't 1998), *Lightning Capitol Holdings LLC v. Erie Painting & Maintenance, Inc.*, 149 A.D.3d 1229, 51 N.Y.S.3d 680 (3d Dep't 2017), *Central Natl. Bank, Canajoharie v. Scotty's Auto Sales, Inc.*, 138 A.D.3d 1263, 29 N.Y.S.3d 677 (3d Dep't 2016), and *George Strokes Elec. & Plumbing v. Dye*, 240 A.D.2d 919, 659 N.Y.S.2d 129 (3d Dep't 1997). Each of these cases is distinguishable from the facts of this case. Furthermore, these manner in which these cases were submitted shows a pattern of misapplying portions of various holdings and bankruptcy terms, which was relied upon by the trial court and the Appellate Division, Second Department.

The holdings in *George Strokes Elec. & Plumbing*, *Central Natl. Bank, Canajoharie,* and *Keegan* are distinguishable from the instant case. Each of these cases involved a related bankruptcy proceeding, wherein the debtor's bankruptcy proceeding was discharged and not dismissed.

In *George Strokes Elec. & Plumbing*, the property owner defendant filed a Chapter 7 bankruptcy petition and failed to list his counterclaim against the mechanic lien holder as an asset to his bankruptcy estate. In *Central Natl. Bank, Canajoharie*, defendant Amidon filed a Chapter 7 bankruptcy petition, wherein she failed to list her counterclaims and cross-claims in the breach of contract on monies owed pursuant to a note and security agreement as an asset in the bankruptcy proceeding. The trial court in each case found that the defendant lacked the legal capacity to pursue the counterclaims and/or cross-claims. The Appellate Division, Third Department in each case affirmed the trial court's rulings.

The *Keegan* case involved a medical malpractice action filed on behalf of the decedent, Nancy Lernihan. The plaintiff-decedent had filed a bankruptcy petition in the Bankruptcy Court for the Eastern District of New York under Docket No. 09-75743-LAS.[7] The defendants submitted evidence to the trial court that showed that the potential medical malpractice cause of action was never listed as an asset.

[7] It is respectfully requested that this Court take judicial notice of the fact that the *Keegan* plaintiff commenced a bankruptcy action on July 31, 2009 in the Bankruptcy Court for the Eastern District of New York bearing Docket No. 09-75743-LAS ("Lernihan Bankruptcy Action").

Ultimately, the Bankruptcy Court discharged the plaintiff-decedent's debts on November 10, 2009.[8] The *Keegan* plaintiff was found to lack standing to pursue a medical malpractice cause of action because the plaintiff-decedent failed to include medical malpractice cause of action in her bankruptcy action and did obtain a discharge of her debts in the bankruptcy proceeding.

It is important to note that in actions where there has been a discharge of a debtor's debts, a cause of action "can only revert to the debtor to be pursued in his or her individual capacity if the claim is 'dealt with' in the bankruptcy, which necessitates it being listed as an asset [in the schedule of assets] and either abandoned by the bankruptcy trustee or administered by the bankruptcy court for the benefit of the creditors." *Mehlenbacher v. Swartout,* 289 A.D.2d 651, 652, 734 N.Y.S.2d 290 (3d Dep't 2001). Here, unlike in *George Strokes Elec. & Plumbing, Central Natl. Bank, Canajoharie* and *Keegan*, there was no discharge of Plaintiff-Appellant's debts. Plaintiff-Appellant's bankruptcy action was dismissed before the initial creditors meeting was held, before any assessment of the bankruptcy estate could be conducted by the trustee, and before any debts were addressed or restructured.

The holding in *Lightning Capital Holdings LLC* is also distinguishable from the Plaintiff-Appellant's case. In *Lightning Capital Holdings LLC*, the Appellate

[8] The bankruptcy court discharged the *Keegan* plaintiff-decedent's action on November 10, 2009. The November 10, 2009 Order of Bankruptcy Judge Dorothy Eisenberg discharging the *Keegan* plaintiff's debts is listed as Document No. 20 in the Lernihan Bankruptcy Action.

Division, Third Department reversed the trial court's order, which had denied the defendants' motion for summary judgment. The Appellate Division, Third Department ruled that the plaintiff lacked the capacity to sue the defendants for beach of contract, account stated and unjust enrichment/quantum meruit because All Seasons Contracting, Inc. ("All Seasons") failed to include certain invoices on its schedule of assets in its Chapter 11 bankruptcy petition. In *Lighting Capital Holdings*, the plaintiff purchased All Seasons' assets and acquired its business contracts, which was subject to the approval of the bankruptcy court because this sale occurred during the pendency of the bankruptcy proceeding. On September 6, 2011, All Seasons' bankruptcy proceeding was dismissed. It can be argued that this dismissal was akin to a functional discharge because the sale of certain assets to the plaintiff was approved by the Bankruptcy Court. The Appellate Division, Third Department held that the omission of these invoices precluded the plaintiff from pursuing an action over these unpaid invoices because these assets were not dealt with or abandoned during the bankruptcy proceeding and thus did not revest back to the plaintiff and/or All Seasons. *Lightning Capital Holdings LLC*, 149 A.D.3d at 1231. Here, there was no restructuring of Plaintiff-Appellant's debts. No bankruptcy estate assets were sold prior to the dismissal of Ms. Jean-Paul's bankruptcy action. Rather, Plaintiff-Appellant's bankruptcy action was dismissed

before the initial creditors meeting and before any assessment of the bankruptcy estate was conducted by the trustee.

It is respectfully submitted that this Court should not consider *Whelan v. Longo*, 23, A.D.3d 459, 808 N.Y.S.2d 95 (2d Dep't 2005) and *Weitz v. Levin*, 251 A.D.2d 402, 675 N.Y.S.2d 544 (2d Dep't 1998) while deciding the instant appeal because these cases do not identify the bankruptcy chapter filed by the debtor litigant, the bankruptcy proceeding docket could not be found, and as such no proper conclusion or detailed comparison can be made to the instant case. It is respectfully submitted that these cases should not be considered by this Court.

The above cases were the cases cited to by Hon. Justice Raffaele in his decision, which granted the Defendant-Respondent's motion for summary judgment. Respectfully, it is apparent that the case law relied upon by tribunals within the Second Department misapply the facts from the underlying bankruptcy proceedings. In the cases where there was sufficient information and the corresponding docket history could be reviewed, six of the cases involved a discharge or the functional equivalent of a discharge of the debtor's debts. A discharge of a bankruptcy proceeding has a completely different meaning than a dismissal of a bankruptcy proceeding. Moreover, the significant misuse of the terms dismissal, discharge, and functional equivalent of a discharge has resulted in inconsistent case law.

Additionally, these courts have misapplied 11 U.S.C. § 349. The language of this statute is clear and unambiguous. There is no expressed language in 11 U.S.C.§ 349 that states that an asset will revest only if it is listed in a bankruptcy petition prior to the dismissal of the bankruptcy action. This condition that was not part of the legislative intent of Congress (*Crawford,* 785 F.3d at 485 *citing* H.R. Rep. No. 95-595 at 338 (1977)) when it enacted this statute. The courts in the Second Department are creating their own interpretation of 11 U.S.C. § 349 by adding additional language. It is improper for the courts to draw this altered conclusion when the language of 11 U.S.C. § 349 is clear and unambiguous.

The misapplication of these bankruptcy concepts and pertinent statutes has resulted in inconsistent case law and the cause for these holdings is in part due to the fact that movants are failing to provide their respective court with sufficient information so that a proper decision can be issued as to whether or not a party lacks standing or the legal capacity to pursue a cause of action, counterclaim or cross-claim that is not listed in a bankruptcy petition.

In the instant case, Plaintiff-Appellant's bankruptcy proceeding was dismissed before there was a meeting of the creditors and before the trustee could assess the bankruptcy estate. No debts were discharged, and no assets were sold. No objections were filed by the trustee with respect to the discharge of the debtor. Upon dismissal of the Chapter 7 bankruptcy proceeding, pursuant to 11 U.S.C. §

349(b)(3), the personal injury action should have revested back to the Plaintiff-Appellant and Ms. Jean-Paul should have been permitted to pursue her claim against Dartmouth. The trial court erred in dismissing the Plaintiff-Appellant's personal injury case as discussed above and the Appellate Division, Second Department erred in affirming same. It is respectfully submitted that the holdings in *Crawford* and in *B.N. Realty Assoc.* should be controlling case law in cases like the Plaintiff-Appellant's case, where the asset revests back to its owner upon dismissal (and not a discharge or the functional equivalent of a discharge) of a bankruptcy proceeding even though said asset was inadvertently not listed on the schedule of assets.

It is respectfully requested that this Court reverse the Appellate Division, Second Department and the trial court's Orders, reinstate Plaintiff-Appellant's complaint, deny the Defendant-Respondent's motion for summary judgment, and remand this matter back to the trial court for further proceedings.

THE DOCTRINE OF JUDICIAL ESTOPPEL DOES NOT APPLY BECAUSE THERE WAS NEVER A FINAL DETERMINATION IN THE PLAINTIFF-APPELLANT'S BANKRUPTCY ACTION

The doctrine of judicial estoppel provides that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, that party may not subsequently assume a contrary position because its interests have changed. *See Moore v. County of Clinton*, 219 A.D.2d 131, 640 N.Y.S.2d 927 (3d Dep't 1996). In a bankruptcy context, judicial estoppel prevents a party from prosecuting claims

not disclosed in a bankruptcy proceeding that resulted in a party's discharge. *Cafferty v. Thompson*, 223 A.D.2d 99, 644 N.Y.S.2d 584 (3d Dep't 1996). In order for the doctrine of judicial estoppel to apply, there first must have been a final determination in the bankruptcy proceeding endorsing that party's inconsistent position concerning his or her assets. *Koch v. National Basketball Assn.*, 245 A.D.2d 230, 666 N.Y.S.2d 630 (1st Dep't 1997); *see also Morton v. Rifkin*, 278 A.D.2d 129, 718 N.Y.S.2d 39 (1st Dep't 2000); *B.N. Realty Assoc. v. Lichtenstein*, 21 A.D.3d 793, 801 N.Y.S.2d 271 (1st Dep't 2005).

In deciding whether to invoke the doctrine of judicial estoppel, the Court must look principally to see whether "a party's later position … [is] clearly inconsistent with its earlier position," and whether the court in the first proceeding adopted the party's position. *New Hampshire v. Maine*, 532 U.S. 741, 750-51 (2001)

In *B.N. Realty Assoc.*, the Appellate Division, First Department held the defendant was not judicially estopped from raising any counterclaims, setoffs, or affirmative defenses against the plaintiff landlord. The Court found that the defendant did not obtain the functional equivalent of a discharge as a result of his filing. Instead, the bankruptcy case was dismissed before there had been any administration of assets or restructuring of debt. The bankruptcy court did not issue a discharge in the bankruptcy case nor did it enter into any order endorsing the defendant's position with regard to his assets and liabilities.

Here, as in *B.N. Realty Assoc.*, there was never a discharge of the Plaintiff-Appellant's debts in the bankruptcy proceeding. The matter was dismissed. (R. 333). The record before this Court is devoid of any admissible evidence showing that Bankruptcy Court made a final determination endorsing that Plaintiff-Appellant's position concerning her assets. Accordingly, the doctrine of judicial estoppel, which was never addressed by the lower court or by the appellate court and thus deemed denied, is not applicable to the instant case.

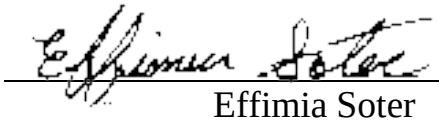
CONCLUSION

For all of the above reasons, it is respectfully requested that this Court reverse the lower court's November 3, 2017 decision as it pertains to the prong of Defendant-Respondent's motion which sought summary judgment, reverse the July 31, 2019 Decision and Order of the Appellate Division, Second Department, deny Dartmouth's motion for summary judgment, and reinstate the Plaintiff-Appellant's complaint.

Dated: New York, New York
May 15, 2020

Respectfully submitted,

LAW OFFICES OF EFFIE SOTER, P.C.

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, using Times New Roman 14 pt. for the body of the brief and Time New Roman 12 pt. for footnotes. According to the aforementioned processing system, the portions of the brief that must be included in a word count pursuant to 22 N.Y.C.R.R § 500.1(j) contain 7599 words.

Dated: New York, New York
May 15, 2020

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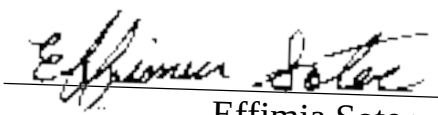
By: 

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