To be Argued by:
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(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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This reply brief is submitted by Plaintiff-Appellant Chantal Jean-Paul in further 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).

Defendant-Respondent's brief does not address the clear and unambiguous language of 11 U.S.C. § 349. Defendant-Respondent's brief does not address the critical differences between a dismissal, a discharge, and the functional equivalent of a discharge as it pertains to the final outcome in a bankruptcy proceeding. These legal terms in the context of a Chapter 7 and a Chapter 11 bankruptcy proceeding have different meanings. It is very important that when interpreting and applying the outcome 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 a proper identification of the final outcome was in that bankruptcy proceeding. This

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

is extremely paramount and the failure to do so can result in rulings that are improper and/or inconsistent with applicable case law. These improper and inconsistent rulings have resulted in the instant appeal that is pending before this Court.

Pursuant to the clear and unambiguous language of 11 U.S.C. § 349, upon dismissal of the Plaintiff-Appellant's Chapter 7 bankruptcy action, all property, disclosed or undisclosed, revested back to her as if the bankruptcy proceeding never occurred. In Plaintiff-Appellant's bankruptcy action, there was never an initial creditor's meeting, the bankruptcy estate was never assessed, and no reorganization plan was ever confirmed. The action was dismissed before any action was taking to address Plaintiff-Appellant's bankruptcy petition.

Defendant-Respondent's brief fails to rebut the arguments set forth in the appellant's brief. The Respondent's brief does not cite to any case law or refute Plaintiff-Appellant's arguments which distinguished the differences between dismissal of a bankruptcy action and a discharge of debts. However, what was discovered by this office in preparing this reply brief was that there was a ruling that was affirmed by the Appellate Division, Second Department in 1996 that is directly on point with the instant appeal. In that case, which is discussed below, a debtor was allowed to pursue two claims that were never listed in a schedule of assets in a bankruptcy proceeding because the claims revested back to the owner pursuant to 11 U.S.C. § 349 when the bankruptcy proceeding was dismissed.

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.

LEGAL ARGUMENTS

DEFENDANT-RESPONDENT FAILED TO ADDRESS THE INTERPRETATION OF 11 U.S.C. § 349

Plaintiff-Appellant's appeal focuses on her personal injury action revesting back to her, pursuant to 11 U.S.C. § 349 upon dismissal of her bankruptcy action. The Respondent's brief fails to address the statutory interpretation of 11 U.S.C. § 349.

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).

11 U.S.C. § 349(b)(3) states in pertinent part:

> (b) Unless the court, for cause, orders otherwise, a dismissal of a 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.

See 11 U.S.C. § 349(b)(3).

The plain language of the statute is very clear, and it does not contain any conditions that must be satisfied prior to the revestment of property back to the owner. Moreover, there is no 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.

Defendant-Respondent concedes this point by its silence in the Respondent's brief.

THE APPELLATE DIVISION, SECOND DEPARTMENT'S RULING WAS INCORRECT AND INCONSISTENT WITH OTHER HOLDINGS INCLUDING ITS OWN HOLDING

Defendant-Respondent has failed to provide this Court with any proper basis for having the Appellate Division, Second Department and the trial court's decision affirmed.

A. THE APPELLATE DIVISION, SECOND DEPARTMENT HAS AFFIRMED RULINGS IN FAVOR OF A DEBTOR THAT FAILED TO LIST A CLAIM AS AN ASSET IN A BANKRUPTCY PROCEEDING.

Before addressing the Defendant-Respondent's argument, it bears noting that the Appellate Division, Second Department has failed to follow its own prior rulings on this exact issue which is before this Court.

In *Folklane Hotel Assocs. v. Bd. of Assessors*, 170 Misc. 2d 712, 651 N.Y.S.2d 264 (Sup. Ct. Suffolk Cty. 1996), the Honorable Mary M. Werner, J.S.C. denied the defendant board's motion for summary judgment, which sought dismissal of the petitioner's complaint on the basis that the petitioner lacked standing to dispute its tax records. In *Folklane Hotel Assocs.*, the petitioner filed a Chapter 11 bankruptcy petition. The bankruptcy petition failed to list the pending 1990-1991 tax certiorari proceeding on the schedule of assets. During the pendency of the bankruptcy action, the petitioner filed a second tax certiorari petition proceeding for the 1991-1992 tax year, which also was not listed on the schedule of assets. The bankruptcy action was dismissed prior to the confirmation of a reorganization plan. The defendant filed a

motion for summary judgment to dismiss the petitioner's arguing that the petitioner lacked the capacity to sue.

Justice Werner denied the defendant's motion for summary judgment and held that since the bankruptcy action was dismissed, all of the property revested back to the petitioner pursuant to 11 U.S.C. § 349. Justice Werner stated:

> "…, the Bankruptcy Code specifically provides that unless otherwise ordered by the court, dismissal of a bankruptcy case 'revests the property of the estate in the entity in which such property was vested immediately before commencement of the case under this title.'"

Id. at 714.

Justice Werner added that "[s]ince the bankruptcy case resulted in dismissal and petitioner neither successfully reorganized nor was discharged from his debts, the purposes of preventing unscheduled assets from revesting in petitioner do not come into play." Justice Werner further stated:

> "The general effect of an order of dismissal is to restore the status quo ante. It is as though the bankruptcy case never existed. The estate reverts, upon dismissal, to the debtor and is subject to all encumbrances in existence prior to the bankruptcy."

Id. at 715.(internal quotations and citations omitted.)

Justice Werner's decision was appealed to the Appellate Division, Second Department. The Appellate Division, Second Department affirmed the lower court's

decision for the "reasons stated by Justice Werner." *Folklane Hotel Assocs. v. Bd. Of Assessors*, 232 A.D.2d 637, 648 N.Y.S.2d 1013 (2d Dep't 1996).

Here, the Plaintiff-Appellant's case is exactly the same as the *Folklane Hotel Assocs.* case. Plaintiff-Appellant's bankruptcy case was dismissed before she was successfully reorganized, before any debts were discharged, and before any reorganization plan was ever confirmed. In fact, the Plaintiff-Appellant's case was dismissed before the initial creditor's meeting was held.

B. DEFENDANT-RESPONDENT'S ARGUMENTS FAILED TO PRESENT THIS COURT WITH A BASIS FOR AFFIRMING THE APPELLATE DIVISION, SECOND DEPARTMENT'S ORDER.

When presenting bankruptcy cases, it is critical that that the bankruptcy proceeding is properly identified as well as the outcome of that litigation. The Respondent's brief continues the pattern of misapplication of basic bankruptcy principles.

Defendant-Respondent's reliance on *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267 (9th Cir. 2013), *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999), and *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3d Cir. 1998) is misplaced because these cases, which are not persuasive or controlling, are not applicable to the instant case before this Court. Each of these cases involved situations where a debtor's debts were discharged or settled, which is completely

different from the instant case, where Plaintiff-Appellant's bankruptcy action was dismissed before the petitioner was reorganized or her debts were discharged.

For example, in *Ah Quin*, the case involved a bankruptcy proceeding where the debtor's debts were discharged after the plaintiff made a representation to the bankruptcy court that she did not have a pending legal claim. The district court in *Ah Quin* ruled that the plaintiff was judicially estopped from pursuing her legal claim because it was not disclosed in her bankruptcy action and the bankruptcy court relied on the plaintiff's representation that she did not have any pending claims. Moreover, the *Ah Quin* plaintiff's debts were also discharged by the bankruptcy court.

Here, Plaintiff-Appellant's bankruptcy action was dismissed before she was successfully reorganized, before any debts were discharged, and before any reorganization plan was ever confirmed, and before the initial creditor's meeting was held. It is respectfully submitted that while the omission was inadvertent by the Plaintiff-Appellant's bankruptcy attorney, there was no intention to undermine the integrity of the bankruptcy system.

Further, Defendant-Respondent's reliance on *Dynamics Corp. of America v. Marine Midland Bank-New York*, 69 N.Y.2d 191, 513 N.Y.S. 2d 91 (1987) is also misplaced. Defendant-Respondent argues that the omission of claims from the schedule of assets in a bankruptcy proceeding "precluded plaintiff from pursuing them on its behalf because they were not 'dealt with' in such proceedings. *See*

Defendant-Respondent's Brief at p. 13. In *Dynamics Corp. of America*, the New York State Court of Appeals relied upon former Bankruptcy Act § 70(i) which provided that "the title of the property dealt with shall revest in the debtor." *See Dynamics Corp. of America*, 69 N.Y.2d at headnote 4. Soon thereafter, Bankruptcy Act § 70 was amended. As noted in *Folklane Hotel Assocs.*, with respect to Bankruptcy Act § 70, "[u]nder the new Bankruptcy Code, however, the language has been amended and upon confirmation of a plan, 'all of the property of the estate [revests] in the debtor.' This section is then qualified in the next subsection: 'the property dealt with by the plan is free and clear of all claims and interests of creditors.'" *See Folklane Hotel Assoc.*, 170 Misc. 2d at 715.

It is respectfully submitted that Defendant-Respondent's reliance on *Dynamics Corp. of America* is misplaced because the Bankruptcy Code statute that was relied upon in this ruling was amended. Based on this amended statute, and in accordance with Justice Werner's ruling, an asset that is not listed in the schedule of assets, revests back to the owner and is thus subject to the claims of the creditors since this asset has not been dealt with in the bankruptcy proceeding.

C. THIS COURT SHOULD REVERSE THE APPELLATE DIVISION SECOND DEPARTMENT AND THE LOWER COURT'S RULING.

As discussed in the Appellant's brief and herein, there is inconsistent case law in New York State Courts. The United States Court of Appeals for the Second Circuit ("Second Circuit") and the Appellate Division, First Department have issued

rulings that undisclosed assets from a bankruptcy proceeding revested back to the asset owner, pursuant to 11 U.S.C. § 349, upon dismissal of the bankruptcy action.

The Appellate Division, Second Department has issued rulings that are inconsistent with itself. As discussed above, in *Folklane Hotel Assocs.*, the Appellate Division, Second Department affirmed a ruling that was consistent with holdings from the Appellate Division, First Department (*B.N. Realty Assoc. v. Lichtenstein*, 21 A.D.3d 793, 801 N.Y.S.2d 271 (1st Dep't 2005)) and the Second Circuit (*Crawford v. Franklin Credit Mgmt.*, 758 F.3d 473, 484 (2d Cir. 2014)). Although the holding in *Folklane Hotel Assocs.* is still good case law, the Appellate Division, Second Department has since issued rulings that are inconsistent with this holding and the plain language of 11 U.S.C. § 349. The Appellate Division, Second Department has also improperly inserted conditions that are not part of the plain language of the statute. There is no express 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.

Here, when Ms. Jean-Paul's bankruptcy action was dismissed and 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 and no reorganization plan was ever confirmed. 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. The bankruptcy court did not adapt any position offered by the Plaintiff-Appellant as to the bankruptcy estate and there was never a final determination in this action. Furthermore, in addition to the personal injury action revesting back to Ms. Jean-Paul, the doctrine of judicial estoppel is also not applicable to the instant matter.

It is respectfully submitted that this Court should reverse the rulings of the Appellate Division, Second Department and of the trial court. Upon reversal, this Court should deny the Defendant-Respondent's motion for summary judgment and remand this matter back to Supreme Court, Queens County.

THIS COURT SHOULD FIND THAT THE DOCTRINE OF JUDICIAL ESTOPPEL IS NOT APPLICABLE TO THE CASE AT BAR

It has always been the undersigned's understanding that if an issue is not addressed by the lower court, the issue is deemed denied. In the interest of judicial

economy, Plaintiff-Appellant respectfully requests that this Court also address the issue of judicial estoppel in order to avoid any further inconsistent rulings.

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).

The key factor in deciding whether or not this doctrine applies is whether or not the bankruptcy court judge relied on the debtor's representations in that proceeding at the time the bankruptcy proceeding was terminated and whether the debtor has taken a different position in a subsequent action. It is respectfully submitted that in the instant matter the bankruptcy judge did not rely on any position prior to the dismissal of the Plaintiff-Appellant's bankruptcy action because there was never an initial creditor's meeting, there was never an assessment of the bankruptcy estate, there was no confirmed reorganization plan, and no debts were discharged. 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 is not applicable to the instant case.

Defendant-Respondent's reliance on *Moran Enters., Inc. v. Hurst*, 160 A.D.3d 638, 75 N.Y.S.3d 195 (2d Dep't 2018) is also misplaced. In *Moran Enters., Inc.*, the plaintiff had filed a Chapter 11 bankruptcy petition which listed real property as an asset and failed to list a legal malpractice claim against the defendant. The bankruptcy action was dismissed after the court determined that there was a lack of equity in the property or other assets of the estate with which to pay creditors. The bankruptcy court had expressly relied upon the plaintiff's representations that it had no assets other than real property and thus is accepted and endorsed the plaintiff's characterization of its assets.

Moreover, reliance on *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001) is also misplaced. *Hamilton* involved a bankruptcy proceeding where the plaintiff failed to list a claim in the schedule of assets. The bankruptcy court had relied on the plaintiff's position at the time that the debtor's debts were discharged by the bankruptcy court. The United States Court of Appeals for the Ninth Circuit held that "a debtor who has failed to disclose a pending claim as an asset in a bankruptcy proceeding where the debts were permanently discharged was estopped from pursuing such a claim in a subsequent proceeding." *Id.* at 784.

Here, Plaintiff-Appellant's bankruptcy action was dismissed before the initial creditor's meeting, before the estate could be assessed, before the Plaintiff-Appellant was reorganized, and before any debts could be discharged and before any reliances were made. The bankruptcy court did not rely on Plaintiff-Appellant's representations when the bankruptcy proceeding was dismissed because the initial creditor's meeting was never held and thus the estate was never assessed. It is respectfully submitted that the doctrine of judicial estoppel does not apply to the instant case. Accordingly, the prong of Defendant-Respondent's motion which seeks dismissal based on the doctrine of judicial estoppel should be denied.

CONCLUSION

For all of the reasons set forth above and in Plaintiff-Appellant's brief, 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
July 17, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to 22 N.Y.C.R.R. § 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
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