Court of Appeals No. 2020-00024

To be Argued by:
IRYNA S. KRAUCHANKA
(Time Requested: 30 Minutes)

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 DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

Defendant-Respondent 67-30 DARTMOUTH ST. OWNERS CORP. (hereinafter "DARTMOUTH") submits this Brief in opposition to Plaintiff-Appellant's appeal from the Order of the Appellate Division, Second Department, dated July 31, 2019, which affirmed the Order of the Supreme Court, Queens County (Raffaele, T. D., J.S.C.), dated November 3, 2017, granting DARTMOUTH'S motion for summary judgment on the ground that Plaintiff lacks the legal capacity to sue.

As set forth in more detailed below, the Second Department's, and, correspondently, the Supreme Court's decisions are in line with the Bankruptcy Code and the courts' statutory construction of same, and should not be disturbed.

Briefly, the Second Department correctly concluded that Plaintiff is deprived of the legal capacity to sue on the claims that she failed to disclose in her bankruptcy proceeding, irrespective of the fact that the proceeding was dismissed due to Plaintiff's intentional failure to appear at the meeting of the creditors. The Second Department's view comports with the state and federal legal precedent, which interprets the Bankruptcy Code with the outmost emphasis on full and honest disclosure and on the preservation of the integrity of the bankruptcy system. The First Department and Second Circuit's decisions referenced by Plaintiff are factually distinguishable and run afoul of these principles. After all, permitting

Plaintiff to pursue her personal injury claims after she took advantage of the automatic stay and then simply abandoned the bankruptcy proceeding in order to obviate the consequences of her non-disclosure would reward her for her duplicitous conduct and make a mockery of the judicial system.

If this Court accepts Plaintiff's position *vis a vis* standing, however, it should remand the matter to the Supreme Court, Queens County, to determine whether a dismissal is warranted pursuant to the doctrine of judicial estoppel as that issue was never decided and is not before this Court. In the event this Court elects to consider judicial estoppel, it is respectfully submitted that Plaintiff's Complaint should be dismissed because there is no disagreement amongst the courts that a discharge from the bankruptcy is not required and because the bankruptcy court accepted and relied upon Plaintiff's characterization that she did not have the undisclosed personal injury claims.

Accordingly, the Order of the Appellate Division, Second Department, should be affirmed.

CORPORATE DISCLOSURE STATEMENT

DARTMOUTH does not have any parent, subsidiary and/or affiliate companies.

COUNTER-QUESTION PRESENTED

Did the Appellate Division, Second Department, correctly affirm the Order of the Supreme Court, Queens County, which dismissed Plaintiff's Complaint on the ground that she lacks the legal capacity to sue, irrespective of the fact that the proceeding was dismissed, as opposed to discharged, because the Bankruptcy Code and the legal precedent interpreting same place the emphasis on full and honest disclosure and on the preservation of the integrity of the bankruptcy system?

Yes.

Should the Court remand the issue of judicial estoppel to be determined by the Supreme Court or, if it elects to consider same, dismiss Plaintiff's Complaint on that ground, because a discharge from the bankruptcy is not required and because the bankruptcy court accepted and relied upon Plaintiff's characterization that she did not have the undisclosed personal injury claims?

Yes.

COUNTER-STATEMENT OF FACTS

A. BACKGROUND

Plaintiff commenced this personal injury action in the Supreme Court, Queens County, alleging that on April 23, 2013, she slipped and fell at the premises located at 67-30 Dartmouth Street, in Queens, New York (hereinafter the "Underlying Litigation") (R. 25-29; R. 36-40).[1]

1. Plaintiff's Bankruptcy Petition

On October 1, 2015, while the Underlying Litigation was pending, Plaintiff filed a Voluntary Petition for Chapter 7 Bankruptcy in the United States Bankruptcy Court for the Eastern District of New York (hereinafter the "Bankruptcy Petition" or the "Bankruptcy Proceeding") (R. 276-331).

In connection same, Plaintiff submitted Schedules A and B, setting forth her assets (R. 282; R. 284-285). Schedule B, point 21, explicitly required Plaintiff to disclose "[o]ther contingent and unliquidated claims of every nature" and to give an estimated value of each (R. 288). However, there is no dispute that the Underlying Litigation was not listed in either of the Schedules or in the Debtor's Statement of Financial Affairs (R. 284-309). Indeed, during her deposition, Plaintiff readily admitted that she did not disclose this personal injury action as an asset on her application (R. 248).

[1] Folio references (R. __) are to the Record on Appeal filed with this Court.

Nevertheless, on August 27, 2015, Plaintiff executed the Declaration Concerning Debtor's Schedules, swearing under penalty of perjury that the schedules are "true and correct to the best of [her] knowledge, information and belief" (R. 301). And, she had already made a similar declaration concerning her Statement of Financial Affairs on August 12, 2015 (R. 310).

2. The Dismissal Of Plaintiff's Bankruptcy Proceeding For Nonappearance

On January 26, 2016, the Trustee moved to dismiss Plaintiff's Bankruptcy Petition for her "unexcused failure…to appear on November 3, 2015, December 1, 2015 and January 26, 2016 at the meeting of the creditors mandated by 11 U.S.C. § 341(a)" (R. 332). The Bankruptcy Proceeding was dismissed on May 10, 2016, after Plaintiff again failed to appear; her case was closed (R. 333-335).

B. DARTMOUTH'S MOTION FOR SUMMARY JUDGMENT

By Notice of Motion, dated February 3, 2017, DARTMOUTH moved before the Supreme Court, Queens County, for, *inter alia,* summary judgment. DARTMOUTH argued that Plaintiff lacked the legal capacity to sue and was judicially estopped from pursuing the Underlying Litigation because she did not disclose it as an asset in her Bankruptcy Petition (R. 9-24).

In opposition, Plaintiff did not dispute that she did omitted the Underlying Litigation in the Bankruptcy Petition, but nevertheless maintained that she should

benefit from the fact that the Bankruptcy Proceeding was dismissed due to her intentional failure to show up for the hearings (R. 346-350).

C. THE SUPREME COURT'S ORDER

By Decision and Order, dated November 3, 2017, the Supreme Court, Queens County, granted DARTMOUTH'S motion and dismissed Plaintiff's Complaint "on the grounds that the plaintiff lacks standing and legal capacity to sue" (R. 8). In reaching his determination, Justice Thomas D. Raffaele cited the Bankruptcy Code, as well as the well-settled case law, which unequivocally requires the debtor to disclose all existing causes of action in a bankruptcy proceeding and holds that a claim not listed remains the property of the bankruptcy estate and cannot be pursued by the debtor (R. 6). The Court went to reject Plaintiff's contention that the standard does not apply to her because her Bankruptcy Petition was dismissed as a result of her own intentional conduct, as opposed to discharged, relying on the Appellate Division, Second Department's decisions in *Nationwide Associates, Inc. v. Epstein*, (24 AD3d 738, 739 [2d Dept. 2005]) and *Potruch & Daab, LLC v. Abraham* (97 AD3d 646, 647 [2d Dept. 2012]) (R. 7-8).

The Supreme Court did not render an opinion with respect to judicial estoppel.

D. PLAINTIFF'S APPEAL TO THE APPELLATE DIVISION, SECOND DEPARTMENT

Plaintiff appealed from the Supreme Court's Order to the Appellate Division, Second Department (R. 3).

On appeal, Plaintiff continued to try to obviate the consequences of her failure to disclose the Underlying Litigation in the Bankruptcy Petition based solely upon the fact that she purposefully allowed the proceeding to be dismissed (*see* Plaintiff-Appellant's Brief filed in the Appellate Division, Second Department).

In its Respondent's Brief, DARTMOUTH maintained that the Supreme Court's dismissal was in line with the purpose and intent of the Bankruptcy Code, as well as the legal precedent emanating from the state and federal courts alike, which places the emphasis on full disclosure and preservation of the integrity of the bankruptcy system (*see* DARTMOUTH'S Respondent's Brief filed in the Appellate Division, Second Department). Citing *Nationwide Associates, Inc. v. Epstein*, *supra*; *Potruch & Daab, LLC, supra*; as well as this Court's decision in *Whelan v. Longo*, 23 AD3d 459, 460 [2d Dept. 2005], *affd* 7 NY3d 821 [2006]), DARTMOUTH argued that Plaintiff's failure to disclose the Underlying Litigation in the Bankruptcy Proceeding deprived her of the legal capacity to subsequently sue on that cause of action (*id.*).

E. THE DECISION AND ORDER OF THE APPELLATE DIVISION, SECOND DEPARTMENT

By Decision and Order, dated July 31, 2019, the Appellate Division, Second Department, affirmed the Supreme Court's Order (R. 392-393). Observing that it was undisputed that Plaintiff did not disclose the Underlying Litigation, of which she knew or should have known, in her Bankruptcy Proceeding, the Second Department held that Plaintiff "lacked the legal capacity to sue" (R. 393).

The Appellate Division did not decide the issue of judicial estoppel.

F. PLAINTIFF'S MOTION FOR LEAVE TO APPEAL

On September 26, 2019, Plaintiff sought leave to appeal to this Court with respect to the issue of standing only (*see* Plaintiff-Appellant's Brief at pp. 10-11). DARTMOUTH opposed.

On February 18, 2020, the Court granted leave to appeal (R. 390).

ARGUMENT

POINT I

THE APPELLATE DIVISION, SECOND DEPARTMENT, CORRECTLY AFFIRMED THE SUPREME COURT'S ORDER, DISMISSING PLAINTIFF'S COMPLAINT ON THE GROUND THAT PLAINTIFF LACKS THE LEGAL CAPACITY TO SUE

Bankruptcy Code defines the bankruptcy estate as including "all legal or equitable interests of the debtor in property as of the commencement of the case" (*see* 11 USC § 541[a][1]). It has been stated that "'[i]t would be hard to imagine language that would be more encompassing' than this broad definition" (*Chartschlaa v. Nationwide Mut. Ins. Co.,* 538 F3d 116, 122 [2d Cir. 2008], *cert denied* 55 US 1213 [2009], citing 4 *Collier on Bankruptcy* ¶ 541.01 [15th ed. 2001]). And, it is well-settled that the causes of action owned by the debtor "fall within the reach of this section" (*Chartschlaa, supra; see In re Jackson,* 593 F3d 171 [2d Cir. 2010]).

Significantly, the "integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets" (*Moran Enterprises, Inc. v. Hurst*, 160 AD3d 638, 640 [2d Dept. 2018], citing *Rosenshein v. Klebam*, 918 F Supp 98, 104 [SDNY 1996]; *see BPP Illinois, LLC v. Royal Bank of Scotland Group PLC,* 859 F3d 188 [2d Cir. 2017]). It is "essential to the proper functioning

of the bankruptcy system, [and] the Bankruptcy Code severely penalizes debtors who fail to disclose assets" (*Chartschlaa, supra*).

In this regard, "[t]he only property that may revest in the debtor in its individual capacity…is property that was 'dealt with' in the bankruptcy [internal citation omitted] or abandoned" (*Dynamics Corp. of America v. Marine Midland Bank-New York*, 69 NY2d 191, 195-196 [1987]). Conversely, the undisclosed assets automatically remain property of the estate after the case is closed (*see Chartschlaa, supra*). Consequently, as this Court has clearly enunciated, the "plaintiff's failure to disclose th[e] cause of action [that she knew or should have known existed] in her bankruptcy petition deprive[s] her of the legal capacity to sue" on that cause of action (*Whelan, supra* at 460, citing *Dynamics Corp. of America*, *supra*).

The Second Department appropriately applied the foregoing legal tenets in affirming the Supreme Court's Order and dismissing Plaintiff's Complaint in this case. That is, there is no dispute that Plaintiff knew of the Underlying Litigation and that she did not disclose same in her Bankruptcy Proceeding (248; 276-331). Accordingly, these causes of actions remained the property of the estate and Plaintiff does not have the legal capacity to sue on same.

Despite Plaintiff's contentions to the contrary, the Second Department's decision in this, and prior cases, is correct even though her Bankruptcy Proceeding

was dismissed, as opposed to discharged (*see Potruch & Daab, LLC, supra; Nationwide Associates, Inc. v. Epstein, supra*). Indeed, the conclusion that "[t]he fact that [the plaintiff's] bankruptcy proceeding was dismissed rather than discharged does not alter the effect of [the] failure to disclose the claim" is in line with the Bankruptcy Code (*Nationwide Associates, Inc. v. Epstein, supra*). That is so even though 11 USC § 349 does not, on its face, mention that there is a distinction between the disclosed and non-disclosed assets. After all, statutory construction is the function of the courts, and they have unanimously interpreted the Code with the focus on the preservation of the integrity of the bankruptcy system (*see generally Albano v. Board of Trustees of New York City Fire Dept*., 98 NY2d 548 [2002]). In other words, as the Second Department correctly understood, "the key issue…is not dismissal nor discharge, but disclosure" (*Kunica v. St. Jean Financial, Inc*., 233 BR 46, 54 [SDNY 1999]; *see also see Keegan v. Moriarty-Morris*, 153 AD3d 683 [2d Dept. 2017]). Thus, failure to disclose is fatal to one's ability to prosecute the withheld claims.

Significantly, as Plaintiff acknowledges in her Appellant's Brief, the Appellate Division, Third Department, is in agreement that the controlling inquiry is whether the appropriate disclosure was made. That is, in *Lighting Capital Holdings LLC v. Erie Painting & Maintenance, Inc*. (149 AD3d 1229 [3d Dept. 2017]), where the bankruptcy proceeding was similarly dismissed, the Court, citing

this Court's decision in *Dynamics Corp. of America, supra*, held that the omission of the claims from the schedule of assets in the bankruptcy proceeding "preclude[d] plaintiff from pursuing them on its own behalf because they were not 'dealt with' in such proceeding" (*id*. at 1230).

Plaintiff's attempt to distinguish *Potruch & Daab, LLC*, was unavailing at the Appellate Division, and continues to lack merit. Irrespective of counsel's wish to categorize the dismissal as a "functional equivalent of a discharge," the Second Department's conclusion in that case was reached based upon an understanding that "that the defendant's bankruptcy petition was later dismissed," which it expressly concluded did "not change the result" (*id*.) (*see* Plaintiff-Appellant's Brief at p. 21).

Plaintiff's parallel argument regarding *Nationwide Associates, Inc. v. Epstein*, *supra*, fails for the same reason. There, too, the Court operated under a premise that the bankruptcy proceeding had been dismissed, explicitly holding that such a fact "does not alter the effect of [the plaintiff's] failure to disclose the claim it now seeks to assert here" (*id*. at 739).

Plaintiff's reliance on *Crawford v. Franklin Credit Mgmt*. (758 F3d 473 [2d Cir. 2014]) and the First Department's decision in *B.N. Realty Assoc*. v. *Lichtenstein* (21 AD3d 793 [1st Dept. 2005]) is misplaced. In *Crawford, supra*, the plaintiff later refiled the bankruptcy proceeding and amended the defective

disclosure (A. 296).[2] Similarly, in *B.N. Realty Assoc.*, *supra*, the plaintiff made partial disclosure. Here, however, Plaintiff never disclosed the Underlying Litigation to the Bankruptcy Court.

But, to the extent that either *Crawford, supra*, or *B.N. Realty Assoc.*, *supra*, can be deemed to be factually analogous, they should not be followed as their rationale is incongruous with the fundamental concept of full and honest disclosure essential to the bankruptcy proceedings. Consequently, accepting it would undermine the integrity, and therefore, the proper functioning of the bankruptcy system, which the federal courts agree is of outmost importance (*see Ah Quin v. Country of Kauai Dept. of Transp*., 733 F3d 267, 272-273 [9th Cir. 2013], citing *In re Coastal Plains, Inc.*, 179 F3d 197, 208 [5th Cir. 1999]; *see also Chartschlaa, supra; Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F2d 414 [3d Cir. 1988], *cert denied*, 488 US 967 [1988]).

Lastly, it is worthy to note that allowing Plaintiff to pursue her claims in this case would run afoul of the notions of fairness and justice. Indeed, by filing the Bankruptcy Petition, Plaintiff disrupted the flow of commerce and took advantage of the six-month automatic stay, but then simply abandoned the proceeding in order to make a procedural end-run around the all-encompassing disclosure

[2] Upon reviewing the papers filed by the parties in *Crawford, supra*, the analysis references the facts established therein beyond what is evident on the face of the Court's determination. Folio references (A. __) are to the Appendix filed in that case.

requirements (*see Eastman v. Union Pacific R. Co.*, 493 F3d 1151 [10th Cir. 2007]). What is more, Plaintiff attempted to hide that fact during the deposition, falsely characterizing the dismissal as having occurred as a result of "hardship" (249). Allowing Plaintiff to "back up" and benefit from her own dishonest actions, "would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtor's assets" (*Eastman, supra* at 1160).

In light of the foregoing, the dismissal is the only outcome appropriate as "[a]ny other result would reward [Plaintiff] for what appears to be duplicitous conduct" and "make mockery of the judicial system" (*Coney Island Land Co., LLC v. Domino's Pizza LLC,* 2017 WL 213016 [EDNY 2017][internal citations and quotation marks omitted]; *see Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp*., 337 F3d 314 [3d Cir. 2003]; *Robinson v. Tyson Foods, Inc*., 595 F3d 1269 [11th Cir. 2010]). Thus, the Appellate Division, Second Department's Order should be affirmed.

POINT II

THE COURT SHOULD REMAND THE ISSUE OF JUDICIAL ESTOPPEL OR DISMISS PLAINTIFF'S COMPLAINT AS BARRED BY THAT DOCTRINE

Assuming, *arguendo*, that this Court concludes that Plaintiff has the legal capacity to sue, it should remand the matter to the Supreme Court, Queens County, to reach a determination relative the applicability of judicial estoppel, which was never examined below. Indeed, leave to appeal was not granted on that issue, there is no disagreement amongst the courts relative same, and it does not present a question of law to be reviewed by this Court. In the event this Court considers judicial estoppel, however, it should dismiss Plaintiff's Complaint on that ground.

"The doctrine of judicial estoppel precludes a party from taking a position in one legal proceeding which is contrary to that which it took in a prior proceeding, simply because its interests have changed" (*Moran, supra*, [internal citation omitted]; *see Uzdavines v. Weeks Marine, Inc*., 418 F3d 138 [2d Cir. 2005], citing *New Hampshire v. Maine*, 532 US 742 [2002]; *see also Rodal v. Anesthesia Grp. Of Onondaga, P.C.*, 369 F3d 113 [2d Cir. 2004]). Full and honest disclosure by the debtor of his/her assets again plays a pivotal role on this point, as the purpose of the doctrine is to protect the integrity of the judicial process and "prevent improper use of judicial machinery" (*New Hampshire v. Maine, supra; Moran, supra; Rodal, supra*). Thus, "judicial estoppel may bar a party from pursuing

claims which were not listed in a previous bankruptcy proceeding" – i.e. where the debtor asserted the inconsistent position that it did not have these claims (*Moran, supra* [internal citations omitted]; *see also Kunica, supra; Coffaro v. Crespo*, 721 FSupp2d 141 [EDNY 2010]).

While Plaintiff correctly notes that for the doctrine to apply there must be "a final determination in the bankruptcy proceeding endorsing the party's inconsistent position concerning his or her assets," she conveniently fails to mention that "a discharge from the bankruptcy is not required" and that "[t]he bankruptcy court may 'accept' the debtor's assertions by relying on the debtor's nondisclosure of potential claims in many other ways" (*Moran, supra*., quoting *Hamilton v. State Farm Fire & Cas*. Co., 279 F3d 778, 784 [9th Cir. 2001], citing *In re Coastal Plains, Inc*., *supra*). In fact, state and federal courts have observed that "the distinction between discharge and dismissal is particularly lacking in substance in the context of judicial estoppel" (*Kunica, supra* at 59; *see Nationwide Assocs. Inc. v. Epstein, supra; Manhattan Ave. Dev. Corp. v. Meit*, 224 AD2d 191 [1st Dept. 1996], *lv denied* 88 NY2d 803 [1996]; *Myers v. Bimbo Bakeries USA, Inc*., 2011 WL 1240095 [EDNY 2011]). Significantly, Plaintiff does not argue that there is any disagreement amongst the courts on this issue and did not raise same in his motion seeking leaving to appeal.

In accordance with the foregoing standard, by dismissing Plaintiff's Bankruptcy Proceeding in this case, "the bankruptcy court expressly relied upon the plaintiff's representation in [her] asset schedules" – i.e. it "accepted and endorsed [P]laintiff's characterization" that she does not have pending personal injury claims (*Moran, supra* at 640, citing 11 USC § 1111[b]; *In re Preferred Door Co., Inc*., 990 F2d 547, 549 [10th Cir. 1993]). And, it is possible that the Petition would not have been dismissed if the bankruptcy court was made aware of the Subject Litigation (*see Omegbu v. Nicholson*, 283 Wis2d 508, 698 NW2d 132 [Wis Ct of App 2005][invoking the judicial estoppel by concluding that if the plaintiff disclosed all of his assets, it was possible that the bankruptcy court would not have dismissed his case]). Plaintiff incorrectly relies on the First Department's decision in *B.N. Realty Assoc., supra*, to argue otherwise because, again, that case is not instructive as the plaintiff there made partial disclosure.

In light of the foregoing, judicial estoppel bars the Underlying Litigation irrespective of the fact that Plaintiff's Bankruptcy Proceeding was dismissed. Holding otherwise would frustrate the integrity of the judicial system and the bankruptcy process.

CONCLUSION

For these reasons, the Order of the Appellate Division, Second Department, affirming the Order of the Supreme Court, Queens County, dismissing Plaintiff's Complaint should be affirmed.

Dated: New York, New York
June 9, 2020

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Brian R. Landy, Jr., being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 38 Davis Avenue, Rye, New York 10580.

That on the 10th day of June, 2020 deponent served the within:

Brief for Defendant-Respondent

upon designated counsel for the parties indicated herein at the addresses provided below by depositing 3 true copies thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State.

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Commission Expires March 5, 2023

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