[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Index Number : 114418/2010
SANTONOCITO, JOHN
VS.
MOSKOWITZ PASSMAN & EDELMAN
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
MAR 08 2012
NEW YORK
COUNTY CLERK'S OFFICE

MAR 07 2012

Dated: March 7 2012

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 10

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John Santonocito,

Plaintiff,

- against -

Moskowitz, Passman & Edelman and Sheldon Edelman,

Defendants.

----------x

Decision/Order
Index No. 114418-2010
Seq No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3211) w/KJG affirm, exhs	1
Plf's opp w/AED affirm, JS affid, exhs	2
Defs' reply/further support w/KJG affirm	3
Steno minutes 1/12/12	4
Stips to adjourn motion	5

Upon the foregoing papers, the court's decision and order is as follows:

Gische J.;

This is an action for legal malpractice. Plaintiff John Santonocito ("plaintiff" at times "debtor") is the former client of defendant Moskowitz, Passman & Edelman, a law firm. A. Sheldon Edelman s/h/a "Sheldon Edelman" is a attorney at law and a partner in the law firm (collectively "Moskowitz defendants"). The Moskowitz defendants now move for the pre-answer dismissal of this action on the basis of CPLR 3211 [a] [1] (documentary evidence) and [a] [3] (lack of standing).

Facts

The following facts are asserted in the verified complaint and in plaintiff's sworn affidavit in opposition to defendants' motion. For purposes of this motion only, these facts are accepted as true (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]). The sworn affidavit is allowed to remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim (Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 [1998]):

Plaintiff was involved in a motor vehicle accident on March 20, 2002 when his vehicle was struck by a vehicle leased to Diana P. Burke ("Burke") by Ford Motor Credit Corporation ("FMCC"). Burke had dropped off her car to be serviced by South Shore Repairs, Inc. ("South Shore") when the car, driven by Frederic M. Barnett ("Barnett"), a South Shore employee, struck the car plaintiff was driving. Plaintiff, who was working when the accident occurred, later filed a workers' compensation claim. That claim was filed on his behalf by non-party Martin C. Julius, Esq. ("Attorney Julius").

Plaintiff also retained Attorney Julius to commence a personal injury action on his behalf in Kings County (Santonocito v. Barnett et al, Sup. Ct., Kings Co., Index No. 25771/09) ("personal injury action"). Although Shore, Burke and Barnett were named defendants in that action, no claim was asserted against FMCC. The personal injury action was commenced with the filing of the Summons and Verified Complaint on or about July 28, 2004. Later Attorney Julius served and filed an Amended Summons and Amended Complaint on December 8, 2004 to add other defendants, but FMCC was still not added as a named defendant.

On June 1, 2004, prior to filing the personal injury action, plaintiff and his wife filed a voluntary petition for bankruptcy under Chapter 7 of the bankruptcy code (In re Santonocito, Case # 04-83641 CIML) ("bankruptcy petition"). The Santonocitos brought the petition pro se, but a legal services company (We the People) prepared and filed the petition on their behalf, charging them a $229 fee.

Schedule B of the bankruptcy petition requires that the debtor "list all personal property of the debtor of whatever kind." Item 20 requires that the debtor list "Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated values." Item 17 of Schedule B requires the debtor to also list "Other liquidated debts owing debtor, including tax refunds." The Santonocito's response was that they had "Proceeds from Auto Accident [Husband] $7,000." This was, however, a monetary settlement for a different car accident, unrelated to the March 20, 2002 collision that was the subject of the underlying personal injury action.

The Santonocitos later filed an amended bankruptcy petition dated June 25, 2004. The responses in Schedule B (see above) remained unchanged. In the amended Statement of Financial Affairs, however, the Santonocitos stated the following:

2. Income other than from employment or operation of business:

Amount	Source
$8,000	2004 Workman Comp/Debtor Husband

4. Suits and administrative proceedings, executions, garnishments [etc]
List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case:

[the Kings County personal injury action is not listed in this section, but other actions in other counties are identified]

The $7,000 in settlement proceeds from the unrelated automobile accident policy were declared as "exempt property" in Schedule C of the original and amended bankruptcy petitions.

After commencing the personal injury action, plaintiff became unsatisfied with Attorney Jullus because the case was not moving forward. In July 2004, plaintiff met and consulted with Attorney Edelman of the Moskowitz firm. He was familiar with the firm because it had successfully represented him in other cases. Plaintiff signed a consent to change attorney ("consent"). The consent is dated July 30, 2004, and notarized by Attorney Edelman. The notarization date is also July 30, 2004. There is, however, a notation typed in stating: "This consent form signed and returned to incoming attorneys in ~~january~~ February 2005." Next to that statement is the name and signature of Attorney Jullus with the date "2/3/05" alongside.

Meanwhile, a bankruptcy trustee ("trustee") had already been appointed in the bankruptcy action. By Order of Final Decree dated September 20, 2004, the Santonocitos were discharged in bankruptcy. The trustee was discharged, his bond cancelled and the bankruptcy case was marked as "closed."

The personal injury action was settled on November 15, 2006, after the order discharging the Santonocitos was issued. The settlement was for $200,000. Burke's insurance company paid $100,000 and Barnett's insurance company also paid $100,000. In connection with the settlement, plaintiff signed a release which is notarized by Attorney Edelman. As part of the release, the Moskowitz defendants

prepared an agreement resolving the workers' compensation carrier's lien. Although only the first page of the agreement is provided and it is undated, the agreement sets forth the following terms:

> It is agreed that the Claimant [Santonocito] has the permission of the Carrier [for workers' compensation insurance] to settle his third party (3rd party) action for damages for personal injuries in [the underlying personal injury action] for [$200,000]...inclusive of attorneys' fees and disbursements and
>
> It is further Agreed that the Claimant, John Santonocito, after deduction for attorneys' fees and disbursements shall receive out of the settlement the sum of [$132,572.03] from which sum the Claimant shall pay the sum of [$41,563.50] (the reduced lien) to the Carrier. The Claimant shall, therefore, receive a net recovery in the sum of [$91,008.53]
> (*the remaining pages of the agreement are not provided*)

Plaintiff claims that he suffered significant injuries and that the money recovered in the settlement is inadequate. He claims that the Moskowitz defendants committed legal malpractice by failing to amend the complaint to bring in FMCC as a named defendant. He contends that when he consulted with the Moskowitz defendants, the statute of limitations for commencing a personal injury action against FMCC had not yet expired, but it expired while the Moskowitz defendants were representing him.

Arguments

The Moskowitz defendants argue that plaintiff does not have standing to bring and maintain this action because he failed to list the underlying personal injury action as an asset in his bankruptcy petition and is now precluded, by law, from asserting this legal malpractice claim. The Moskowitz defendants argue that any claim for personal injuries stemming from the March 2002 accident, as well as the legal malpractice claims

flowing therefrom, were assets of the estate that had to be marshaled by the trustee.

The Moskowitz defendants also contend that the consent to change attorney was not a "retainer" and therefore, plaintiff did not retain the defendants until February 3, 2005, when the consent form was returned to the defendants by Attorney Julius. Thus, the Moskowitz defendants contend Attorney Julius continued to act as plaintiff's lawyer until at least February 3, 2005, if not February 14, 2005 when plaintiff signed a Contingency Retainer Agreement in connection with the March 20, 2002 collision.

In opposition to the motion to dismiss, plaintiff raises equitable and legal arguments. He contends that he filed the petition pro se and although he amended his petition to include the $8,000 in workers' compensation he had received, he did not know he should have also included the personal injury action he later commenced. Plaintiff contends the told Attorney Edelman about the bankruptcy action and that Attorney Edelman said they would discuss this later. Plaintiff claims that after he changed attorneys, there was no activity in his case for another six (6) month. He claims to have asked Attorney Edelman about the delay and been puzzled by it. Plaintiff states further that when he signed the retainer in February 2005, he reminded Attorney Edelman about the bankruptcy case, but was assured that the case was over and it "would not be a factor in my personal injury lawsuit."

At oral argument and in his opposition, plaintiff states that he has contacted the trustee and requested that the bankruptcy action be reopened because he made an error in not disclosing the personal injury action and is in the process of suing the Moskowitz attorneys. The Moskowitz defendants reply that lack of standing cannot be cured and substitution cannot cure that incapacity.

Discussion

Since the defendants have moved under CPLR 3211 [a] 1 and [3], the documentary evidence they rely on must definitively dispose of plaintiff's claims (Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept. 2006]; Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 [1st Dept. 1995]). On the other hand, the issue of whether a person seeking relief is the proper party to request adjudication is "an aspect of justiciability which, when challenged [by the defendant], must be considered at the outset of any litigation" Society of Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 769 [1997]). For the reasons that follow, defendants have proved that the order of the bankruptcy court conclusively disposes of plaintiff's claims in this case because it shows that he lacks standing to assert it.

When a debtor files for bankruptcy protection, this creates an "estate" comprised of "all legal and equitable interests of the debtor as of the commencement of the case" (11 USC § 541[a][1]). A pre-petition injury qualifies as a legal interest, within the meaning of the statute (In re Corbi, 149 B.R. 325, 329 [Bankr.E.D.N.Y.1993]) and a debtor is required to disclose in its bankruptcy petition any causes of action that could be brought by the debtor (Kunica v. St. Jean Financial, Inc., 233 B.R. 46 [SDNY 1999]). This is for the benefit of the creditors (Kunica v. St. Jean Financial, Inc., supra). If the debtor fails to list a claim, "an unscheduled claim remains the property of the bankruptcy estate..." (Crawford v. Franklin Credit Management Corp., —B.R.—, 2011 WL 1118584 [S.D.N.Y. 2011]; *also* Bromley v. Fleet, 240 A.D.2d 611 [2nd Dept 1997]). Consequently, the debtor lacks standing to bring a lawsuit in connection with such claims after emerging from bankruptcy, and if s/he does, the lawsuit must be dismissed

(Crawford v. Franklin Credit Management Corp., supra, *citing* Kunica v. St Jean Financial, Inc, supra).

Accepting plaintiff's facts as true, a cause of action for legal malpractice exists because FMCC, a potential defendant, was not brought into the underlying personal injury action before the applicable statute of limitations expired and plaintiff signed a consent to change attorney in July 2004.

An action for legal malpractice accrues when the malpractice is committed (Zorn v. Gilbert, 8 N.Y.3d 933 [2007]). This legal malpractice claim, however, does not belong to the plaintiff and he does not have standing to assert it because it accrued while plaintiff was seeking a discharge in bankruptcy court. Alternatively, this action for legal malpractice can also be viewed as a derivative action, arising from the personal injury action which was not disclosed in the bankruptcy petition (Whelan v. Longo, 7 N.Y.3d 821 [2006]; Dischiavi v. Calli, 68 A.D.3d 1691[4th Dept 2009]).

A debtor cannot not conceal assets and then, upon termination of the bankruptcy case, utilize the assets for its own benefit (Kunica v. St Jean Financial, Inc., supra). Only the trustee, and not a debtor, has standing to pursue causes of action that belong to the bankruptcy estate (In re Merrill Lynch, 375 B.R. 719, 725 [S.D.N.Y.2007]). Whether through inadvertence or otherwise, plaintiff's failure to disclose the personal injury cause of action in his bankruptcy petition deprives him of the legal capacity to sue for malpractice in this action. Under the bankruptcy law, property is only "abandoned" (and reverts back to the debtor) if it was properly scheduled (Donaldson, Lufkin & Jenrette Sec. Corp. v. Mathiasen, 207 AD2d 280 [1st Dept 1994]). Since the personal injury was not properly disclosed in the bankruptcy action, the trustee did not approve of

the $200,000 settlement and the plaintiff claims for legal malpractice during the bankruptcy action, plaintiff does not have standing to assert this claim. Furthermore, the final order of the bankruptcy court is documentary evidence that the personal injury was not exempted from plaitniff-debtor's estate. Therefore, defendants' motion to dismiss this claim for legal malpractice is granted (see Webster Estate of Webster v. State of New York, 2003 WL 728780 [N.Y.Ct.Cl. 2003] n.o.r.).

The court has considered plaintiff's contention, that he was self represented and made a mistake, as well as his claim that dismissal of this action rewards defendants for their malpractice. The first contention is unavailing and the latter argument underestimate his own role in these events.

Although in reply and at oral argument the parties first dealt with the issue of whether the trustee can be substituted as plaintiff in this action, or has the power to reopen the bankruptcy case since he was already discharged as trustee by the bankruptcy judge, these issues are not properly before the court to decide and, in any event, appear to be within the province of the bankruptcy court. This decision is without prejudice to any remedies available in bankruptcy court.

Conclusion

It is hereby

ORDERED that the motion by defendants to dismiss this action based upon CPLR 3211 [a] 1 and [3] is granted for the reasons stated; and it is further

ORDERED that the clerk shall enter judgment in favor of defendants Moskowitz, Passman & Feldman and A. Sheldon Edelman s/h/a Sheldon Edelman, against plaintiff John Santonocito, dismissing the complaint; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 7, 2012

So Ordered:

Hon. Judith J. Gische, JSC