SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

DANIEL GRIPPE,	TRIAL/IAS PART 9 NASSAU COUNTY
Plaintiff,	INDEX NO. 22354/10
- against -	**X X X**
SILVERITE CONSTRUCTION COMPANY, INC.,	MOTION SUBMISSION DATE: 4/18/12
Defendant.	MOTION SEQUENCE NOS. 2, 3, 4

SILVERITE CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiff,

- against -

AIRFLEX INDUSTRIAL, INC., AIRFLEX CORP., McGLONE TRUCKING, INC. and SEAN McGLONE,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion and Affidavits.....	X
Notice of Cross-Motions and Affidavits.....	X
Affirmations in Opposition.....	X
Reply Affirmations.....	X

RELIEF REQUESTED

The third-party defendants, Airflex Industrial, Inc., and Airflex Corp., (hereinafter referred to as "Airflex"), move for an order pursuant to CPLR §3025(b) permitting Airflex to amend its answer to include the defense of lack of capacity to sue, and for dismissal of plaintiff's complaint and the third-party action pursuant to CPLR §3211(a)(3), CPLR §3211(a)(5) and judicial estoppel. The defendant/third-party plaintiff, Silverite Construction Company, Inc., (hereinafter referred to as "Silverite"), and the third-party defendants, McGlone Trucking, Inc. and Sean McGlone, (hereinafter referred to as "McGlone"), cross-move separately for the same relief. The plaintiff submits opposition. The movants submit reply affirmations.

BACKGROUND

The plaintiff initiated this action to recover for personal injuries sustained on November 21, 2008. The plaintiff claims that he was struck by a falling louver that was improperly hoisted and improperly secured, whereby while the louver was being installed, the attachment hooks pulled out causing the louver to fall, striking the plaintiff causing plaintiff serious injuries.

The following procedure in plaintiff's bankruptcy filing is not disputed. Plaintiff filed for bankruptcy pursuant to Chapter 7 of the United States Bankruptcy Court on February 27, 2009, filed the requisite Schedule B listing all personal property and claims, and amended the schedule two times thereafter. The plaintiff did not submit this claim in his bankruptcy filing. On August 23, 2010, the Bankruptcy Judge issued a final decree discharging the trustee and closing the Chapter 7 filing of the plaintiff. Approximately three months later, plaintiff initiated the instant action.

APPLICABLE LAW

A debtor is required to submit a schedule of assets and liabilities to the Bankruptcy Court, including "all pre-petition causes of action belonging to the debtor". (*Meneses v. Long Island Railroad Co.*, 2009 US Dist. Lexis 20471). Such property includes "causes of action belonging to the debtor which accrued prior to the filing of the bankruptcy petition". (*Id.*) A plaintiff, who fails to list a claim in the schedule of assets filed with the bankruptcy court, lacks the capacity to sue. (*Goldstein v. St. John's Episcopal Hospital*, 267 AD2d 426). The debtor's failure to list a legal claim as an asset on the debtor's petition precludes a debtor from pursuing the claim on his own behalf, and the claim remains the property of the bankruptcy estate. (*Coogan v. Ed's Bargain Buggy Corp.*, 279 AD2d 445). The argument that the debtor innocently failed to schedule a claim is unavailing. (*Vegas-Ruiz v. Keller*, 9 Misc3d 1123A).

The Court of Appeals in *Dynamics Corp. Of Am. v. Marine Midland Bank - N.Y.*, 69 NY2d 191, held that plaintiff could not pursue its damages action as and against the defendant, Marine, as plaintiff failed to disclose the claim in the bankruptcy proceeding, as it was not listed in its filed schedules as an asset. "Having failed to disclose the claims, so that they might be "dealt with" in the bankruptcy, DCA [plaintiff] cannot now pursue them individually in this action. That DCA [plaintiff] may have innocently failed to schedule as unliquidated claims the causes of action it now seeks to pursue is immaterial." (*Id.*) The Court further added "[w]ithout a rule precluding such a debtor from later pursuing claims about which it knew or should have known at the time of filing its petition, a debtor-in-possession might employ less than diligent efforts to ascertain and disclose all potential claims, thus undermining its obligation to the estate and prejudicing the interests of the unsecured creditors". "This rule ensues that 'a debtor may not conceal assets and then, upon termination of the bankruptcy case, utilize the assets for [his] own benefit." *(Meneses v. Long Island R. Co., supra*, citing *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, D.D. N.Y. 1999). "Accordingly, courts have held that because an unscheduled claim is the property of debtor's bankruptcy estate, a debtor who attempts to pursue such a claim after emerging from bankruptcy lacks standing to do so." (*Meneses, supra*).

The Courts have invoked the doctrine of judicial estoppel to prevent a party who failed to disclose a claim in a bankruptcy proceeding from asserting the claim in a subsequent action. (*Negron v. Weiss*, 2006 WL 2792769; *Meneses, supra*). It is well settled that the doctrine of judicial estoppel or estoppel against inconsistent positions precludes a party from taking a position in one

legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed. (*Festinger v. Edrich*, 32 AD3d 412, citing *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 AD2d 435; *Kimco of NY v. Devon*, 163 AD2d 573, and *Environmental Concern v. Larchwood Constr. Corp.*, 101 AD2d 591). "The doctrine rests upon the principle that a litigant should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise". (*Environmental Concern v. Larchwood Constr. Corp., supra*, quoting Note, The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings, 59 Harv. Law Rev. 1132). The doctrine is invoked to estop parties from adopting contrary positions because the judicial system "cannot tolerate this 'playing "fast and loose with the courts".' (*Id.*, citing *Scarano v. Central Ry Co.*, 203 F2d 510).

The Court in *Negron v. Weiss*, 2006 WL 2792769, stated that "[i]n bankruptcy context, 'the rationale for these [estoppel] decisions is that the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets..." (*Id.*, citing *Kunica v. St. Jean Fin. Inc.*, 233 B.R. 46, 58 (SDNY 1999) (quoting *Rosenshein v. Kleban*, 918 F Supp 98, 104 (SDNY 1996). Thus, a number of courts have invoked judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy. (*See e.g., Cannon-Stokes v. Potter*, 453 F 3d 446, 449 (7th Cir. 2006); *Lewis v. Weyerhaeuser Co.*, 141 F Appx 420, 427-28 (6th Cir. 2005); *In re Superior Crewboats, Inc.*, 374 F3d 330, 336 (5th Cir. 2004), *Burnes v. Pemco Aeroplex, Inc.*, 291 F3d 1282, 1288 (11th Cir. 2002); *Payless Wholesale Distrib., Inc. v. Alberto Culver, Inc.*, 989 F2d 570 (1st Cir. 1993); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F2d 414 (3d Cir. 1988); *Kunica*, 233 B.R. at 46; *Kleban*, 918 F.Supp at 104; *In re Galerie Des Monnaies of Geneva, Ltd.*, 55 B.R. 253, 259-60 (SDNY 1985), aff'd 1986 WL 6230 (SDNY May 27, 1986)." A plaintiff's failure to list her medical malpractice claim against the defendants in a bankruptcy proceeding resulted in the divesture of plaintiff's title to the claim. (*Bajanov v. Grossman*, 36 AD3d 572).

Leave to amend is freely given, and should be granted where the proposed amendment is neither palpably insufficient or totally devoid of merit. (*Watson v. Getman*, 260 AD2d 472). The defendant was granted leave to amend its answer and assert the affirmative defense of lack of capacity to sue when the defendant discovered that plaintiff filed a petition for relief under Chapter 7 of the United States Bankruptcy Code, and did not disclose the subject property. *(Nunez v. Mousouras*, 21 AD3d 355). The Court granted the defendant leave to amend, finding the amendment permissible and not devoid of merit because plaintiff failed to disclose her pre-petition ownership interest in the subject property and the related cause of action in her bankruptcy filing schedule. (*Id.*)

DISCUSSION

Here, it is undisputed that plaintiff failed to disclose the instant claim in his schedule of assets in his bankruptcy proceeding. His failure to list the claim as an asset on his petition for bankruptcy precludes him from pursuing the claim on his own behalf. (*Cougan v. Ed's Bargain Buggy Corp., supra; Dynamics Corp. of Am. v. Marine Midland Bank - NY, supra*). The plaintiff is judicially estopped from asserting his claim. (*Negron v. Weiss, supra*). Plaintiff had an affirmative obligation to disclose to the bankruptcy court all of his legal or equitable interests, and "the obligation to disclose assets is not limited to those assets to which a debtor has a legal claim. Rather, a debtor must disclose all legal and equitable interests . . ." to the bankruptcy court. (*Id.*)

Plaintiff provides that he informed his bankruptcy attorney that he suffered a "jobsite accident" but his lawyer didn't ask him where he filed any claim or action as a result of the accident. Plaintiff also avers that he "did not believe that any claim [he] might have had against Silverite [defendant herein] was an item that need to be disclosed". As already provided plaintiff's self-proclaimed "innocent" failure to schedule the claim is "immaterial". (*Dynamics v. Marine Midland, supra; Vegas-Ruiz v. Keller, supra*). Even the "[a]dvice of counsel is generally not a defense to the application of judicial estoppel". (*Negron v. Weiss, supra*, citing *Cannon-Stokes*, 453 F3d at 449). Cathy Negron thereto explained to the Court that she and her husband did not disclose an asset under the advice of counsel. (*Id.*) Judicial estoppel does not preclude a debtor's reliance on the advice of counsel in omitting claims from a bankruptcy petition as the debtor was aware of facts giving rise to the claims. (*In re Coastal Plains*, 179 F3d 197). Here, plaintiff was aware of the facts that gave rise to the instant claim.

On the one hand, plaintiff avers that he didn't believe he had a claim against Silverite with respect to the jobsite accident. Yet, on the other hand, plaintiff avers that he "dismissed" his claim against the city with respect to the jobsite accident. These assertions, juxtaposed, not only reflect that he was aware of the facts that gave rise to the instant action and claim herein, but that his proclaimed innocence, or inadvertent omission to list the claim as an asset, is a bit disingenuous. Moreover, approximately within three months of emerging from bankruptcy, plaintiff filed the instant claim in Supreme Court, Nassau County. This is the exact scenario the courts have intended to prevent by invoking the doctrine of judicial estoppel, and in holding that a debtor in these circumstances, lacks standing to pursue the claim. As already provided, without a rule precluding a debtor from pursuing a claim that he knew about, or should have known about at the time of his bankruptcy petition, a debtor will employ "less than diligent efforts to ascertain and disclose all potential claims, thus undermining its obligation to the estate and prejudicing the rights of the unsecured creditors". (*Dynamics v. Marine Midland, supra*).

In any event, plaintiff's assertion that he dismissed his claim against the city is unsubstantiated. Plaintiff's self-serving conclusory assertion is insufficient alone to raise an issue of fact. (*Zuckerman v. City of New York*, 49 NY2d 557).

Plaintiff, in opposition, also requests that this Court adjourn the instant motions until such time as the bankruptcy court can entertain and grant a motion to re-open plaintiff's bankruptcy case to administer the additional asset. Plaintiff, upon service of the instant motions, has moved before the bankruptcy court to re-open the bankruptcy proceeding so that the trustee, thereto, may be later substituted for plaintiff in this action. That is because plaintiff's failure to schedule the asset vested title in the trustee, leaving plaintiff without the capacity to sue, requiring the complaint to be dismissed. (*Reynolds v. Blue Cross of Northeastern N.Y.*, 210 AD2d 619, citing *Weiss v. Goldfeder*, 201 AD2d 644; *Stitch v. Oakdale Dental Center*, 157 AD2d 1011). However, "substitution is not available to cure the deficiency as a party with no capacity to sue cannot be replaced with one who has capacity in these circumstances". (*Reynolds v. Blue Cross, supra*). In *Gazes v. Bennet*, 38 AD3d 287, the Court held that the debtor, who did not list the claim in the bankruptcy proceeding in the schedule of assets, lacked the capacity to commence the action and the "subsequent attempt to substitute *Gazes*, the bankruptcy trustee, as plaintiff, does not cure the defect".

"If debtors could omit personal injury actions or other lawsuits, and then simply move to reopen once caught, nondisclosure would be altogether too attractive. The public interest in the systemic integrity of the bankruptcy process dictates that a bankruptcy court should withhold relief that encourages concealment of assets by debtors." (*In re Marie M. Lowery*, 398 B.R. 512; *Cafferty v. Thompson*, 223 AD99, 102).

The Courts have held that dismissal is appropriate under the circumstances at bar, cognizant that the trustee may commence a new action in a representative capacity on behalf of plaintiff's bankruptcy estate, and in doing so, will receive the benefit of the 6-month extension pursuant to CPLR §205. (*Pinto v. Ancona*, citing *Carrick v. General Hospital*, 51 NY2d 242; *George v. Mt. Sinai Hosp.*, 47 NY2d 170; *Goldberg v. Littauer Hosp. Assn.*, 160 Misc2d 571).

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that the defendant, and the third-party defendants, are hereby granted leave to amend their answer and assert the defense of lack of capacity to sue, and it is hereby further

ORDERED that the defendants' motion and cross-motions are granted in their entirety, and therefore, plaintiff's complaint, and the third-party complaint, are hereby dismissed in their entirety.

ENTER:

J.S.C.

Dated: June 6, 2012

ENTERED
JUN 12 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

cc: Sacks and Sacks LLP
Goldberg, Segalls, LLP
Lawrence, Worden, Rainis & Bard, P.C.