To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KENNETH G. MARTIN, JR.,

Plaintiff,

-against-

DECISION & ORDER
Index No. 57142/2016

Seq. No. 1

ANNMARIE FOGLIO and CONSOLIDATED EDISON OF NEW YORK, INC.,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Document Numbers 21-29, 31-38, were read in connection with defendants' motion for an order to amend their answer and grant dismissal in their favor.

This action arose from a motor vehicle accident on March 23, 2015, wherein defendant Foglio was operating a vehicle owned by Con Edison, when the vehicle was caused to come into contact with that of plaintiff.

NOW, based upon the foregoing the motion is decided as follows:

Under CPLR 3025, "a party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or

additions to be made to the pleading."

"The granting of leave to amend a pleading is in the sound discretion of the trial court and the exercise of the court's discretion will not be lightly disturbed" (Henderson v Gulati, 270 AD2d 308, 309 [2d Dept 2000]). One will generally be freely given leave to amend their pleadings under CPLR 3025(b), "unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit. (Maldonado v Newport Gardens, Inc., 91 AD3d 731 [2d Dept 2012]). "In exercising its discretion, the court will consider how long the amending party was aware of the facts upon which the motion was predicated, and whether a reasonable excuse for the delay is offered" (Caruso v Anpro, Ltd., 215 AD2d 713 [2d Dept 1995]). It must be noted that, "mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side" (Edenwald Contracting Co., Inc. v City of New York, 60 NY2d 957, 959 [2d Dept 1983] citing Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 3025:5, p. 477). Also, "the general rule is that the legal sufficiency or merits of proposed amendments will not be examined on a motion to amend unless the insufficiency or lack of merit is clear and free from doubt." (Ficorilli v Thomsen, 262 AD2d 602, 603 [2d Dept 1999]).

Further, leave to amend a pleading should be granted "where there is no significant prejudice or surprise to the opposing party and where the documentary evidence submitted in support of the motion indicates that the proposed amendment may have merit" (Zito v County of Suffolk, 81 AD3d 722, 724 [2d Dept 2011]). Prejudice is not mere exposure of the defendant to greater liability but, instead "there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure

in support of his position" (Loomis v Civetta Corinno Const. Corp., 54 NY2d 18, 23 [1981]).

CPLR 3211(a)(3) allows the court to dismiss an action where the party bringing the action lacks the legal capacity to sue. In a bankruptcy situation where plaintiff declares bankruptcy will lack capacity to sue on a cause of action if plaintiff failed to disclose the existence of the cause of action as an asset in the bankruptcy proceeding (Dynamics Corp. of America v. Marine Midland Bank–New York, 69 NY2d 191 [1987]; Whelan v Longo, 23 AD3d 459 [2d Dept2005]).

Even if a party waives defense of lack of capacity to sue by failing to raise it in answer, defense can be interposed in amended answer, by leave of court, so long as amendment does not cause other party prejudice or surprise resulting directly from the delay (CPLR 3025(b), 3211(a)(3), (e); Complete Mgmt., Inc. v Rubenstein, 74 AD3d 722 [2d Dept 2010]).

Defendants now move to amend their answer pursuant to CPLR 3025(b) to include the affirmative defense of lack of capacity to sue and for a judgment dismissing the plaintiff's complaint pursuant to CPLR 3211 (a)(3), on the grounds that plaintiff failed to include his personal injury cause of action as an asset with his bankruptcy petitions.

After defendants interposed an answer in this action, plaintiff had filed two bankruptcy petitions relief under Chapter 13, which were dismissed upon a motion by debtor's attorney. According to plaintiff, in both matters, plaintiff's proposed payment plan was not agreed upon, the plan was not confirmed, no payments were made upon the plan, and plaintiff's debts were not discharged. US Trustees, and the bankruptcy estates, did not possess or control plaintiff's possessions, including the instant cause of action.

"The Bankruptcy Code broadly defines the property of a debtor to include causes of action existing at the time of the commencement of the bankruptcy action" (Bromley v Fleet

Bank, 240 A.D.2d 611 [2d Dept 1997]; see also, 11 USC § 541[a] [1]). "Upon the filing of a voluntary bankruptcy petition, all property that the debtor owns or subsequently acquires, including a cause of action, vests in the bankruptcy estate. A debtor's failure to list a legal claim as an asset on his or her bankruptcy petition causes the claim to remain the property of the bankruptcy estate and precludes a debtor from pursuing the claim on his or her own behalf" (Coogan v Ed's Bargain Buggy Corp., 279 AD2d 445 [2d Dept 2001]).

Here, contrary to defendants' contention, plaintiff, as a litigant in a Chapter 13 bankruptcy proceeding, possessed the requisite capacity to maintain this action (Nicke v Schwartzapfel Partners, P.C., 148 AD3d 1168, 1170 [2d Dept 2017], citing Giovinco v Goldman, 276 AD2d 469, 469; Olick v Parker & Parsley Petroleum Co., 145 F.3d 513, 515), appeal withdrawn, 33 NY3d 945 [2019]).

The Second Department explains that:

"In contrast to Chapter 7 proceedings, the object of a Chapter 13 proceeding is the rehabilitation of the debtor under a plan that adjusts debts owed to creditors by the debtor's regular periodic payments derived principally from income. Thus, in a Chapter 13 proceeding, a debtor generally retains his property, if he so proposes, and seeks court confirmation of a plan to repay his debts over a three- to five-year period (see 11 U.S.C. §§ 1306[b]; 1322, 1327[b]). Payments under a Chapter 13 plan are usually made from a debtor's "future earnings or other future income" (11 U.S.C. § 1322[a] [1]). "Accordingly, the Chapter 13 estate from which creditors may be paid includes both the debtor's property at the time of his bankruptcy petition, and any wages and property acquired after filing" (Harris v. Viegelahn, ——U.S. ——, ——, 135 S.Ct. 1829, 1835, 191 L.Ed.2d 783; see 11 U.S.C. § 1306 [a]). Assets acquired after a Chapter 13 plan is confirmed by the court are not included as property of the estate, unless they are necessary to maintain the plan (see 11 U.S.C. §§ 1306[a]; 1326), or the trustee seeks a modification of the plan to remedy a substantial change in the debtor's income or expenses that was not anticipated at the time of the confirmation hearing (see 11 U.S.C. § 1329[a]; In re Solis, 172 B.R. 530, 532 [Bankr.S.D.N.Y.])."
((Nicke v Schwartzapfel Partners, P.C., 148 AD3d 1168, 1170 [2d Dept 2017]).

Thus, "while Chapter 7 and Chapter 11 debtors lose standing to maintain civil

suits—which must be brought and/or maintained by their bankruptcy trustees—it is clear that Chapter 13 debtors like plaintiff are not subject to this restriction" (Murray v. Bd. of Educ. of City of New York, 248 B.R. 484, 486 [SDNY 2000], see Olick v Parker & Parsley Petroleum Co., 145 F3d 513 [2d Cir.1998]).[1] Plaintiff does not lack the capacity to prosecute his claims in this action by having filed a Chapter 13 petition and/or his failure to list the claims at issue in this action on the bankruptcy petitions.

Thus, after consideration of the arguments by the parties, the motion by defendants for leave to amend their answer to assert the affirmative defense of lack of capacity to sue and for dismissal of the complaint, is denied as palpably insufficient or patently devoid of merit.

All other matters not herein decided are denied. This constitutes the Decision and Order of the Court.

Date: February 5 , 2020
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF

[1] In Jean-Paul v. 67-30 Dartmouth St. Owners Corp., 174 A.D.3d 870, 871, [2d Dept 2019]) plaintiff did not disclose, in the bankruptcy petition that she filed a bankruptcy petition. The Court found that the failure of a party to disclose a cause of action as an asset in a prior bankruptcy proceeding, which the party knew or should have known existed at the time of that proceeding, deprives him or her of 'the legal capacity to sue subsequently on that cause of action' However, significantly, the Jean-Paul matter involved a Chapter 7 bankruptcy petition, and therefore, is distinguishable from the matter at hand.