[Cite as *Kinder v. Zuzak*, 2009-Ohio-3793.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

REBECCA S. KINDER, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2008-L-167**
- vs -	:	
BRIAN ZUZAK, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 001067.

Judgment: Reversed and remanded.

Michael J. Feldman, Lallo & Feldman Co., L.P.A., Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094 (For Plaintiffs-Appellants).

Brian Zuzak, pro se, 16029 Messenger Road, Chagrin Falls, OH 44023 (Appellee Brian Zuzak).

Brian A. Meeker, Law Office of Kerns & Proe, 304 Commerce Place, 7123 Pearl Road, Middleburg Heights, OH 44130 (For Appellee State Auto Insurance Company).

MARY JANE TRAPP, P.J.

{¶1} Rebecca and Ernest Kinder appeal from a judgment of the Lake County Court of Common Pleas dismissing their claim against Brian Zuzak and State Auto Insurance Company ("State Auto") in connection with an automobile accident. The trial court granted the defendants' motion to dismiss claiming the Kinders lacked standing to bring the suit because of their bankruptcy filing. For the following reasons, we reverse and remand the case for further proceedings.

{¶2} On December 20, 2004, a vehicle driven by Mr. Zuzak struck Mrs. Kinder's vehicle from behind, and she sustained injuries from the incident.

{¶3} Subsequent to the incident, on April 6, 2006, the Kinders filed for Chapter 7 bankruptcy in the U.S. Bankruptcy Court for the Northern District of Ohio. On the bankruptcy petition they listed the potential personal injury claim as an asset.

{¶4} On December 19, 2006, the Kinders filed a lawsuit against Mr. Zuzak and their own insurance company, State Auto. Apparently, on February 27, 2007, State Auto filed a motion to dismiss alleging that the Kinders lacked standing to bring the action due to their bankruptcy filing. The Kinders voluntarily dismissed the case on March 29, 2007. The first case is not part of the record of the instant case.[1]

{¶5} On March 28, 2008, the Kinders refiled their case.[2] State Auto filed a motion to dismiss based on Civ.R. 12(B)(1) and 12(B)(6), claiming that because of their bankruptcy filing, the Kinders lacked standing to prosecute the claim.[3] State Auto attached two exhibits including a docket report from the bankruptcy case and also a copy of the "Individual Estate Property Record and Report." A review of the latter indicates that among the assets listed is a "possible personal injury claim," the value of which is listed as "unknown."

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1. We note that Mr. Zuzak moved this court in the instant appeal to supplement the record with the trial court's docket of the first case, No. 06-CV-003034. We granted the request and remanded it for the trial court to supplement the record. However, the trial court denied the request on the ground that it was "unnecessary." We are able to discern from the limited record that the same standing challenge was raised in the first case because the trial court, in its judgment entry for the instant case, stated: "The Court further notes that this is a re-filed action and Plaintiffs' counsel made the same representations prior to filing a voluntary dismissal in the previous case."

2. The underlying trial court case, No. 08 CV 001067, was consolidated with a related insurance subrogation case, *State Auto Insurance Company v. Brian Zuzak*, No. 08 CV 001437. The latter case is not part of this appeal.

3. Mr. Zuzak answered and subsequently filed a motion to dismiss for lack of standing, incorporating by reference the arguments set forth in State Auto's motion to dismiss.

{¶6} In response to the defendants' motion to dismiss, the Kinders filed a brief in opposition asserting their claim would be exempted from the bankruptcy estate pursuant to R.C. 2329.66(A)(12)(c) because it likely had a value of less than $5,000. Attached to their motion was an affidavit from the Kinders' counsel, which stated that counsel learned from his communication with the bankruptcy trustee that because the value of the claim would be under the exempted amount, the claim did not become a part of the bankruptcy estate.

{¶7} The trial court granted State Auto's motion to dismiss on the ground that the Kinders lacked standing to bring the instant action because their claim was part of the bankruptcy estate.

{¶8} The Kinders timely appealed, raising one assignment of error:

{¶9} "The trial court erred when it granted appellee's motion to dismiss."

{¶10} As an initial matter, we note that "in determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, the trial court is not confined to the allegations of the complaint and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment." *McHenry v. Industrial Com. of Ohio*, 68 Ohio App.3d 56, 62, citing *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, paragraph one of syllabus.

{¶11} The Kinders maintain that they had standing to commence the instant action because the bankruptcy trustee intended to abandon the claim even though it had not done so, and also because their claim in the action is exempt from the bankruptcy estate under R.C. 2329.66(A)(12)(c).

{¶12} "Upon the commencement of a bankruptcy case, all of a debtor's property becomes property of the estate." *Krieger v. Cleveland Indians Baseball Co.*, 176 Ohio App.3d 410, 2008-Ohio-2183, ¶48, citing 11 U.S.C. §541. Once a bankruptcy case is filed, all property, including civil causes of action, is a property of the bankruptcy estate. *In re Cottrell* (C.A. 6, 1989), 876 F.2d 540, 542.

{¶13} However, "[p]roperty abandoned under 11 U.S.C. 554 ceases to be property of the estate and the debtor reacquires that right upon abandonment." *Hargreaves v. Carter* (Mar. 27, 1996), 9th Dist. No. C.A. No. 17450, 1996 Ohio App. LEXIS 1167, *6, citing *In re Dewsnup* (C.A. 10, 1990), 908 F.2d 588. See, also, *Northland Ins. Co. v. Illuminating Co*., 11th Dist. Nos. 2000-A-0058 and 2002-A-0066, 2004-Ohio-1529, ¶19 (citing *Hargreaves* for the statement of law that a tort claim must have been prosecuted by the bankruptcy trustee, unless the claim was abandoned).

{¶14} In order to demonstrate that a claim had been abandoned by the trustee, a plaintiff in the Kinders' position must produce evidence establishing one of the following three conditions had occurred: "(1) the trustee expressly abandoned the claims after giving notice to creditors of the proposed abandonment; (2) the court ordered abandonment after a party in interest had requested abandonment of the claims and notice to creditors had been afforded; or (3) *the claims were scheduled under 11 U.S.C. 521(1) and not otherwise administered at the time the case was closed*." (Emphasis added.) *Hargreaves* at *6-7, citing 11 U.S.C. 554(a)-(c) and *In re Fossey* (D. Utah 1990), 119 B.R. 268, 271. The party seeking to demonstrate abandonment bears the burden of showing that the trustee intended to abandon the asset. *Hanover Ins. Co. v. Tyco Ind.* (C.A. 3, 1974), 500 F.2d 654, 657.

{¶15} Here, State Auto's own exhibits show that the personal injury claim was listed as an asset in the bankruptcy case. Furthermore, it appears from the record the bankruptcy case has *not* been formally discharged, and that, although provided with the notice and the opportunity, the bankruptcy trustee has *not* formally acted on this claim. Thus, it appears the inactivity of the trustee and the fact that the bankruptcy case has not closed prevented the plaintiffs from establishing the trustee had abandoned the asset.

{¶16} State Auto refers us to the Individual Estate Property Record and Report attached to the motion to dismiss. The report shows a list of properties that were marked as abandoned either pursuant to 11 U.S.C. section 554(a) or section 554(c). State Auto points out the personal injury claim did not carry a notation of abandonment and argues a lack of notation in the report shows the personal injury claim was *not* abandoned.

{¶17} Because the bankruptcy case has not closed, however, a lack of notation in this report does not mean the trustee will not later decide to abandon the claim or employ special counsel and join in the plaintiffs' action as a party prior to the closing of the bankruptcy case. Until the bankruptcy case is formally closed, the Kinders have no way of proving that the tort claim was scheduled but "not otherwise administered at the time the case was closed." *Hargreaves* at *6. The Kinders listed the personal injury claim as an asset in the bankruptcy case thus giving proper notice to the trustee and affording the trustee an opportunity to act on it. It would be unfair to penalize them for the trustee's inactivity and the protraction of the bankruptcy proceeding, over which they have no control. Therefore, the trial court's outright dismissal of the case is premature.

{¶18} State Auto relies on this court's decision in *Northland* for the proposition that upon a bankruptcy filing, plaintiffs in the Kinders' position are not the real party in interest and therefore lack standing to pursue their claim. That case is factually distinguishable, because there, the plaintiffs' claim was never scheduled as an asset in the bankruptcy case. In that case, we explained that "[t]he Bankruptcy Code 'deprives the creditors of the right to share in the debtor's property only if that property was formally abandoned by the court after a hearing or if the property was explicitly identified in the debtor's bankruptcy schedules and was never administered by the trustee during the pendency of the case.'" Id. at ¶18, citing *In re Schafler* (N.D.Ca., 2001), 263 B.R. 296, 305, quoting *In re Harris* (S.D.Fla., 1983), 32 B.R. 125, 128. We stressed that "a claim is not deemed to be abandoned if the debtor fails to schedule the claim." Id. citing *In re McCoy* (S.D.Ohio, 1991), 139 B.R. 430, 431-432. Because the claim in that case was never scheduled as an asset, or formally abandoned after a hearing, we concluded the trial court's judgment awarding damages to the plaintiff pursuant to a jury verdict must be reversed because the plaintiff failed to meet his burden that the claim was abandoned, thus he lacked standing to bring the suit.

{¶19} Furthermore, R.C. 2329.66(A)(12)(c) allows individuals to hold certain property exempt from attachment by judgment creditors, one such item being "a payment, not to exceed five thousand dollars, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss." *Wylie v. Wiley*, 1st Dist. No. C-970243 and C-970473, 1998 Ohio App. LEXIS 1030, fn. 4. See, also, *Young v. IBP, Inc*., 124 Ohio Misc. 2d 31, 2003-Ohio-3512, ¶11-12 ("R.C. 2329.66(A)(12)(c) exempts from the estate of an Ohio bankruptcy petitioner $5,000

collected because of the right to sue for personal injuries. Exempted property does not become part of the bankruptcy estate if the bankruptcy petitioner claims the exemption and the trustee does not dispute the exemption. If a bankruptcy petitioner has a claim for personal injuries because of the tortious conduct of another, then following the filing of the bankruptcy petition, there are two possible plaintiffs, the person who was injured and the trustee"). Here, it appears that the Kinders' counsel raised the exemption issue with the trustee yet the trustee neither formally objected to nor granted the exemption, another reason this case was prematurely dismissed.

{¶20} When a tort claim is scheduled as an asset in a plaintiff's bankruptcy case and a defendant objects that the plaintiff is not the real party in interest, we believe the proper course of action to be taken by the trial court is the following approach set forth by the Tenth Appellate District in *McLynas v. Karr*, 10th Dist. No. 03AP-1075, 2004-Ohio-3597:

{¶21} "Pursuant to Civ.R. 17(A), after defendants objected that plaintiff is not the real party in interest, the trial court was required to give plaintiff a reasonable opportunity to cure the deficiency through the trustee's ratifying commencement of the action, or being substituted or joined in the action as the real party in interest. While the statute of limitations would have run on plaintiff's claim at the time of joinder, ratification or substitution, such action in curing the deficiency has 'the same effect as if the action had been commenced in the name of the real party in interest.'" Id. at ¶22, citing Civ.R. 17(A). Moreover, "'[i]f there is no attempt at cure, then the action should be dismissed.'" Id., quoting *Foster v. Blue Cross/Blue Shield of Ohio* (Dec. 11, 1997), 10th Dist. No. 97APE03-410, 1997 Ohio App. LEXIS 5606.

{¶22} Therefore, we reverse the judgment of the trial court and remand this case for further proceedings. Upon remand, the trial court is to allow the plaintiffs 30 days to cure the deficiency through the mechanisms provided for in Civ.R. 17(A), and, if there is no attempt at cure by the plaintiffs, the action should then be dismissed.

{¶23} The judgment of the Lake County Common Pleas Court is reversed, and case remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.