NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

GREGG F. BRADY, D.C. AND KAREN L. BRADY, Appellants v. DELAWARE VALLEY PAIN AND REHABILITATION CENTER, P.C. AND RONALD M. REPICE, II, D.C.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 715 EDA 2012

Appeal from the Order Entered February 7, 2012,
in the Court of Common Pleas of Delaware County
Civil Division at No. 05-12082

BEFORE: FORD ELLIOTT, P.J.E., DONOHUE, J. AND McEWEN, P.J.E.*

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 3, 2013

Gregg F. Brady, D.C. ("Brady") and Karen L. Brady appeal from the order entered February 7, 2012, granting summary judgment in favor of defendants/appellees, Delaware Valley Pain and Rehabilitation Center, P.C. ("Delaware Valley") and Ronald M. Repice, II, D.C. ("Repice"). We affirm in part, vacate in part, and remand for further proceedings.

On March 18, 2005, Brady purchased Delaware Valley, a chiropractic clinic, from Repice for $1.2 million. To pay for the business, Brady arranged a Small Business Administration ("SBA") loan in the amount of $956,000, as well as a promissory note to Repice in the amount of $200,000. According to Brady, soon after purchasing the practice, which Repice had characterized

* This decision was reached prior to the retirement of P.J.E. McEwen.

as a "turnkey" operation, it became apparent that Repice had misrepresented the financial condition of the practice. Specifically, Brady alleged that instead of the 80 to 130 patient visits per week that Repice claimed, he saw only 40 to 60 patients per week; that the revenues generated by the practice were nowhere near the levels represented by Repice; that the practice's accounts receivable were not as represented by Repice; that the business was failing financially at the time it was purchased by Brady; and that the business had been "blackballed" by the area's personal injury lawyers, who were a major patient referral source. Brady alleged that had he been made aware of the financial condition of the practice prior to closing, he never would have proceeded with the purchase.

On October 19, 2005, Brady filed a complaint against Repice and Delaware Valley, alleging fraud. An amended complaint was filed on February 9, 2006. Brady sought rescission of the purchase agreement, as well as money damages. Brady sought repayment of the promissory note to Repice as well as the SBA loan. Brady also claimed unspecified compensatory damages in excess of $50,000, to be determined at trial.

On August 31, 2006, Brady filed for Chapter 7 bankruptcy, claiming in excess of $1.9 million in liabilities. Among various other debts, the SBA loan and the promissory note in favor of Repice were discharged. On August 17, 2007, the bankruptcy trustee, Charles Bierbach, Esq., gave notice that he

intended to abandon the instant lawsuit. Therefore, the cause of action returned to the debtors, ***i.e.***, appellants.

On July 20, 2010, the trial court granted appellees' motion ***in limine*** and ordered that Brady was precluded from offering, seeking admission of or otherwise arguing any alleged damages regarding Brady's claim which were ultimately discharged in bankruptcy. Thereafter, appellees filed a motion for offer of proof of damages. On October 28, 2011, appellees filed a motion ***in limine*** to preclude at trial the introduction of any damages by Brady, arguing that same were either previously barred by the trial court's July 20, 2010 order, or were never pleaded in either Brady's original or amended complaints. On December 5, 2011, the motion was granted. Thereafter, appellees filed a motion for summary judgment which was granted on February 7, 2012. This timely notice of appeal followed on March 1, 2012. Brady was not ordered to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A.; however, on April 23, 2012, the trial court filed a Rule 1925(a) opinion.

Initially, we note:

> Our scope of review of a trial court's order disposing of a motion for summary judgment is plenary. Accordingly, we must consider the order in the context of the entire record. Our standard of review is the same as that of the trial court; thus, we determine whether the record documents a question of material fact concerning an element of the claim or defense at issue. If no such question

> appears, the court must then determine whether the moving party is entitled to judgment on the basis of substantive law. Conversely, if a question of material fact is apparent, the court must defer the question for consideration of a jury and deny the motion for summary judgment. We will reverse the resulting order only where it is established that the court committed an error of law or clearly abused its discretion.
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> ***Grimminger v. Maitra***, 887 A.2d 276, 279 (Pa.Super.2005) (quotation omitted). "[Moreover,] we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." ***Evans v. Sodexho***, 946 A.2d 733, 739 (Pa.Super.2008) (quotation omitted).

Ford Motor Co. v. Buseman, 954 A.2d 580, 582-583 (Pa.Super. 2008), ***appeal denied***, 601 Pa. 679, 970 A.2d 431 (2009).

Brady's primary argument on appeal is that because the cause of action reverted back to him when the bankruptcy trustee declined to prosecute it, he should be permitted to proceed with the instant lawsuit, including those alleged damages which were already discharged through bankruptcy. We disagree.

"Upon a declaration of bankruptcy, all petitioner's property becomes the property of the bankruptcy estate. ***See*** 11 U.S.C. § 541(a). This includes 'all legal or equitable interests of the debtor in property,' ***id.*** at § 541(a)(1), which has been interpreted to include causes of action." ***Lane v. Vitek Real Estate Industries Group***, 713 F.Supp.2d 1092, 1097

(E.D.Cal. 2010) (additional citations omitted). "Accordingly, a bankruptcy petitioner loses standing for any causes of action and the estate becomes the only real party in interest unless the bankruptcy trustee abandons the claims." ***Id.*** (citations omitted).

"Upon the filing of a Chapter 7 petition, an interim Trustee is appointed to administer, *inter alia*, the property of the estate. The Trustee is the sole representative of the estate. As such, the Trustee has the exclusive right to prosecute causes of action that are property of the bankruptcy estate." ***Anderson v. Acme Markets, Inc.***, 287 B.R. 624, 628 (E.D.Pa. 2002) (citations omitted). "A debtor may regain standing to pursue a cause of action if it is abandoned by the Trustee. Under 11 U.S.C. § 554(a), the Trustee may abandon property which is burdensome to the estate or that is of inconsequential value to the estate." ***Id.*** at 629.

Instantly, Brady is correct that the trustee chose not to pursue the cause of action. At that point, the cause of action was abandoned to the debtor and Brady regained standing to pursue this case. Nevertheless, Brady would still have to prove damages resulting from the alleged fraud.[1]

[1] "The specific elements of fraud are as follows: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." ***Youndt v. First Nat. Bank of Port Allegany***, 868 A.2d 539, 545 (Pa.Super. 2005), quoting ***Gibbs v. Ernst***, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994).

Brady fails to state any case for the proposition that even where debts are forever discharged in bankruptcy, the debtor can continue to pursue those same debts as damages in a civil lawsuit.

"While it is a fundamental rule of damages that a person injured by the tortious act of another is entitled to compensation, a court will not allow that person more than one satisfaction in damages. An injured party cannot recover twice for the same injury." ***D'Adamo v. Erie Ins. Exchange***, 4 A.3d 1090, 1096 (Pa.Super. 2010), ***appeal denied***, ___ Pa. ___, 26 A.3d 483 (2011), quoting ***Rossi v. State Farm***, 465 A.2d 8, 10 (Pa.Super. 1983) (internal citations omitted). "This rule applies equally to situations where the injured party legally has another claim for the same loss; the purpose of this rule of damages in any context is to avoid unjust enrichment." ***Id.***, citing ***Rossi***, ***supra***. ***See also Moorhead v. Crozer Chester Medical Center***, 564 Pa. 156, 163-164, 765 A.2d 786, 790 (2001) (Pennsylvania remedies seek to put the injured party in a position as nearly as possible equivalent to his or her position prior to the tort, and an injured party cannot recover twice for the same injury) (citations omitted).

Most of Brady's damages listed in his complaint and amended complaint, including the SBA loan and the promissory note to Repice, were discharged in bankruptcy. Brady will never have to repay these loans. To allow Brady to recover the same amounts in the instant lawsuit would result in a duplicative recovery which is not permitted under Pennsylvania law.

While not directly controlling, we find ***Moorhead***, ***supra***, to be instructive. In that case, the plaintiff sought compensatory damages for past medical expenses in the amount of $108,668.31. However, the Medicare allowance for those services was only $12,167.40. ***Moorhead***, 564 Pa. at 159, 765 A.2d at 788. Therefore, the plaintiff would never be legally obligated to pay more than $12,167.40 for the medical services. ***Id.*** In holding that the plaintiff was not entitled to collect the difference of the cost of the hospital's services and the Medicare allowance ($96,500.91), the court noted that the plaintiff did not pay the $96,500.91, nor did Medicare or Blue Cross pay that amount on her behalf. ***Id.*** at 165, 765 A.2d at 791. The plaintiff was only entitled to recover $12,167.40, the amount actually paid and accepted as full payment for the medical services rendered by the hospital. Allowing the plaintiff to collect the excess amount would result in a duplicative recovery:

> Awarding Appellant the additional amount of $96,500.91 would provide her with a windfall and would violate fundamental tenets of just compensation. It is a basic principle of tort law that damages are to be compensatory to the full extent of the injury sustained, but the award should be limited to compensation and compensation alone.

Id. at 163, 765 A.2d at 790 (citation and quotation marks omitted).

Similarly, here, Brady would only be entitled to collect damages not already discharged in bankruptcy. Allowing Brady to recover on the SBA loan and the promissory note to Dr. Repice would result in a windfall.

That said, it appears from the record that Brady did sustain out of pocket losses related to the purchase of the business which were not discharged in bankruptcy. For example, Brady alleges in his amended complaint that he paid a deposit of $25,000 at the time of execution of the purchase agreement. (Amended Complaint, 2/9/06 ¶ 22(a); RR at 6a.) Brady also alleges that the purchase price for the business and real estate assets was $1.2 million, which Brady paid by execution and delivery of the $200,000 promissory note to Dr. Repice; $884,500 from the proceeds of the SBA financing; and the $25,000 deposit, with the balance due at closing. (***Id.*** ¶¶ 20-22; RR at 6a.) Therefore, it may be inferred that Brady paid approximately $90,500 at closing on March 18, 2005. These amounts were not part of the bankruptcy proceedings.

In Count Two of the amended complaint, Brady seeks rescission of the purchase agreement, including repayment of all sums paid to Dr. Repice for the purchase of the business and real estate assets, and repayment of all interest and principal sums paid on account of both the SBA loan and the promissory note. (RR at 15a.) In his response to appellees' motion for offer of proof of damages, and again in his memorandum of law in opposition to appellees' motion for summary judgment, Brady claims that he paid Dr. Repice monthly principal and interest payments of $2,000 for more than one year on the promissory note, and made monthly payments of at least

$6,000 for more than one year on the SBA loan. (RR at 601a, 650a.) Brady alleges that these sums were not discharged in bankruptcy.

Therefore, it appears that not all of Brady's alleged damages were discharged in bankruptcy. At the very least, it presents a genuine issue of material fact as to which damages survived and which did not. Certainly, as discussed above, the balance of the SBA loan and the promissory note to Dr. Repice were discharged and the trial court did not err in dismissing those claims. However, to the extent Brady sustained losses as a result of Dr. Repice's alleged fraud prior to filing for bankruptcy, including the $25,000 deposit and the balance due at closing, he may be able to proceed on those claims. As this court is not a fact-finding court, we deem it necessary to remand to the trial court to make that determination.

Order affirmed in part and vacated in part. Remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished.