

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX: STP

-----X
 BERTHENIA SINGLETON,

Plaintiff,

INDEX NO.: 16530/04

-against-

RIVERBAY CORPORATION,

Defendant.

DECISION

-----X
HON. STANLEY GREEN

The motion by Riverbay for an order pursuant to CPLR §3025(a), granting permission to amend its answer to include the affirmative defense of lack of capacity to sue, and pursuant to CPLR §3211(a)(3) and the US Bankruptcy Code, granting dismissal of this action based upon plaintiff's lack of capacity to sue is granted.

Plaintiff commenced this action to recover damages for personal injuries she sustained in a slip and fall accident at defendant's premises on November 4, 2003.

On May 20, 2004, plaintiff filed the summons and complaint in this action. On June 27, 2004, Riverbay served its answer. On February 22, 2005, plaintiff filed a petition for Chapter 7 Bankruptcy in the US Bankruptcy Court for the Southern District of New York. Plaintiff annexed a schedule of assets to her bankruptcy petition. Although she was required to list in her petition all property belonging to her, including causes of action which existed at the time of the commencement of the bankruptcy action (11 USC 541(a)(1)), she failed to list this action. Plaintiff's bankruptcy petition was discharged on or about April 7, 2006.

Riverbay seeks permission to amend its answer to include the affirmative defense that plaintiff lacks capacity to bring this action on the ground that it only discovered plaintiff's

bankruptcy filing while preparing the case for trial. Citing several Third Department cases, Riverbay seeks dismissal on the ground plaintiff lack of capacity to bring this action because she failed to list this as a contingent asset in her bankruptcy petition.

Plaintiff contends that the motion should be denied because it was filed on the eve of trial, resulting in prejudice and unfair surprise to her. Plaintiff also contends that even if Riverbay's motion to amend is granted, the motion to dismiss should be denied because the motion is not supported by a copy of the pleadings, plaintiff did not lack standing to sue when she brought this action and the cases cited by Riverbay which restrict the trustee's ability to be substituted for the plaintiff are not binding precedent on this Department and should not be followed.

Plaintiff also informs the court that in June 2007, she moved to reopen the bankruptcy proceeding and her motion was granted in an order dated July 11, 2007, which directed the United States trustee to appoint a disinterested person to act as Chapter 7 trustee. Thus, plaintiff intends to have the trustee substituted in her place to prosecute her claim, which will also benefit her creditors.

Leave to amend a pleading is freely granted in the absence of prejudice resulting from the delay, provided the proposed amendment is not plainly lacking in merit (CPLR §3025(b)). Mere lateness is insufficient to preclude amendment of the pleading (Fitzpatrick v. Structure Tone Inc., 201 AD2d 373). Here, Riverbay has explained that the delay is due to the fact that it discovered the existence of plaintiff's bankruptcy petition while preparing for trial. While plaintiff contends that she is prejudiced by the timing of this motion, she can hardly claim unfair surprise since she is the person who filed for bankruptcy and failed to list this action as a contingent asset.

With respect to the merits of the proposed amendment, a debtor in bankruptcy is required to file a comprehensive schedule of its assets, including "unliquidated claims of every nature" (Dynamics v. Marine Midland, 69 NY2d 191). Where a trustee is appointed, tort claims of a debtor vest in the bankruptcy trustee who determines whether the claims should be pursued on the creditors' behalf or "abandons" it (Bankruptcy Act §70 (a)(6)). Only property that has been "dealt with" or "abandoned" by the trustee may re-vest in the debtor in his individual capacity at the conclusion of the bankruptcy proceedings and the debtor's property cannot be "dealt with" or "abandoned" unless it is listed in the debtor's schedule of assets (*Id.*).

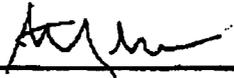
It is undisputed that plaintiff failed to disclose this claim. Therefore, it was neither abandoned nor "dealt with" in the bankruptcy and plaintiff lacks the capacity to pursue it individually. Accordingly, Riverbay's motion to amend its answer is granted and upon amendment, Riverbay's motion to dismiss the complaint is granted.

While it is noted that the Bankruptcy Court has issued an order reopening plaintiff's case, it will be up to the trustee to decide whether or not to abandon this claim or pursue it by commencing an action within six months pursuant to CPLR §205(a).

Movant shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: October 12, 2007



STANLEY GREEN, J.S.C.