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**SHORT FORM ORDER  
NEW YORK SUPREME COURT - QUEENS COUNTY**

**IA TRP**

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**MATTHEW ADESSA,**

**Plaintiff,**

**-against-**

**Index No.: 378/95 006  
Motion Date: May 8, 2001  
Motion Cal. No.: 1**

**HON. DAVID GOLDSTEIN**

**JOSEPH LITRENTA and JOHN FRAMOSSA,  
individually and in their official capacity,  
the NEW YORK CITY POLICE  
DEPARTMENT and the CITY OF  
NEW YORK,**

**Defendants.**

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The following papers numbered 1 to 15 read on this motion to amend the answer and to dismiss the cross-motion.

**PAPERS  
NUMBERED**

<b>Notice of Motion-Affirmation-Exhibits .....</b>	<b>1-4</b>
<b>Notice of Cross-Motion-Affidavit-Exhibits .....</b>	<b>5-9</b>
<b>Reply Affirmation in Opposition to Cross-Motion..</b>	<b>10-12</b>
<b>Reply Affirmation in Support of Cross-Motion .....</b>	<b>13-15</b>

Upon the foregoing papers, it is ordered that this motion and cross-motion are disposed of in accordance with the accompanying decision and order.

Dated: May 18, 2001

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J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: PART TRP

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MATTHEW ADESSA,

Plaintiff,

Index No.:  
378/95 006

-against-

Motion No. 1 of  
May 8, 2001

DECISION AND ORDER

JOSEPH LITRENTA, JOHN FRAMOSSA,  
individually and in their official  
capacity, the NEW YORK CITY  
POLICE DEPARTMENT and the CITY OF  
NEW YORK,

Defendant.

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DAVID GOLDSTEIN, J.:

This is a motion by defendants, pursuant to CPLR § 3025, for leave to serve an amended answer to interpose an affirmative defense of lack of standing, based upon plaintiff's failure to disclose this cause of action as an asset when he filed for bankruptcy and, upon such affirmative defense, dismissing the complaint. Plaintiff cross-moves to stay the action pending a motion before the Bankruptcy Court to reopen the bankruptcy and, upon the reopening of the bankruptcy, permitting the Trustee to be substituted as the plaintiff.

The action was brought to recover for personal injuries sustained by the plaintiff on October 2, 1993, when he was shot by one of the defendant police officers. On that date, it is alleged,

the officers were on patrol in a yellow taxicab, when they observed plaintiff back out of a gas station, strike a parked car, and then flee the scene. The officers pursued plaintiff over several miles, during which, it is claimed, plaintiff threatened them with his vehicle. At some point, plaintiff stopped along the Long Island Expressway, whereupon he exited his vehicle, holding a baseball bat in a raised position. As he approached the officers, he was shot three times by Officer Litrenta. Plaintiff then got into his vehicle and fled the scene again, whereupon the officers called for back-up assistance.

The action was commenced by the filing of a summons and complaint on January 9, 1995. Prior to joinder of issue, plaintiff filed for bankruptcy under Chapter 7 on March 22, 1995, five days prior to service of the City's answer. The bankruptcy was filed because of plaintiff's alleged inability to pay medical bills arising from this occurrence. He was subsequently discharged from bankruptcy on October 15, 1995. Undisputed, however, is that plaintiff did not list the within claim as an asset when the bankruptcy petition was filed. Based upon that omission, defendants seek to interpose an affirmative defense of lack of standing and for dismissal of the complaint upon that ground. In doing so, it is claimed that the defendants were not aware that plaintiff had failed to list this action as an asset of the bankruptcy estate until a search was performed on March 5, 2001. This is offered as an excuse for not moving earlier. The validity of plaintiff's attorney's contention that he did not know about the bankruptcy

until this motion was made, renders equally plausible the City's position that it did not learn about it until the search conducted in March of this year.

It has been held that an affirmative defense of lack of standing may be interposed when the plaintiff fails to list a claim or cause of action as an asset of the bankruptcy estate (**Roberts v. Alexander's, Inc.**, 224 AD 2d 677; **Polow v. Quiros**, 128 AD 2d 763.) The Bankruptcy Act [11 U.S.C. § 521] clearly requires the debtor to file "a schedule of assets and liabilities" and "a statement of the debtor's financial affairs \* \* \*." It has been recognized that the broad definition in the Bankruptcy Code requires the debtor to list within the schedule any causes of action which exist at the time of the bankruptcy. (**Bromley v. Fleet Bank**, 240 AD 2d 611). Where a plaintiff fails to list any cause of action as an asset, he lacks capacity to sue and, by that omission, is precluded from pursuing any claim. (**Goldstein v. St. John's Episcopal Hospital**, 267 AD 2d 426; **Weiss v. Goldfeder**, 201 AD 2d 644; **Robinson v. J.A. Wiertel Construction**, 185 AD 2d 664; **Ervolino v. Scappatura**, 162 AD 2d 654). In these and other cases, plaintiff failed to list an existing cause of action in a schedule of assets filed with the Bankruptcy Court. As a result, it was held that plaintiff lacked capacity to sue and was precluded from pursuing the claim.

It has also been recognized in this Department, that the bankruptcy trustee cannot be substituted where plaintiff failed to list the claim as an asset and, therefor, lacks capacity to sue (**Pinto v. Ancona**, 262 AD 2d 472; **Reynolds v. Blue Cross of**

**Northeastern New York, Inc.**, 210 AD 2d 619). In **Pinto**, as in our case, the bankruptcy post-dated the negligence action. The Appellate Division, Second Department, held that plaintiff lacked capacity to sue by reason of the failure to disclose the action in the bankruptcy schedule of assets:

"In light of the defect based on a lack of capacity to sue, the trustee, who re-opened the bankruptcy proceeding, could not be substituted for Richard Pinto in this action (see, **Reynolds v. Blue Cross**, 210 AD 2d 619; **Matter of C & M Plastics [Collins]**, 168 AD 2d 160, 162). Instead, the trustee must commence a new action in a representative capacity on behalf of Richard Pinto's bankruptcy estate and, in doing so, he will receive the benefit of the 6-month extension embodied in CPLR 205 \* \* \* [citing cases]." **Pinto v. Ancona**, 262 AD 2d at 473.

Applying these principles to our case, there is no dispute that plaintiff failed to list the within action as an asset when he filed for bankruptcy, approximately two months after the action was commenced. As a result, he lacked capacity and standing to pursue the claim and the action must be dismissed. The excuse attempted to be offered in opposition, that plaintiff proceeded pro se in the bankruptcy proceeding, is without merit. Whether he acted in that capacity or by counsel, he was bound by the same rules of law as would apply to anyone. The Bankruptcy Code and the reported decisions mandate the disclosure and inclusion of a cause of action in the schedule of assets. The claim by plaintiff that he believed that he was required to list only actions brought against him as a defendant and not those where he was a plaintiff, is ridiculous. Whether his failure to list the claim was inadvertent or

deliberate, in either case, he lacks standing to pursue this claim.

Nor is there any basis to stay the action pending determination by the Bankruptcy Court on the motion to reopen the bankruptcy. Assuming the Bankruptcy Court reopens the bankruptcy, the Trustee could not be substituted as a party plaintiff in any event. A new action would have to be commenced within the six month period afforded by CPLR 205. Should the Trustee elect not to pursue this claim, thereby abandoning the claim as a bankruptcy asset, plaintiff would likewise be required to commence a new action within the six month period. He could not continue this action, since such would permit him to benefit from his omission to list the claim as a bankruptcy asset. Thus, whatever determination is made on the pending motion before the Bankruptcy Judge, this action must be dismissed. Inasmuch as the dismissal is not on the merits, and is based upon plaintiff's lack of standing, the six month period provided by CPLR 205 would apply.

Accordingly, upon the foregoing, defendants' motion is granted in all respects, granting leave to amend the answer in the form annexed to the moving papers, adding as an affirmative defense plaintiff's lack of standing based upon his failure to disclose his claim as an asset when he filed for bankruptcy and, upon such additional defense, dismissing the complaint upon that ground. The cross-motion to stay the action pending determination by the Bankruptcy Court of the motion to re-open the bankruptcy proceeding

and permitting the bankruptcy trustee to be substituted as a party plaintiff in this action, is denied in all respects.

Serve a copy of this order with notice of entry without undue delay.

Dated: May 18, 2001

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J.S.C.