

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

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P.M.,

Plaintiff(s), Index
Number 16254/2004

- against -

Motion
Date 02/08/05

WALDBAUM'S INC.,

Motion
Cal. Number 16

Defendant(s).

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The following papers numbered 1 to 10 read on this motion by the dismissing plaintiff's complaint with prejudice upon the grounds that plaintiff lacks capacity to sue, *res judicata* and statute of limitations, and imposing costs and sanctions upon the plaintiff for bringing and maintaining a frivolous action.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation In Opposition.....	5 - 7
Reply	8 - 10

Upon the foregoing papers it is **ORDERED** that the motion is denied as follows:

Plaintiff commenced the within action on or about July 29, 1992, seeking monetary damages for personal injuries sustained on February 26, 1992 in an accident in which the plaintiff slipped and fell on the defendant's premises. During the pendency of the action, plaintiff filed for bankruptcy, but apparently failed to list this lawsuit on her schedule of assets. On March 18, 2004, the court, (Hon. Alan LeVine), dismissed plaintiff's complaint, finding that, despite her knowledge of the instant action, plaintiff lacked standing to sue because she had failed to properly list the cause of action against the defendant as an asset of her bankruptcy estate. Subsequent to the dismissal, the plaintiff reopened the bankruptcy matter, and the bankruptcy trustee formally abandoned the within claim. On July 19, 2004, within six months following service of the order of dismissal with Notice of Entry on April 1, 2004, the plaintiff, in her individual capacity, recommenced the action against the defendant. Defendant now moves to dismiss, contending, *inter alia*, that plaintiff may not avail herself of the

six-month tolling provision pursuant to C.P.L.R. §205(a).

C.P.L.R. §205 (a) provides:

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

The function of a C.P.L.R. §205(a) extension is to ameliorate the potentially harsh effect of the statute of limitations in cases in which the defendant has been given timely notice of a claim previously brought by a party, but not fully litigated for reasons not enumerated and excluded in the statute. As a remedial statute, its broad and liberal purpose is not to be diminished by a narrow construction. (*See, Goldberg v. Nathan Littauer Hosp. Ass'n*, 160 Misc. 2d 571, 574-575 [Sup. Ct. Albany Co. 1994]; *Genova v. Madani*, 283 A.D.2d 860 [3d Dept. 2001]; *Tulis v. Nyack Hosp.*, 271 A.D.2d 684 [2d Dept. 2000]).

It is uncontested that the first action was timely commenced, that it was terminated in a manner other than by a voluntary discontinuance, a failure to obtain personal jurisdiction, a dismissal for neglect to prosecute or a final judgment upon the merits, and that the present action is based upon the same transaction or occurrence as, and was commenced within six months after the termination of, the first action.

Defendant's only argument against the application of C.P.L.R. §205(a) is that the second action must be brought by the trustee in bankruptcy in order to benefit from the six-month toll.

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 (*see*, 11 U.S.C. § 541[a][1]). The debtor must schedule the causes of action as

assets on the bankruptcy petition in order for the trustee to formally abandon the claims (see, *Weitz v. Lewin*, 251 A.D.2d 402 [2d Dept. 1998]; *Dynamics Corp. v. Marine Midland Bank*, 69 N.Y.2d 191 [1987]). Thus, "a debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on his or her own behalf" (*Santori v. Met Life*, 11 A.D.3d 597 [2d Dept. 2004]; *123 Cutting Co. v. Topcove Assocs.*, 2 A.D.3d 606 [2d Dept. 2003]; *Coogan v. Ed's Bargain Buggy Corp.*, 279 A.D.2d 445 [2d Dept. 2000]). The trustee, however, may elect to abandon assets of the bankrupt and, following abandonment, title reverts in the bankrupt (see, *Bromley v. Fleet Bank*, 240 AD2d 611 [2d Dept. 1997]; *Scharmer v. Carrollton Mfg. Co.*, 525 F2d 95, 98 [6th Cir. 1975]).

The plaintiff-debtor herein initially failed to schedule the within causes of action as an asset on the bankruptcy petition, with the result that the court (LeVine, J.) properly granted the defendant's motion to dismiss the complaint on the ground that the plaintiff lacked standing to sue because she failed to properly list on her bankruptcy petition the present claim regarding assets about which she knew or should have known when her bankruptcy petition was filed (see, *Bromley v. Fleet Bank*, *supra*; *Hart Sys. v. Arvee Sys.*, 244 A.D.2d 527 [2d Dept. 1997]).

However, following dismissal, the plaintiff reopened the bankruptcy matter, amended her filing to list the instant cause of action, and the latter was formally abandoned by the trustee, thereby causing a reversion back to the plaintiff, who commenced the instant action. Several appellate cases, (analyzed *infra*), hold that where the trustee recommences the suit on behalf of the plaintiff, the trustee gets the benefit of the six-month tolling provision of C.P.L.R. §205(a).

In *Pinto v. Ancona*, (262 A.D.2d 472 [2d Dept. 1999]), during a deposition of the plaintiff, it was discovered that he had filed a bankruptcy petition in a separate bankruptcy proceeding, but failed to disclose in the petition's schedule of assets the pendency of his personal-injury action. Plaintiff's action was dismissed for lack of capacity, since his causes of action vested in the bankruptcy trustee. The court held that the trustee must commence a new action in a representative capacity on behalf of plaintiff's bankruptcy estate and, in doing so, the trustee would receive the benefit of the six-month extension embodied in C.P.L.R. §205.

In the case at bar, the facts are slightly different, insofar as the bankruptcy trustee in the case at bar subsequently abandoned the plaintiff's cause of action, which thereby reverted to the plaintiff by operation of law. However, the reasoning of *Pinto* in applying the broad purpose underlying C.P.L.R. §205(a) mandates the same outcome, whether the proceeding is recommenced by the trustee or the plaintiff individually upon reversion of the claim, which is that the plaintiff receives the benefit of the six-month tolling provision, thereby permitting her to maintain the within action (see also, *Genova v. Madani*, 283 A.D.2d 860 [3d Dept. 2001]).

Likewise, in *Luna v. North Shore Univ. Hosp.*, 182 Misc. 2d 803 [Sup. Ct. Nassau Co. 1999] Justice Bruce D. Alpert opined that: "[i]f abandoned, title to the cause of action would revert in the bankrupt. . . In the event the bankruptcy proceeding is reopened, and the trustee elects to pursue the claim, he or she would receive the benefit of the six-month extension embodied within CPLR 205."

In *Adessa v. Litrenta*, (2001 N.Y. Slip Op. 40107U [Sup. Ct. Queens Co., 2001]), the late Justice David Goldstein opined: "[s]hould 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." The court agrees with this reasoning.

The defendant, for the first time in its reply papers, shifts its focus to alleged deficiencies in the re-opening of the bankruptcy matter and the alleged procedural improprieties in the relinquishment of the instant claim by the trustee. These arguments are misplaced. The court declines to entertain matters improperly raised for the first time in reply papers, since to do so deprives the plaintiff of the ability to respond (see, *Wal-Mart Stores, Inc. v. United States Fid. & Guar. Co.*, 11 A.D.3d 300, 301 [1st Dept. 2004]; *Sanz v. Discount Auto*, 10 A.D.3d 395 [2d Dept. 2004]; *Canter v. East Nassau Med. Group*, 270 A.D.2d 381 [2d Dept. 2000]). In any event, these matters, which pertain to the form and nature of the underlying bankruptcy proceeding, are within the exclusive purview of the bankruptcy court, and should have been raised in that venue. The Supreme Court cannot entertain cases, such as bankruptcy matters, in which exclusive jurisdiction has been conferred by Congress on the federal courts (see, 28 U.S.C. §1334[a] *et seq.*; *Tallman v. French*, 38 N.Y.2d 717 [1975]).

Accordingly, the defendant's motion is denied in all respects.

In light of the foregoing, the defendant's request for costs and sanctions is denied as academic. If all discovery is complete, the plaintiff is granted leave to file her note of issue to restore this matter to the trial scheduling calendar for trial.

Dated: February 17, 2005

JANICE A. TAYLOR, J.S.C.

16254-04_Miller_Dismiss_Bankruptcy