VIRGINIA Lawyers Weekly

Lack of standing: Failure to disclose dooms med-mal claim

By: Nick Hurston November 7, 2022

A medical malpractice claim that a plaintiff failed to disclose when she filed for bankruptcy has been dismissed for lack of standing.

The defendants discovered the bankruptcy filing on the eve of trial and filed a motion to dismiss the next morning.

Judge Richard E. Gardiner of the Fairfax County Circuit Court agreed with the defendants that the plaintiff lacked standing to proceed.

"Plaintiff's instant claim passed to her bankruptcy estate … and 'could only be asserted by the trustee in bankruptcy, unless and until it was restored to the plaintiff by the bankruptcy court,'" he pointed out.

Finding that the asset had neither been abandoned by the trustee, nor exempted by the bankruptcy court before trial, Gardiner dismissed the plaintiff's complaint with prejudice.

Fatima Shaw-McDonald sued Eye Consultants of Northern Virginia and Northern Virginia Eye Surgery Center for medical malpractice in August 2019. During discovery, Shaw-McDonald responded in interrogatories that she had not filed for bankruptcy.

But when Shaw-McDonald filed Chapter 7 bankruptcy in the Eastern District of Virginia on March 24, 2022, she didn't list the medical malpractice claim as an asset on her petition.

She also neglected to disclose the bankruptcy when she supplemented her interrogatory responses the following month. The defendants eventually discovered it one day before trial.

The defendants then moved to dismiss for lack of standing because of the bankruptcy filing. The court deferred ruling on the motion for further investigation, briefing and a hearing.

Later that day, Shaw-McDonald filed a bankruptcy amendment with the claim listed as an asset.

Legal nullity

The defendants argued that Shaw-McDonald no longer had standing to pursue the case after she filed for bankruptcy, relying on the Supreme Court of Virginia's 2011 decision in *Kocher v. Campbell*.

Gardiner agreed.

According to *Kocher*, "upon the filing of a petition in bankruptcy, '[a]ll the legal and equitable interests in property that the debtor had before the petition was filed pass to and become a part of the bankruptcy estate, under the control of the trustee,'" the judge wrote.

He noted that *Kocher* outlined two methods by which an asset could be restored to a debtor after filing bankruptcy.

The first is trustee abandonment.

"As in *Kocher*, the trustee here did not abandon the instant claim as he was not even aware of it as of June 6, 2022, because Plaintiff did not disclose the instant claim in response to Question 33 of the Voluntary Petition," Gardiner found.

An asset is also abandoned if it was unadministered when a bankruptcy case closes.

But Gardiner said the fact that Shaw-McDonald's bankruptcy closed on July 1, 2022, had no bearing here because it was still open at the time of trial.

The second method by which an asset may be exempted from a bankruptcy estate is by court order.

> ***"Plaintiff did not list the cause of action as an asset in her schedule B and then claim it as exempt property on her schedule C prior to June 6, 2022. Accordingly, the bankruptcy court did not enter an order exempting the cause of action prior to June 6, 2022, so that, as of June 6, 2022, the cause of action remained a part of the bankruptcy estate and was enforceable solely by the trustee."***
>
> ***— Fairfax County Circuit Court Judge Richard E. Gardiner***

Gardiner said that Virginia has opted out of the federal bankruptcy exemptions and substituted their own, which include personal injury actions.

"But the 'opt out' is conditional," the judge cautioned.

Debtors must disclose the asset and claim it as exempt property in their bankruptcy filings, he explained, and only

exempting the cause of action prior to June 6, 2022, so that, as of June 6, 2022, the cause of action remained a part of the bankruptcy estate and was enforceable solely by the trustee."

As such, he concluded, "as of March 24, 2022, Plaintiff did not have standing to pursue the cause of action. As 'an action filed by a party who lacks standing is a legal nullity,' the case must be dismissed."

Frozen reality

Benjamin J. Trichilo of McCandlish Lillard in Fairfax represented the plaintiff. He told Virginia Lawyers Weekly he was surprised to learn of his client's bankruptcy the morning of trial.

"My client corrected her mistake immediately and I consulted with a bankruptcy attorney who assured me that it was no problem for a debtor to amend their petition any time before a final bankruptcy order is issued," Trichilo said.

He added that he felt it was error for the judge to effectively "freeze" reality on the trial date.

"There was no prejudice to the defendants because the claim was subject to the personal injury exemption, and also because it was abandoned as unadministered by the time of our October hearing," he pointed out.

Trichilo hopes the Court of Appeals of Virginia will reverse the ruling.

Sarah E. Godfrey, senior counsel with Jackson & Campbell in Washington, D.C., represents the Northern Virginia Eye Surgery Center. She said a law clerk found Stover's bankruptcy at 5:15 pm while they were preparing on the eve of trial.

"We immediately began preparing a motion to dismiss and alerted the other defendant's attorney, but our communications with plaintiff's counsel had become contentious, so we didn't reach out to him," Godfrey explained.

Eye Consultants was represented by Kenneth T. Roeber, a partner with Wimbish Gentile McCray & Roeber in Richmond.

"My interrogatories have asked about bankruptcy for 20 years and never before has it been as momentous or significant as in this case," he told Virginia Lawyers Weekly.

While Roeber anticipates Stover will appeal, he maintains the trial court's outcome was ultimately correct because her claim was meritless.

"Plaintiff did not list the cause of action as an asset in her schedule B and then claim it as exempt property on her schedule C prior to June 6, 2022. Accordingly, the bankruptcy court did not enter an order exempting the cause of action prior to June 6, 2022, so that, as of June 6, 2022, the cause of action remained a part of the bankruptcy estate and was enforceable solely by the trustee."

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022-8-069 – Shaw-McDonald v. Eye Consultants of Northern Virginia

Med mal action is part of bankruptcy estate

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