2017 IL App (2d) 160984-U
No. 2-16-0984
Order filed August 10, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOHN NACHTRIEB, BEVERLY NACHTRIEB, and FOTEL, INC.,	)	Appeal from the Circuit Court of Kane County.
Plaintiffs-Appellants,	)	
v.	)	No. 15-L-204
LAW OFFICES OF JAMES M. KELLY, P.C., and JAMES M. KELLY,	)	Honorable Edward C. Schreiber,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* We find that, once plaintiffs filed for bankruptcy protection, they lacked standing to bring any insurance claims against their insurer or broker, and since they lacked standing to pursue those claims, they cannot prove that defendants' legal malpractice proximately caused them to lose those claims. Therefore, the trial court properly granted defendants' section 2-619 motion to dismiss; affirm.

¶ 2 Plaintiffs, John Nachtrieb, Beverly Nachtrieb, and Fotel, Inc., filed a legal malpractice complaint against their bankruptcy attorneys, defendants, Law Offices of James M. Kelly, P.C., and James M. Kelly. The trial court granted defendants' motion to dismiss brought pursuant to

section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014). We affirm.

¶ 3 I. BACKGROUND

¶ 4 John Nachtrieb owned a small business, Fotel, Inc., and Beverly Nachtrieb owned property in Lombard, Illinois, where Fotel operated its business. Beverly rented the remaining commercial space to various commercial tenants.

¶ 5 In July 2010, Beverly's property suffered a serious flood, causing significant damage. Following the flood, plaintiffs made a claim to their insurance carrier, Hartford Casualty Insurance. On August 3, 2010, Hartford denied coverage for the flooding damage. Plaintiffs specifically alleged that Hartford's denial of insurance coverage caused them to file for bankruptcy, as plaintiffs "lost their family business and the commercial property owned by Beverly Nachtrieb was destroyed."

¶ 6 Plaintiffs retained Kelly to file their bankruptcy petitions. With his assistance, plaintiffs filed for Chapter 7 bankruptcy protection on February 5, 2011, for Fotel, and on May 3, 2011, for John and Beverly. John and Beverly were discharged as debtors on November 2, 2011, and Fotel was discharged on October 3, 2012. Plaintiffs were ultimately successful in discharging about $1 million worth of personal and business debt through the Chapter 7 bankruptcy proceedings.

¶ 7 After plaintiffs bankruptcy case concluded, plaintiffs sued Hartford and plaintiffs' insurance broker, Lamb, Little, Inc., and a third party. This case was dismissed. Defendants point out that this case was not dismissed on *res judicata* grounds for failure to include the claim in the bankruptcy petition, as plaintiffs have stated in their allegations and in their appellate brief. Rather, as shown by the record, the trial court dismissed the claim against Lamb, Little based on

the statute of limitations, and the claim against Hartford was voluntarily dismissed with prejudice by agreement.

¶ 8 Plaintiffs subsequently filed the present legal malpractice case against defendants for failing to include contingent claims against Hartford and Lamb, Little in plaintiffs' Schedule B bankruptcy disclosure petition. Specifically, plaintiffs alleged that, following Hartford's denial of their insurance claim, they had two contingent claims that were diametrically opposed to one another: (1) a claim against Hartford for wrongful denial of insurance coverage; and (2) a claim against their insurance broker, Lamb, Little, for errors and omissions in securing the insurance policy issued by Hartford. Plaintiffs alleged that these two contingent claims should have been included on the Schedule B bankruptcy disclosure petition and, because they were not included, defendants committed legal malpractice and caused them to suffer damages.

¶ 9 On September 9, 2016, defendants filed a section 2-619 motion to dismiss the second-amended complaint. In their motion, defendants maintained that plaintiffs could not establish the proximate cause element to sustain plaintiffs' cause of action based on the following. Once plaintiffs filed for bankruptcy protection, they lost standing to pursue any insurance claims against Hartford or Lamb, Little because upon filing, any such claims became part of the bankruptcy estate. Plaintiffs could not prove they could have recovered in any claim against Harford or Lamb, Little since the right to any such claims was already lost to them by filing for bankruptcy. And, by exchanging their prospective right to sue their insurer and broker for bankruptcy protection, plaintiffs cannot prove that they were damaged by defendants' alleged negligence for failing to include those insurance claims in plaintiffs' bankruptcy disclosure petition. The trial court agreed and granted defendants' section 2-619 motion to dismiss. Plaintiffs timely appeal.

¶ 10 II. ANALYSIS

¶ 11 Plaintiffs contend that the trial court erred by granting defendants' section 2-619 motion to dismiss. "A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006); *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). For a section 2-619 dismissal, our standard of review is *de novo*.[1]

¶ 12 To prove legal malpractice, the plaintiff-client must plead and prove that the defendant-attorney owed the client a duty of due care arising from the attorney-client relationship, that the defendant breached that duty, and that as a proximate result, the client suffered an injury. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005) (citing *Sexton v. Smith*, 112 Ill. 2d 187, 193 (1986)). "Even if negligence on the part of the attorney is established, no action will be against the attorney unless that negligence proximately caused damage to the client." *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306-07.

¶ 13 Where the alleged legal malpractice involves litigation, no actionable malpractice claim exists unless the attorney's negligence resulted in the loss of an underlying cause of action. *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 200 (2006). If the underlying action never reached trial because of the attorney's negligence, the plaintiff is required to prove that but for the attorney's negligence, the plaintiff would have been successful in that underlying action. *Id.*

[1] There is no transcript of the hearing on the motion to dismiss. However, because our review is *de novo*, there is no issue under *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 14 The basis of this legal malpractice suit is predicated upon fundamental bankruptcy law and principles. The act of filing a petition for relief under the Bankruptcy Code commences a bankruptcy case and creates an estate in bankruptcy. See 11 U.S.C. §§301, 541. Upon commencement of the case, a debtor's interests in property vest in the bankruptcy estate, and the debtor surrenders the right to control estate property. Property of the estate falls under the exclusive jurisdiction of the bankruptcy court. See 28 U.S.C. §1334(e). Since property of the estate is now in *custodia legis*, it is administered exclusively by a specifically designated fiduciary, a trustee. See, *e.g.*, 11 U.S.C. §§ 323(a), 363, and 704.

¶ 15 Pre-bankruptcy claims are part of the debtors' estates and belong to the bankruptcy trustees, for the benefit of the debtors' creditors. *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 413 (7th Cir. 2006). A debtor's bankruptcy estate includes claims and causes of action that belonged to the debtor on the petition date. *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006); *Cable v. Ivy Tech State College*, 200 F.3d 467, 472-73 (7th Cir. 1999). Thus, a legal claim arising out of events occurring before a debtor's bankruptcy filings belongs to the debtor's estate. *In re Polis*, 217 F.3d 899, 901-02 (7th Cir. 2000).

¶ 16 These principles apply regardless of whether the bankruptcy petitioner has scheduled the property or assets. *Dailey v. Smith*, 292 Ill. App. 3d 22, 25 (1997). "[T]he failure to schedule a claim in bankruptcy (as well as the reasons for such failure) can have no relevance to the bankrupt's standing to bring a subsequent claim." *Id.* at 26. Once the petition is filed, all claims belong to the estate, and the bankruptcy trustee alone has standing to pursue them. *Id.* If a legal claim is not scheduled or otherwise administered by the time the bankruptcy is closed, it forever remains property of the estate, and the trustee remains the real party in interest. 11 U.S.C. §554(d).

¶ 17 Once a debtor files for bankruptcy, any unliquidated lawsuits become part of the bankruptcy estate, and a debtor is divested of standing to pursue them upon filing his or her petition. *Dailey*, 292 Ill. App. 3d at 25. Because the non-disclosed claim does not belong to the debtor, the debtor "cannot pursue it in litigation." *Biesek*, 440 F.3d at 414. A trustee's statutory right to exclusivity ceases once the property has been abandoned. See *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006) (if estate, through trustee, abandons a cause of action, then creditors no longer have an interest, and claim reverts to debtor's hands); 11 U.S.C. §554. Absent abandonment, a debtor cannot pursue a cause of action for his or her own benefit. *In re Enyedi*, 371 B.R. 327, 333 (N.D. Ill. 2007).

¶ 18 Plaintiffs' argument focuses on standing to bring the malpractice action when the issue, as is evident by their pleading, is standing to bring the insurance claims. It is clear that, once the bankruptcy petition was filed, any insurance claims belonged to the bankruptcy trustee. This means that any potential claims against Hartford or Lamb, Little belonged to the trustee when the bankruptcy petition was filed. Thus, once plaintiffs filed for bankruptcy, they lacked standing to bring any claims against Hartford or Lamb, Little, and only the bankruptcy trustee could have prosecuted those two claims. Since plaintiffs then lacked standing to pursue the insurance claims, they cannot establish the element of legal malpractice that defendants' deficient representation proximately caused them damage; *i.e.*, that "but for" defendants' alleged negligence, they would have prevailed in recovering on the insurance claims against Hartford and Lamb, Little.

¶ 19 In this case, plaintiffs' second-amended complaint for malpractice alleges that defendants departed from the standard of care by filing the Schedule B disclosure statement that failed to list the contingent insurance claims and failing to notify plaintiffs or the bankruptcy trustee of those

contingent claims. Plaintiffs never alleged that defendants' malpractice stemmed from the failure to advise plaintiffs that they should refrain from filing the bankruptcy petition or they would lose their insurance claims.

¶ 20 Plaintiffs maintain that defendants' lack of standing argument is predicated upon the premise that all claims, regardless of their origin or time, become an asset of the bankruptcy estate once a bankruptcy petition is filed and this legal theory advocated by defendants "really means that a party that files a bankruptcy petition cannot, under any circumstances, sue their attorney for legal malpractice." As explained by defendants, plaintiffs misunderstand the fundamentals of bankruptcy law. The option to pursue claims against the insurer and the broker in this case does not disappear. Rather, the debtors secure the protections afforded by the bankruptcy laws, including wiping away their debts, and the trustee in bankruptcy is engaged to collect assets in an effort to attempt to repay the debtors' creditors. See, *e.g.*, *Leventhal v. Schenberg*, 917 F. Supp. 2d 837, 847 (N.D. Ill. 2013). If the plaintiffs, as debtors, were allowed to both erase their debts and separately maintain claims against their insurer and broker, it would provide them with a double recovery, which is neither intended nor permitted at law.

¶ 21 Plaintiffs maintain that defendants' failure to advise the trustee of the contingent claims exempts the claims from belonging to the trustee. This is a *non sequitur*. As stated above, under the law, these claims belonged to the trustee once the bankruptcy petition was filed. See *Dailey*, 292 Ill. App. 3d at 26. The only way the claim reverts to the debtor is if the trustee abandons the claim. See *Cannon-Stokes v. Potter*, 453 F.3d at 448. There can be no abandonment if the trustee is unaware of the claim. *Aspling v. Ferrall*, 232 Ill. App. 3d 758, 767 (1992) (section 554(a) of the Bankruptcy Code (11 U.S.C. §554(a)) states that trustee may abandon after notice and a hearing). The claim does not somehow revert to the debtors because

neither the debtors nor the trustee are aware of it. See *Id*. ("[T]he failure to schedule a claim in bankruptcy (as well as the reasons for such failure) can have no relevance to the bankrupt's standing to bring a subsequent claim. Once the petition is filed, all claims belong to the estate, and the bankruptcy trustee alone has standing to pursue them.").

¶ 22 Relying on this court's opinion in *Hoth v. Stogsdill*, 210 Ill. App. 3d 659 (1991), plaintiffs argue that, under Illinois law, legal malpractice claims may not be assigned, and therefore, the trustee does not have standing. While in *Hoth* we refused to decide whether a legal malpractice claim was part of the bankruptcy estate (*Id*. at 664-667), a bankruptcy court did take that step. In *In re Hice*, 223 B.R. 155 (N.D. Ill. 1998), the United States Bankruptcy Court for the Northern District of Illinois determined that the broad scope of §541(a)(1) of the Bankruptcy Code (11 U.S.C. §541(a)(1)) included the debtor's legal malpractice cause of action in the bankruptcy estate. *Id*. at 158-59. Regardless, we need not resolve this issue because, as we previously noted, the issue concerns standing to bring the insurance claims. Since the trustee alone had standing to pursue these claims once the bankruptcy petition was filed, plaintiffs cannot show proximate cause for damages in their legal malpractice case.

¶ 23 III. CONCLUSION

¶ 24 For the preceding reasons, the judgment of the circuit court of Kane County granting defendants' section 2-619 motion to dismiss is affirmed.

¶ 25 Affirmed.