2014 IL App (1st) 130646-U

FIRST DIVISION
Filed: July 21, 2014

No. 1-13-0646

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WRIGHT DEVELOPMENT GROUP, LLC, Plaintiff-Appellant and Cross-Appellee, v. JOHN WALSH, Defendant-Appellee and Cross-Appellant, (Pioneer Newspapers, Inc., d/b/a News Star, and Sun-Times Media Group, Inc., Defendants).	)	Appeal from the Circuit Court of Cook County. No. 11 L 00116 Honorable Eileen M. Brewer, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The appeal was dismissed for lack of jurisdiction where the underlying litigation proceeded in violation of the automatic stay provision of the Bankruptcy Code (11 U.S.C.A. § 362 (West 2008)).

¶ 2 The plaintiff, Wright Development Group, LLC (Wright), filed a complaint for defamation against the defendant, John Walsh (Walsh), after he made statements to a newspaper reporter regarding the quality of the plaintiff's construction of the condominium building in which he owned a unit. Walsh moved to dismiss the complaint pursuant to the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq.* (West 2008)). The trial court determined that Walsh's statement was not immune under the Act, but it ultimately dismissed Wright's complaint, with prejudice, pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008), finding that Walsh's statements were not actionable under the innocent construction rule. Walsh appealed, contending he was entitled to dismissal under the Act and, therefore, entitled to attorney fees under section 25 of the Act (735 ILCS 110/25 (West 2008)). This court dismissed Walsh's appeal as moot. *Wright Development Group, LLC v. Walsh*, No. 1-08-2783 (unpublished order under Supreme Court Rule 23). However, the supreme court reversed our mootness finding and the trial court's judgment, holding that the Act applied to Walsh's statements and remanding the cause for a determination of the amount of his reasonable attorney fees and costs incurred in connection with the motion as provided by section 25 of the Act. *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 640 (2010).

¶ 3 Upon remand, the trial court awarded Walsh attorney fees and costs in the amount of $339,010.28. Wright moved to vacate the court's judgment under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)), and Walsh filed a petition seeking additional attorney fees incurred in connection with Wright's postjudgment motion. The trial court denied both petitions,

and both parties have now appealed. For the reasons that follow, we dismiss this appeal for lack of jurisdiction.

¶ 4 A detailed account of the facts surrounding the history of this case prior to the proceedings conducted on remand are contained in *Wright Development*, 238 Ill. 2d at 622-631, and we restate only those facts necessary to resolve the issues in this appeal.

¶ 5 On October 4, 2007, Wright filed defamation *per se* actions against Walsh, Pioneer Newspapers, Inc., and the Sun-Times Media Group, Inc., alleging that Walsh intentionally misrepresented to newspaper reporters that it was responsible for various construction defects in his condominium building. On April 15, 2008, Walsh independently moved to dismiss the complaint under the Act, and all the parties moved to dismiss the complaint under section 2-615 of the Code. *Wright Development*, 238 Ill. 2d at 626-27. On July 29, 2008, the trial court denied Walsh's motion under the Act, but later, on September 26, 2008, the court granted the defendants' section 2-615 motions and dismissed Wright's complaint, with prejudice.

¶ 6 Walsh appealed the trial court's judgment, arguing that he was entitled to dismissal under the Act, and therefore, entitled to attorney fees under section 25 of the Act. On September 29, 2009, this court dismissed Walsh's appeal, finding that it was moot because he was ultimately granted the relief he sought when the court dismissed Wright's complaint, with prejudice, on other grounds, pursuant to section 2-615 of the Code. *Wright Development*, No. 1-08-2783 (unpublished order under Supreme Court Rule 23). On October 21, 2010, our supreme court held that Walsh's appeal was not moot (*Wright Development*, 238 Ill. 2d at 634) and that his statements were protected under the Act (*id.* at 639). The supreme court further determined that Walsh was entitled to reasonable attorney fees and costs incurred with the motion under section

25 of the Act and remanded the cause to the trial court for a determination of the amount of those fees and costs. *Id.* at 640.

¶ 7 On February 24, 2011, upon remand, Walsh filed his petition for attorney fees and costs, seeking $287,981.22 in attorney fees and costs which he allegedly incurred in connection with his motion under the Act.[1] Walsh's affidavit was attached to his petition in which he stated that he was president of the 6030 Condominium Association (Association) at the time the alleged defamatory statements were made. He stated that he "tendered [his] defense in this lawsuit to the Association to pay the defense fees based on the indemnification provisions of Association's Declaration documents." Walsh further attested that "all legal bills were sent to the Association for payment" and that "[a]ny costs and fee recovered-as a result of the Illinois Supreme Court's mandate ***-will go directly to pay any outstanding, unpaid legal bill or to the Association for reimbursement of legal bills it paid on my behalf." Additional documents attached to Walsh's petition included the affidavits of the billing attorneys and redacted copies of the firms' invoices which were addressed to "Sixty Thirty Condominium Association." Walsh was represented by attorneys employed by the firms of Freeborn and Peters and Sanchez and Daniels.

¶ 8 In response, Wright issued subpoenas *duces tecum* to the Association and the firms representing Walsh, seeking documents and correspondence between the Association and the attorneys related to the payment of the legal fees and costs of the lawsuit. Wright argued that Walsh conceded that he did not incur any attorney fees or costs as the Association voluntarily paid for his defense costs and that many of the fees and costs were associated with work not

[1] On March 21, 2011, Walsh filed a motion to supplement his petition for attorney fees and costs to include an invoice which was inadvertently excluded. The trial court granted the motion, amending the total fees and costs to $287,981.22.

directly connected to the motion filed under the Act. Walsh moved to quash these subpoenas, stating "[w]has has been paid for, and who has paid [his] attorneys' fees is not at issue," but rather, the court was to determine the "amount of attorneys' fees owed to him by [Wright]." While it did not specifically grant or deny the motion to quash, the courts ordered Walsh to submit evidence of all paid and outstanding legal bills.

¶ 9 In his reply in support of his fees, Walsh submitted a letter from his counsel at Freeborn and Peters to Wright's counsel stating that all of Walsh's bills were sent to and paid by the Association, and he included a ledger, as ordered by the court, showing that $183,034.47 in attorney fees had been billed and paid for between November 12, 2007, and February 14, 2011. The ledger was later updated to reflect $218,301.72 in attorney fees remained outstanding for legal services performed between October 14, 2008, and June 10, 2011.

¶ 10 On June 16, 2011, following a hearing on the limited issue of whether fees incurred during Walsh's appeal were recoverable under the Act, the trial court found that such fees were recoverable and ordered an evidentiary hearing to be conducted to determine the amount of fees and costs to which Walsh was entitled.

¶ 11 During the evidentiary hearing, Walsh testified that he tendered his defense to the Association because Wright's suit was based on statements he made at a governmental meeting sponsored by the local alderman, which he attended in his capacity as president of the Association. He admitted that he was individually named in the suit and that he never signed an engagement agreement with either firm representing him. Walsh testified that, after he tendered his defense to the Association, the Association retained Michael Franz, an attorney employed by the law firm of Freeborn and Peters and later employed by the law firm of Sanchez and Daniels. Walsh explained that Franz regularly represented the Association and that, during the course of

the litigation, Franz left Freeborn and Peters for a position with Sanchez and Daniels. Walsh testified that both firms continued working on the case.

¶ 12 Franz and Terrence Sheahan, an attorney employed by Freeborn and Peters, testified to the accuracy of the invoices submitted with Walsh's fee petition, confirming that the charges were incurred by him in connection with the motion to dismiss filed under the Act and the appeal. By the time of the hearing, Sheahan testified that the total amount of fees and costs connected to Walsh's motion under Act amounted to $339,010.28, which included the fees and costs related to the appeals and the fee petition proceedings through September 8, 2011. Sheahan explained that, after Franz left Freeborn and Peters, he began working on the case and agreed to consult with Franz as needed, which he did so on occasion. Sheahan further testified regarding the reasonableness and purpose of each service billed in the matter, and Wright objected to the fees by thoroughly cross-examining him and submitting evidence of items allegedly double- or over-billed by Sheahan and Franz.

¶ 13 Included in evidence admitted during the hearing, section 8(B) of the 6030 Condominium declarations of ownership agreement states, in relevant part, that "each of the members of the Board and each of the officers" shall be indemnified and held harmless by the owners or Association for:

> "all contractual and other liabilities to others arising out of contracts made by or other acts of the *** Board and officers on behalf of the Owners or Association, or arising out of their de facto or de jure status as Board members or officers unless any such contract or act shall have been made fraudulently or with gross negligence or contrary to the provisions of the Declaration. It is intended that the foregoing indemnification shall include indemnification against all costs and

> expenses (including, but not limited to, attorney's fees, amounts of judgments paid and amounts paid in settlement) reasonably incurred in connection with the defense of any claim, action, suit or proceeding, whether civil, criminal, administrative or other in which *** any member of the Board or officers may be involved by virtue of such person being or having been or having served as such member or officers; provided, however, that such indemnity by the Association shall not be operative with respect to (i) any matter as to which such person shall have been finally adjudged in such action, suit or proceeding to be liable for willful misconduct in the performance of his duties as such member or officer, or (ii) any matter settled or compromised, unless in the opinion of independent counsel selected by the Board (who may be counsel regularly retained by the Association) there are no reasonable grounds for such person or officer being adjudged liable for willful misconduct in the performance of his duties as such member or officer. *** If the Board or Association elects to or is required to indemnify or hold harmless a Board member or officer pursuant to this section, the Board reserves the right to provide defense of such member and to settle or compromise any claim against such individuals."

¶ 14 On January 3, 2012, the trial court issued its order, finding that all of the fees and costs requested by Walsh were reasonable and allowable under the Act. The court, therefore, ordered Wright to pay $339,010.28 in favor of Walsh for his fees and costs.

¶ 15 On January 5, 2012, Walsh immediately sought to enforce the judgment against Wright, filing various citations to discover assets or income. Shortly thereafter, Wright moved for reconsideration of the court's January 3 judgment and that motion was denied on May 4, 2012.

¶ 16 On May 14, 2012, the court ordered Fifth-Third Bank to turn over $11,359.85 to Walsh pursuant to his earlier citation to discover assets. Additionally, Walsh issued several additional citations to discover assets, and his counsel filed a lien pursuant to the Attorney's Lien Act (770 ILCS 5/1 *et seq.* (West 2012)), seeking to recover any amount recovered on the judgment and moved the court to appoint a receiver on Wright's assets.

¶ 17 On October 16, 2012, Wright filed an emergency petition for relief from the final judgment pursuant to section 2-1401 of the Code. In the petition, Wright alleged that Walsh filed for bankruptcy on March 18, 2008, and his unsecured debts were discharged by the bankruptcy court on March 22, 2012. According to an affidavit by Wright's counsel, Wright independently learned of Walsh's bankruptcy case on October 8, 2012, "by happenstance," as Walsh failed to disclose his pending bankruptcy petition in the state court proceedings and failed to disclose his pending claim under the Act in the federal bankruptcy proceedings. Thus, Wright contended that the judgment was void because it was entered in violation of the automatic stay provision of the Bankruptcy Code (11 U.S.C.A. § 362(a)(3) (2008)). Further, Wright argued that that Walsh was judicially estopped from collecting any fees and lacked standing to recover any attorney fees and costs as the claim belonged to the bankruptcy trustee. Wright requested that that the court vacate its judgment and return the $11,395.85 which Fifth-Third Bank turned over to Walsh.

¶ 18 The following documents were attached to the section 2-1401 petition: (1) Walsh's voluntary bankruptcy petition, dated March 18, 2008, filed pursuant to Chapter 13 of the Bankruptcy Code (11 U.S.C.A. Ch.13 (2006)); (2) the December 1, 2011, federal court notice of the conversion of Walsh's bankruptcy conversion to a proceeding under Chapter 7 of the Bankruptcy Code (11 U.S.C.A. Ch. 7 (2010)); and (3) the March 22, 2012, order terminating

Walsh's bankruptcy and discharging his scheduled debts. Wright's defamation suit against Walsh was not listed as pending litigation in any of the bankruptcy court's documents.

¶ 19 On November 15, 2012, Walsh filed his response to Wright's petition in which he requested that the trial court deny the petition and amend the judgment to include an additional $19,186 for attorney fees which he incurred for the defense against the petition. Walsh contended that his attorney fee claim was not part of the bankruptcy estate as it belonged to the Association under the doctrine of equitable subrogation or was subject to a resulting trust in favor of the Association. He alleged that he never scheduled the claim on his bankruptcy petition because he believed any proceeds would be paid to the Association once he tendered his defense to it.

¶ 20 On January 23, 2013, the trial court denied Wright's section 2-1401 petition and denied Walsh's request for additional attorney fees. In its ruling, the trial court determined that the automatic stay provision suspended actions pending against the debtor, but not actions, even closely related actions, asserted by the debtor. The court also rejected Wright's judicial estoppel argument, finding that the judgment does not benefit Walsh, but rather his attorneys. Further, the court determined that the attorney fees were not property of the bankruptcy estate under section 541(b) of the Bankruptcy Code (11 U.S.C.A. §541(b) (West 2008)), which states that the bankruptcy estate does not include any power that the debtor may exercise solely for the benefit of an entity other than the debtor. The court stated that it viewed Walsh as "merely a conduit" for the attorneys to collect their fees in the case.

¶ 21 On February 21, 2013, Wright filed its notice of appeal; on March 1, 2013, Walsh filed notice of his cross-appeal.

¶ 22 On May 6, 2013, Wright filed in the trial court a "Notice of Bankruptcy," stating that, on April 30, 2013, the bankruptcy court reopened *In re Walsh*, No. 08-06424 (N.D.Ill.) upon the bankruptcy trustee's motion in order to permit her to recover and distribute the proceeds of the judgment to Walsh's creditors. According to Wright, §362(a)(3) of the Bankruptcy Code automatically stays any act by Walsh to exert control over a bankruptcy estate asset and the trustee should be allowed to distribute the asset. On May 8, 2013, the trial court entered a "special stay" order, staying the proceedings pending the resolution of the bankruptcy proceedings. This appeal followed.

¶ 23 As a reviewing court, we must consider our jurisdiction, even if no party to the appeal has directly raised the issue, and therefore, we must consider the jurisdictional implications of Walsh's bankruptcy petition on this case. *In re County Treasurer and Ex Officio County Collector of Cook County*, 308 Ill. App. 3d 33, 39 (1999). In *In re County Treasurer*, the appellate court determined that the motion to reconsider and the notice of appeal in a tax-deed case involving property of the bankruptcy estate were filed in the circuit court during the pendency of the automatic stay provision in the debtor's bankruptcy case. *Id.* at 43. The court held that, since the motion and notice of appeal were filed in violation of the automatic stay, the notice of appeal was void, depriving the court of jurisdiction and requiring the court to dismiss the appeal. *Id.* at 44. Likewise, in this case, we determine that the automatic stay was triggered when Walsh filed for bankruptcy on March 18, 2008, requiring the stay of the continuation of Wright's defamation action, and that no order of relief was ever entered by the bankruptcy court thereafter. Accordingly, the ensuing trial court orders and filings entered in the defamation case, including the notice of appeal, violated the automatic stay and are void. Therefore, we lack jurisdiction, and we must dismiss this appeal.

¶ 24 Many of the parties' arguments pertaining to the merits of Wright's attack on the trial court's denial of its section 2-1401 petition are relevant to our conclusion that we lack jurisdiction. Here, Wright contends that Walsh's action for attorney fees arose only through his statutory right under the Act upon which the defamation action was based and that defamation action was always subject to the automatic stay. Wright further contends that Walsh's right to pursue his appeal and seek attorney fees under the Act was "property" of the bankruptcy estate pursuant to section 541(a) of the Bankruptcy Code, and only the bankruptcy trustee had control to administer that property, meaning only the trustee had standing to continue the proceedings in the trial court.

¶ 25 Walsh, on the other hand, contends that § 362 applies only to actions against the debtor and not to actions, such as his attorney fee claim, on the debtor's behalf. Nevertheless, Walsh contends that the automatic stay terminated when the bankruptcy court discharged his debts on March 22, 2012. Walsh also asserts that the his right to collect attorney fees does not constitute "property" under section 541(a) of the Bankruptcy Code, but rather falls within an exception contained in §541(b) which states that the estate property does not include "any power that the debtor may exercise solely for the benefit of an entity other than the debtor (11 U.S.C.A. § 541(b)(1) (West 2008)). In further support of his argument that the judgment is not bankruptcy estate property, Walsh cites § 541(d) of the Bankruptcy Code (11 U.S.C.A. § 541(d) (West 2008)), which provides that property in which the debtor holds only legal title but not an equitable interest becomes the property of the estate only to the extent of the debtor's equitable interest. Walsh argues that, because he had the power to pursue his attorney fee action solely for the benefit of the Association, the property was not part of the bankruptcy estate as he held only

legal title to the fees and the equitable interest belonged to the Association under the theories of equitable subrogation and a resulting trust.

¶ 26 Section 362 of the Bankruptcy Code provides, in relevant part, that the filing of a bankruptcy petition operates as an automatic stay, "applicable to all entities," of: (1) the commencement or continuation of a judicial proceeding "against the debtor" that "was or could have been commenced before the commencement" of the bankruptcy petition. 11 U.S.C.A. § 362(a)(1) (West 2008); see also 11 U.S.C.A. § 362(a)(2-8) (setting forth other scenarios in which the automatic stay shall be triggered). The purpose of the automatic stay provision is two-fold: (1) protect the estate for the benefit of creditors who may rush to obtain payments of claims in preference to and to the detriment of other creditors; and (2) provide immediate relief to the debtor from the pressures of collection activities, fostering his fresh start. *In re Benalcazar*, 283 B.R. 514, 520 (N.D.Ill. 2002).

¶ 27 The automatic stay "takes effect immediately upon the debtor filing his petition in bankruptcy, regardless of whether the other parties to the stay, including a state court, are aware of the filing." *In re Application of County Collector for Judgment & Sale Against Lands & Lots*, 367 Ill. App. 3d 34, 38 (2006). The stay lasts "(1) with respect to acts against the property of the estate, until the property is no longer part of the estate, or (2) with respect to any other act, until the earliest of the case being closed, dismissed, or discharged, unless a party requests relief from the stay from the bankruptcy court. *Id.* (citing 11 U.S.C. §362(c) (2000)).

¶ 28 Further, under §362(d)(1) of the Bankruptcy Code (11 U.S.C.A. § 362(d)(1) (West 2008), the bankruptcy court has the authority to grant relief from the automatic stay, including retroactively annulling the stay for cause or if the debtor does not have an equity in such property and such property is not necessary to an effective reorganization. See *In re Benalcazar,* 283 B.R.

at 521-22, 529 (stating that only the court presiding over the bankruptcy has the authority to grant any relief from the automatic stay and recognizing that "annulment of the stay, retroactively validating an erroneous exercise of jurisdiction by a state court, is available to deal with any bad faith by the debtor in the conduct of the litigation"); *In re Germansen Decorating, Inc.*, 149 B.R. 517, 520 (N.D.Ill. 1992) (finding that the only way that a transfer of estate property in violation of the stay can be made valid retroactively is by annulling the stay on an appropriate motion in the bankruptcy court).

¶ 29 In this case, it is undisputed that Wright filed its defamation action against Walsh on October 4, 2007, and, Walsh filed his bankruptcy petition on March 18, 2008. At the time Walsh filed his bankruptcy petition, the automatic stay provision was triggered to stay Wright's action against him, regardless of whether Wright or the state court were aware of the pending bankruptcy or whether Walsh performed any act to enforce the automatic stay. Thus, every trial court order and filing entered in the defamation suit after the filing date of Walsh's bankruptcy petition is void, including the notice of appeal. We note that only the bankruptcy court has the authority to retroactively annul the automatic stay that was in effect at the time the state court proceedings continued after the bankruptcy petition was filed and may do so only upon proper motion within that court. See *In re Benalcazar*, 283 B.R. at 521. However, the record does not contain any annulment order entered by the bankruptcy court.

¶ 30 In so holding, we reject Walsh's contention that his judgment is not "property" of the bankruptcy estate because he only held bare legal title to the attorney fees and served only as a conduit for the Association to receive the judgment. First, bankruptcy courts have deemed that a debtor's right to pursue a claim, including an appeal of an adverse judgment, is property under § 541(a). See *In re Matter of Croft*, 737 F.3d 372, 375, 377 (5th Cir. 2013) ("It is well established

that any causes of action, [including right to appeal an adverse judgment] belonging to the debtor are property that becomes part of the estate once the bankruptcy petition is filed []";"[o]nce the claim belongs to the estate, the trustee has exclusive standing to assert the claim"); *Matthews v. Potter*, 316 Fed. Appx. 518, 521 (7th Cir. 2009) (stating that, under § 541 of the Bankruptcy Code, "all of a debtor's property, including legal claims, become part of the bankruptcy estate at the time the petition is filed"); *In re Mozer*, 302 B.R. 892, (C.D.Cal. 2003) (holding that the "Defensive Appellate Rights arising from a judgment against the Debtor are not qualitatively different with respect to their status as property than appellate rights from a judgment on the Debtors' claims"); *In re Crossman*, 259 B.R. 301, 307 (N.D.Ill. 2001) (debtor's receipt of post-petition personal injury settlement funds were property of bankruptcy estate). Further, "[t]he trustee may abandon a legal claim, but until then only the trustee, as the real party in interest, has standing to sue." *Matthews*, 316 Fed. Appx. At 521.

¶ 31 Therefore, even if we were to treat Walsh's claim for attorney fees as a cause-of-action separate and apart from the defamation suit, the right to pursue that claim became bankruptcy property under federal law at the time Walsh filed his petition and only the bankruptcy trustee had standing to continue the action unless she abandoned the claim. Here, the trustee was unaware of the pending defamation claim against Walsh or Walsh's pending claim to attorney fees if he won dismissal of the suit under the Act. Thus, there is no evidence in the record of the trustee's abandonment of the legal claim.

¶ 32 Second, we reject Walsh's argument that § 541(d) of the Bankruptcy Code somehow renders the attorney fee judgment non-estate property. Section 541(d) addresses the "classic [express] trust situation," meaning where the debtor's interest in property is limited to that of a trustee, the bankruptcy estate acquires only bare legal title. *In re Foos*, 183 B.R. 149, 156

(N.D.Ill. 1995). In this case, there is no evidence of an express trust between the Association or its insurer and Walsh, but Walsh contends there is a resulting trust or that the doctrine of equitable subrogation applies. However, the record does not conclusively establish what entity or what arrangement Walsh had with the Association regarding attorney fees. The facts only establish that the attorneys representing Walsh sent all legal bills to the Association, Walsh did not pay any of the legal bills, and some bills were still outstanding. There is no evidence in the record that Walsh was under any specific obligation turn over the judgment to the Association. Furthermore, it is not clear whether Walsh has taken control of any of the funds already paid by Wright. Thus, the elements of equitable subrogation or a resulting trust are not present here. See *In re Hall*, 477 B.R. 74, 85 (N.D. Ill. 2012) (discussing elements of a subrogation claim under state law and under the Bankruptcy Code, which both include the requirement of evidence that the debtor has the obligation to pay a third-party creditor); *In re Marriage of Link*, 362 Ill. App. 3d 191, 195 (2005) (noting that a resulting trust can arise only at the time of the conveyance of the property to the incorrect party); *cf In re Lan Tamers, Inc*., 329 F.3d 204, 212-14 (2003) (determining government reimbursements sent to debtor as conduit to third-party were not part of bankruptcy estate where evidence showed that the debtor signed an acknowledgment that he had no beneficial interest in the funds).[2]

[2] Wright contends that we should stay this appeal pending the bankruptcy court's determination of whether the judgment constitutes bankruptcy property. However, we note that, if the bankruptcy court disagrees with a state court's determination regarding bankruptcy property, there is authority that the bankruptcy court's ruling regarding the effect of the automatic stay "trumps a determination made by a nonbankruptcy court." *In re Matter of the Application of the County Treasurer*, 308 Ill. App. 3d at 42. Thus, we need not delay a decision in this matter as a conflicting decision by the bankruptcy court will trump our decision.

¶ 33 Because we have determined that we lack jurisdiction to address the merits of Wright's appeal and Walsh's cross-appeal, we dismiss both appeals.[3]

¶ 34 Appeals dismissed.

[3] The parties dispute at some length in their briefs whether Walsh is judicially estopped from pursuing his attorney fee claim based on the decision in *Berge v. Mader*, 2011 IL App (1st) 103778. However, we find *Berge* is inapplicable to the facts of our case. In *Berge*, the automatic stay was not in effect at the time the plaintiff-debtor filed her negligence suit for a claim which arose before the filing of her bankruptcy petition. Thus, the *Berge* court did not have a jurisdictional impediment to issue its decision that the defendant was entitled to summary judgment because the debtor-plaintiff was judicially estopped from pursuing a claim which she denied existed in her earlier bankruptcy proceeding. *Berge*, 2011 IL App (1st) 103778, ¶ 21.