2013 IL App (2d) 100671-U
No. 2-10-0671
Order filed February 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TIM BOWEN,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	No. 08-L-896
HOWARD KRAVETS and DAVID PEREGRIN,	)	
	)	Honorable
	)	David M. Hall,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Appeal dismissed, where plaintiff, who filed for bankruptcy in federal court after he brought his defamation suit against defendants, is not the proper party to pursue the appeal. Sanctions argument forfeited.

¶ 2 Plaintiff, Tim Bowen, sued defendants, Howard Kravets and David Peregrin, alleging that their defamatory statements resulted in his termination as a high school basketball coach. The trial court granted defendants' motions to dismiss (735 ILCS 5/2-615 (West 2012)) and subsequently granted their petitions for attorney fees. Bowen appealed to this court. Also, Bowen and, later,

Peregrin petitioned for bankruptcy in federal court. Defendants each move to dismiss this appeal, arguing that Bowen lacks standing. We agree, and, for the following reasons, dismiss the appeal.

¶ 3 Bowen worked as a teacher at Grayslake Central High School and was the head coach of the boys' varsity basketball team. Kravets was an assistant coach and, later, coach for the boys' sophomore basketball team. Peregrin is the father of a former player of Bowen's. On June 26, 2008, Bowen was terminated as the boys' varsity coach. On October 28, 2008, he sued defendants, alleging, in a three-count complaint, that they made defamatory statements that resulted in him losing his coaching job.

¶ 4 Defendants each moved to dismiss the complaint. 735 ILCS 5/2-615 (West 2010). On October 27, 2009, the trial court granted both motions, and, on June 3, 2010, it granted defendants' petitions for attorney fees ($8,775 for Peregrin and $15,590.65 for Kravets). Bowen appealed on July 1, 2010. Due to the attorney fees award against him, Bowen also filed for chapter 7 bankruptcy (in August 2010).

¶ 5 In a December 1, 2010, order, this court stayed the current appeal, noting Bowen's bankruptcy filing and ordering him to file status reports with this court concerning that petition. Kravets had moved (on November 17, 2010) to dismiss the appeal and for sanctions; also on December 1, 2010, this court ordered that Kravets' motion be held in abeyance pending disposition of the pending bankruptcy.

¶ 6 Over one year later, on December 22, 2011, this court dismissed the appeal (for failure to comply with an October 18, 2011, order by this court, directing that Bowen file a status report as to the bankruptcy proceedings). However, on March 8, 2012, the appeal was reinstated (on the basis

that this court determined that it lacked authority to dismiss the appeal while a stay order was in effect).

¶ 7 On June 28, 2012, this court vacated the portion of the trial court's order awarding attorney fees (pursuant to a recent case and to Kravets' concession) and ruled that, in all other respects, Kravets' motion to dismiss the appeal and for sanctions was taken with the case.

¶ 8 On July 3, 2012, Peregrin filed for bankruptcy.

¶ 9 On September 5, 2012, this court entered an order, noting receipt of notice of a bankruptcy stay as to Peregrin and, again, staying the proceedings in this cause. On November 13, 2012, following receipt of Bowen's most recent status report (as to *his* bankruptcy), this court terminated the stay.

¶ 10 Each defendant has moved in this court to dismiss this appeal. In Kravets' (November 17, 2010) motion to dismiss, which we ordered taken with the case, Kravets argues that Bowen: (1) does not have standing to pursue his appeal because, since he filed a bankruptcy petition, he no longer owns his claim; and (2) is judicially estopped from prosecuting the claim because, Kravets contends, Bowen failed to disclose this appeal, filed his petition in order to stay enforcement of Kravets' judgment for fees and costs in order to obtain a discharge from his liability to both defendants (and then keep for himself his claims and a check he had deposited with the circuit clerk). Kravets also requests that Bowen's counsel be sanctioned, where Kravets' counsel, in a November 5, 2010, letter, informed Bowen's counsel that the bankruptcy petition failed to disclose the present action as an asset and demanded that Bowen voluntarily dismiss the appeal before any further attorney fees were incurred.

¶ 11 In his response to Kravets' motion, Bowen contends that he disclosed the present case in his bankruptcy filings.

¶ 12 In his appellee's brief to this court, Kravets further argues as to his motion that, although Bowen disclosed to the bankruptcy court that he is a party to the defamation suit, this constituted a mere notice to the bankruptcy court, the bankruptcy trustee, and his creditors that his *debts* included attorney fees owed to defendants. Bowen did not, Kravets urges, provide notice of an *asset* (*i.e.*, his claims against defendants) that might have some monetary value to the bankruptcy estate. Thus, Kravets asserts, Bowen's response that the bankruptcy court was aware of his appeal in this case misses the point; the appeal should be dismissed because Bowen failed to disclose this suit as an *asset* of the bankruptcy estate. In his reply brief, Bowen reiterates that he listed the current suit in his bankruptcy filings.

¶ 13 Subsequent to the parties' briefing in this case (but prior to Peregrin's motion to dismiss, discussed below)[1], the bankruptcy court, on November 28, 2012, issued a decision in Peregrin's bankruptcy case. *In re Peregrin*, 2012 WL 5939266 (Bankr. N.D. Ill. 2012). The court ruled on Peregrin's motion to dismiss Bowen's adversary proceeding therein. Peregrin's (and his wife's) case, which was filed in July 2012, was discharged in September 2012. However, prior to its discharge/close, Bowen filed an adversary proceeding against Peregrin, asserting that Peregrin owed him debt non-dischargeable under section 523(a)(6) of the Bankruptcy Code (11 U.S.C. § 523(a)(6) (2012)). Peregrin moved to dismiss the adversary proceeding on the ground that Bowen lacked standing to pursue it. In its recitation of the factual and procedural background, the court, addressing Bowen's bankruptcy filing, noted that Bowen had disclosed the defamation action in question No.

[1]Peregrin has not filed an appellee's brief.

4 of his Statement of Financial Affairs, but did not disclose this appeal or mention the defamation action on Schedule B of his filing. The bankruptcy court also noted that Bowen never amended his filings after this court "reversed" the dismissal[2] (to disclose that the case was pending and constituted a contingent and unliquidated claim belonging to him). Bowen's bankruptcy case remains open and pending.

¶ 14 The bankruptcy court granted Peregrin's motion, dismissing the proceeding, without prejudice, for lack of standing. The court determined that only the bankruptcy trustee in Bowen's bankruptcy case has standing to pursue the claim. It explained that, because Bowen's claim in the adversary proceeding is property of the estate in his bankruptcy case (it became part of Bowen's estate on the petition date), only the trustee in that case has standing to pursue the claim (because the trustee is the real party in interest). Further, although Bowen can regain standing if the trustee abandons the claim, she has not done so.[3] The court further determined that dismissal was proper because the adversary proceeding lacks a proper plaintiff: the trustee (*i.e.*, the real party in interest) is unwilling to pursue the claim (*i.e.*, she had taken no steps to pursue it and declared on October 5, 2012, to the bankruptcy court that she would not do so, although this did not constitute abandonment), and Bowen is unwilling to take steps necessary to become the real party in interest

[2]The bankruptcy court noted that the case "appears to have been remanded to the circuit court where it remains pending."

[3]According to the court, even if the case had been closed, *the claim was never scheduled as an asset* (because Bowen never amended his Schedule B or Statement of Financial Affairs to disclose it) and an asset that is not scheduled is not abandoned when the case is closed.

(*i.e.*, he has declined to move to compel abandonment, which would, if granted, cause standing to revert to him).

¶ 15 On December 14, 2012, Peregrin moved in this court to dismiss the appeal. He argues that the bankruptcy court's decision makes clear that Bowen's claim in this court should be dismissed because Bowen is not the proper party in interest; rather, the bankruptcy trustee is and, if there were to be an appeal, the trustee would be the proper party to pursue it. Peregrin argues that, since the date Bowen filed his bankruptcy petition, Bowen has lacked standing to pursue this appeal. Further, since the date of Peregrin's petition, the proceedings in this appeal, he asserts, have been in violation of the permanent discharge injunction under section 524(a)(2) of the Bankruptcy Code (11 U.S.C. § 524(a)(2) (2012) (a discharge operates as an injunction against an action to collect any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived)).

¶ 16 We conclude that Bowen is not a proper party to pursue this appeal and, accordingly, we dismiss the appeal. A debtor's bankruptcy estate includes claims and causes of action that belonged to the debtor on the petition date. See, *e.g.*, *Cannon-Stokes v. Potter*, 453 F. 3d 446, 448 (7th Cir. 2006); *In re Holstein*, 321 B.R. 229, 234 (Bankr. N.D. Ill. 2005); *see also Dailey v. Smith*, 292 Ill. App. 3d 22, 26 (1997) ("Once a bankruptcy petition is filed, all claims belong to the estate, and the bankruptcy trustee alone has standing to pursue them").

¶ 17 In *Dailey*, the appellate court held that the plaintiff debtor, who (before his bankruptcy filing) had sued the defendants for alleged partnership profits and had appealed from a judgment notwithstanding the verdict for the defendants, did not have standing to bring the appeal in light of the bankruptcy proceedings. *Id.* at 24. This rule applies, according to the court, "regardless of whether the bankruptcy petitioner has scheduled the property or assets. Once a debtor files for

bankruptcy, any unliquidated lawsuits become part of the bankruptcy estate, and, even if such claims are scheduled, a debtor is divested of standing to pursue them upon filing his petition." *Id.* at 25. The court also upheld the trial court's determination that judicial estoppel precluded the plaintiff debtor from pursuing the claim, where he failed to list the claim on his bankruptcy filing and benefitted from this, as he was able to avoid his creditors by doing so. *Id.* at 28. See also *Berge v. Mader*, 2011 IL App (1st) 103778, ¶¶ 14, 21 (affirming, in negligence suit, summary judgment for defendants on the basis of judicial estoppel, where the plaintiff debtor did not disclose suit to bankruptcy court and benefitted by having her debts discharged in bankruptcy without notifying her creditors of her potential to recover a money judgment).

¶ 18 As *Dailey* makes clear (and as the bankruptcy court found with respect to the adversary proceeding in that court), here, once Bowen filed his bankruptcy petition, he lost standing to pursue this appeal. *Dailey*, 292 Ill. App. 3d at 25. Upon his filing, Bowen's claim became part of his bankruptcy estate. Only the bankruptcy trustee has standing to pursue it if she so chooses. We dismiss the appeal on this basis and need not reach the issue whether Bowen is also judicially estopped from pursuing his claim.

¶ 19 We also decline Kravets' request that we sanction Bowen's counsel, where he (allegedly) had notice that his client's bankruptcy petition failed to disclose the present action as an asset and where Kravets' demanded that Bowen voluntarily dismiss the appeal. Kravets cites no authority, such as the rule pursuant to which this court should act, to support his contention and, thus, his argument is forfeited. See, *e.g.*, *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23 ("A failure to cite relevant authority violates [Illinois Supreme Court] Rule 341 [(eff. July 1, 2008)] and can cause a party to forfeit consideration of the issue").

¶ 20 For the foregoing reasons, we dismiss the appeal.

¶ 21 Appeal dismissed.