

LAW CURRENTS

An informational newsletter from

Richard A. Klass, Esq.

Attorney Advertising

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Amendment to Bankruptcy Petition Worth Millions!

A brother tried to help his sister, and it almost cost him millions of dollars. Based upon the brother's good credit, his sister bought a house in Queens in his name. At some point, she was unable to keep up with the mortgage payments and the house fell into foreclosure.

On the eve of the foreclosure sale, the brother filed bankruptcy to "stay" the sale. In the mad rush to save the family home (which, unfortunately, is common these days!), the brother did not understand something very important: the personal injury lawsuit he filed years earlier, relating to a construction work-site injury in which he was severely injured, was an "asset" of his to be listed in his bankruptcy petition. Unfortunately, the Chapter 13 bankruptcy case was dismissed because the brother could not make the mortgage or bankruptcy plan payments. The house was later sold at foreclosure sale.

State Court Motion to Dismiss:

Subsequently, the defendants in the state court personal injury case asked the judge to dismiss the case based upon the failure

of the plaintiff/injured person to list the pending lawsuit as a "contingent asset" in his bankruptcy petition. Substantial New York case law, going all the way up to the New York State Court of Appeals, has held that the failure to list the asset in the petition is *fatal* to the continuance of the personal injury case – every case on point says the injured person's lawsuit gets dismissed without any recovery, no matter how grave the injury.

Uncharted Course to Be Taken:

Faced with this apparently insurmountable challenge, Richard A. Klass, Your Court Street Lawyer, was brought in to help save the man's personal injury case. The strategy developed was to return to the Bankruptcy Court to seek to amend or fix the petition to reflect the existence of the personal injury claim. This was trail-blazing!

In determining that the debtor/personal injury plaintiff should be permitted to amend his bankruptcy petition to list the claim as an asset, Chief Bankruptcy Judge Craig stated: "This Court

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has not found any statute, rule or precedent that provides that a debtor's right to amend expires upon dismissal of the case, or that the order dismissing the case must be vacated before schedules, statements or lists may be amended." *In re Severius Raggie*, *New York Law Journal* 7/9/2008.

Interplay between "Closed" and "Closed":

At first glance, the court noted that the bankruptcy case was marked "closed." The judge was skeptical that an amendment to the petition could be made because Bankruptcy Rule 1009 provides that "a voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed."

However, in relying upon the decision in *In re Critical Care Support Services*, 236 BR 137, it was pointed out that a case can only be "closed" when the assets of the bankruptcy estate have been fully administered. The term "closed," as used in Bankruptcy Rule 1009 and Bankruptcy Code §350, does not encompass "dismissed" cases. Thus, an Order dismissing a case accomplishes a completely different result than an Order closing it would; essentially, upon dismissal of a bankruptcy case, all of the debtor's rights in his property revert back to him.

Separately, the court also held that, as part of accepting the debtor's amendment, it could reject the amendment when "the facts and circumstances presented indicate that the amendment was filed in bad faith, fraudulent or prejudicial." *Citing to In re Nye*, 250 BR 46. In this case, Judge Craig held that there was no evidence of bad faith, fraud or prejudice; the state court defendants' argument that granting the amendment would "reward" the debtor was not persuasive. In the absence of any evidence that the debtor deliberately omitted the personal injury claim from his schedules to defraud his creditors, permitting the debtor to amend did not reward wrongdoing.

After Judge Craig granted the debtor's motion to amend his bankruptcy petition, the state court defendants in the personal

injury lawsuit withdrew their motion to dismiss the case. The plaintiff's case is now winding through the New York State Supreme Court towards a trial, in which his serious injuries will be considered by a jury.

— Richard A. Klass, Esq.

Special Announcement: Foreclosures Seminar

"Foreclosures: Fraud/Scams, Nuts and Bolts, and Short-Sales"

October 27, 2008, from 6-8pm.

Moderated by **Richard A. Klass, Esq.** on behalf of the Volunteer Lawyers Project at Brooklyn Bar Association at 123 Remsen St., Brooklyn NY 11201

Speakers:

David Doyaga, Esq., Chapter 7 Trustee, on the interplay between foreclosures and bankruptcy.

Adam Gross, Esq., Managing Attorney for Steven M. Baum PC, on the general flow of a typical foreclosure case.

Yolande Nicholson, Esq., on short-sales and lender loss mitigation.

Assemblyman Darryl C. Towns, on new changes in foreclosure law.

Navid Vazire, Esq., Staff Attorney for the Foreclosure Prevention Project of the South Brooklyn Legal Services, on foreclosures scams and mortgage fraud.

Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court Street, 29th Floor, Brooklyn Heights, New York. He may be reached by phone at (718) COURT-ST or e-mail at RichKlass@CourtStreetLaw.com with any questions. Prior results do not guarantee a similar outcome.

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