



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

PENNEY S. AZCARATE, CHIEF JUDGE

RANDY I. BELLOWS

ROBERT J. SMITH

BRETT A. KASSABIAN

MICHAEL F. DEVINE

JOHN M. TRAN

GRACE BURKE CARROLL

STEPHEN C. SHANNON

THOMAS P. MANN

RICHARD E. GARDINER

DAVID BERNHARD

DAVID A. OBLON

DONTAË L. BUGG

TANIA M. L. SAYLOR

CHRISTIE A. LEARY

JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

October 17, 2022

J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
JAN L. BRODIE
BRUCE D. WHITE
RETIRED JUDGES

Sarah E. Godfrey
Jackson & Campbell, P.C.
2300 N Street, NW Suite 300
Washington, D.C. 20037

Michelle L. Warden
Wimbish Gentile McCray & Roeber PLLC
8730 Stony Point Parkway, Suite 201
Richmond, VA 23235

Benjamin J. Trichilo
McCandlish & Lillard, P.C.
11350 Random Hills Road, Suite 500
Fairfax, VA 22030-7429

Re: *Fatima Shaw-McDonald v. Eye Consultants of Northern Virginia, et al.*,
CL 2019-11982

Dear Ms. Godfrey, Ms. Warden, and Mr. Trichilo:

Before the court are the motion to dismiss of Defendant Eye Consultants of Northern Virginia, P.C. and Plaintiff's motion in support of reinstatement and for award of sanctions.

BACKGROUND

This is a medical malpractice action filed on August 29, 2019. During discovery, Defendant Eye Consultants submitted an interrogatory to Plaintiff asking whether Plaintiff had ever filed for bankruptcy protection; Plaintiff did not state that she had done so. And, when Plaintiff supplemented her interrogatory answers on April 14, 2022, she still did not state that she had filed for bankruptcy protection, although she had filed for Chapter 7 bankruptcy on March 24, 2022 in the United States Bankruptcy Court for the Eastern District of Virginia. Plaintiff did not disclose the instant claim in response to Question 33 of the Voluntary Petition when she filed on March 24, 2022.

On the morning of trial, June 6, 2022, Defendant Northern Virginia Eye Surgery Center moved to dismiss the case for lack of standing and judicial estoppel because of Plaintiff's bankruptcy filing (which it discovered the day before). Another judge of this court deferred ruling on the motion to dismiss to allow Plaintiff's counsel to investigate and stayed the case pending briefing and argument on the motion to dismiss. On June 8, 2022, Plaintiff amended her bankruptcy filing by disclosing the instant claim in response to Question 33.

ANALYSIS

Defendant Eye Consultants asserts that, after March 24, 2022, Plaintiff no longer had standing to pursue this case, relying on *Kocher v. Campbell*, 282 Va. 113 (2011). *Kocher* resolves the instant matter.

Kocher first held that, 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." 282 Va. at 117. Moreover, the Bankruptcy Code extends to "causes of action which are pending in court" *Id.* Accordingly, Plaintiff's instant claim passed to her bankruptcy estate on March 24, 2022 and "could only be asserted by the trustee in bankruptcy, (citation omitted), unless and until it was restored to the plaintiff by the bankruptcy court." *Id.*

Kocher went on to explain that there are "two methods by which assets of a bankruptcy estate may be restored to a debtor after a petition in bankruptcy has been filed." *Id.* The first method allows the trustee to abandon the assets. 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. Abandonment also occurs "when listed assets remain unadministered when the bankruptcy case is closed. 11 U.S.C. § 554(c)." *Id.*¹ 11 U.S.C. § 554(c) has no bearing on this case, however, as the statute is concerned with the status of property "at the time of the closing of a case" and the issue in this case is the status of the claim as of June 6, 2022, not as of July 1, 2022 when the case was closed.

The second method "allows the bankruptcy court to exempt the assets pursuant to 11 U.S.C. § 522. In the absence of abandonment or exemption, the assets remain a part of the bankruptcy estate." *Id.*

The federal bankruptcy law:

provides for certain exemptions, but permits the states to "opt out" of those provisions by substituting their own exemption laws. 11 U.S.C. 522(d). Virginia is a state that has done so. . . . Code § 34-28.1 provides that causes of action for personal injury "shall be exempt from creditor process against the injured person. . . ." That exemption is therefore applicable in bankruptcy proceedings.

¹ 11 U.S.C. § 554(c) provides:

Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

282 Va. at 118.

But the "opt out" is conditional:

[T]he debtor must list the cause of action as an asset in his schedule B and then claim it as exempt property on his schedule C using forms prescribed by the bankruptcy rules. The bankruptcy court may thereafter enter an order exempting the listed property. Until such an order is entered, the property remains a part of the bankruptcy estate. (Citations omitted). If the debtor fails to follow this procedure, the cause of action, having become a part of the bankruptcy estate by virtue of 11 U.S.C. 541, remains so, and is enforceable solely by the trustee.

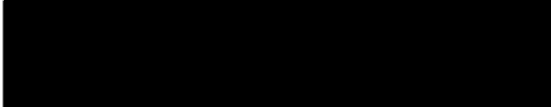
Id.

In the case at bar, 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.

As the cause of action was neither abandoned or exempted prior to June 6, 2022, it remained a part of the bankruptcy estate as of that date and was enforceable solely by the trustee. That being the case, 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" (*Kocher*, 282 Va. at 119), the case must be dismissed.² Accordingly, Defendant Eye Consultants motion to dismiss is GRANTED and Plaintiff's motion in support of reinstatement and for award of sanctions is DENIED.

An appropriate order will enter.

Sincerely yours,


Richard E. Gardiner
Judge

² In view of the court's disposition of the case pursuant to *Kocher*, the court does not address Defendant's contention that Plaintiff's claims should be barred by judicial estoppel.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FATIMA SHAW-MCDONALD)	
)	
Plaintiff)	
)	
v.)	CL 2019-11982
)	
EYE CONSULTANTS OF NORTHERN)	
VIRGINIA, P.C., et al.)	
)	
Defendants)	

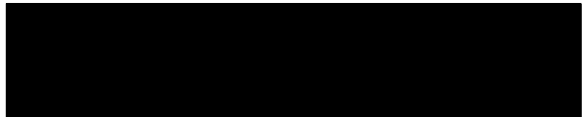
ORDER

THIS MATTER came before the court on the motion to dismiss of Defendant Eye Consultants of Northern Virginia, P.C. and Plaintiff's motion in support of reinstatement and for award of sanctions.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby GRANTS the motion to dismiss of Defendant Eye Consultants of Northern Virginia, P.C. and DENIES Plaintiff's motion in support of reinstatement and for award of sanctions, and it is therefore

ORDERED that the case is DISMISSED with prejudice.

ENTERED this 17th day of October, 2022.



Richard E. Gardiner
Judge

**ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR
THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA**

Copies to:

Benjamin J. Trichilo
btrichilo@mccandlaw.com
Counsel for Plaintiff

Sarah E. Godfrey
sgodfrey@jackscamp.com
Counsel for Defendant Northern Virginia Eye Surgery Center, LLC

Michelle L. Warden
mwarden@wgmlaw.com
Counsel for Defendant Eye Consultants of Northern Virginia, P.C.