22-cv-0599

In the District of Columbia Court of Appeals

JEROME STIEBER,

Appellant

v.

BURCHELL & HUGHES, PLLC, *et al.*,

Appellees

Appeal from the Superior Court of the District of Columbia
(Civil Division)
(Hon. Maurice Ross)

Brief of Appellant Jerome Stieber

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CERTIFICATE OF COUNSEL

Case No. 21-CV-0599

Jerome Stieber v. Burchell & Hughes, PLLC, *et al.*

Certificate required by Rule 28(a)(2)
Of the Rules of the District of Columbia
Court of Appeals

The undersigned, counsel of record for the Appellant, Jerome Stieber, certifies that the following listed parties appeared below: Jerome Stieber, represented by Jeffrey W. Stickle and Richard W. Evans of McCarthy Wilson, LLP and Neil S. Hyman of the Law Office of Neil S. Hyman, LLC; Burchell & Hughes, PLLC, Kelly Burchell, Esquire, represented by Laura N. Steel of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP.

These representations are made in order that the judges of this Court, *inter alia,* may evaluate possible recusal.

Respectfully submitted,

By: /s/ Amy Leete Leone
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This appeal is from a final order of the Superior Court, dismissing Plaintiff's First Amended Complaint with prejudice.

I. STATEMENT OF THE ISSUES

The trial court erred by dismissing the First Amended Complaint since it stated a claim for legal malpractice and alleged facts to show that Mr. Stieber would have "fared better" if his prior attorneys had pursued his bankrupt employer's $10 million liability insurance policy to satisfy the settlement.

II. STATEMENT OF THE CASE

Mr. Jerome Stieber filed the underlying Complaint against his former attorneys, Burchell & Hughes, PLLC, Kelly Burchell, Esquire, and Theresa Taing, Esquire[1] (collectively the "Law Firm"). The Complaint stated one cause of action for negligence/professional malpractice arising out of the Law Firm's prior legal representation of Mr. Stieber in a claim against his former employer, Cumulus Media, LLC ("Cumulus").

In response to the Complaint, the Law Firm filed a Motion to Dismiss for Failure to State a Claim. Mr. Stieber opposed that Motion and, simultaneously, filed an Amended Complaint. The Law Firm again moved to dismiss and Mr. Stieber filed an Opposition. The Superior Court, the Honorable Maurice Ross presiding, held a motions hearing and denied the Law Firm's Motion. Days later, Judge Ross, *sua sponte,* set a second hearing, at which time he heard additional

[1] Defendant Taing was not served prior to the Court's dismissal.

argument from counsel. At the conclusion of that second hearing, Judge Ross granted the Law Firm's Motion and dismissed the case with prejudice. The instant appeal ensued.

III. STATEMENT OF THE FACTS

A. Mr. Stieber Retains Counsel

Mr. Stieber, who has been diagnosed with multiple disabilities, was formerly employed by Cumulus as an account executive in the District of Columbia. (JA009) His employment was terminated in May 2017. (JA009) Shortly thereafter, he engaged counsel[2] to represent him in bringing claims against his former employer for discrimination and wrongful termination. (JA009)

B. Counsel Commences Legal Action

In February 2018, Mr. Stieber, through counsel, commenced an employment discrimination action in the D.C. Office of Human Rights (DCOHR). In or around late July 2019, the DCOHR issued its probable cause finding in favor of Mr. Stieber on his claims for failure to accommodate, retaliation, and disparate treatment on the basis of his age and disability, and ordered the parties to participate in conciliation. (JA012) On January 10, 2020, as a result of this conciliation process, Mr. Stieber, through counsel, entered into a Settlement

[2] Mr. Stieber initially hired Appellee Burchell, Teresa Taing, Esquire, and their prior law firm, BGM Law, PLLC. (JA009) During their representation of Mr.

Agreement with Cumulus, in which the parties agreed that the value of Mr. Stieber's claim was One Million One Hundred and Sixty Thousand Dollars ($1,160,000.00). (JA012) Also during the conciliation process, Mr. Stieber, through counsel, and Cumulus agreed to settle his claims against Cumulus for Three Hundred Sixty Thousand Dollars ($360,000.00), even though they had previously valued his claim for more than One Million Dollars. (JA013)

C. Cumulus Bankruptcy Proceedings

Meanwhile, on or about November 30, 2017, Cumulus, Mr. Stieber's former employer, filed for Chapter 11 bankruptcy. (JA010) *See In re: Cumulus Media, Inc., et al., Debtors,* Case No. 17-13381 (SCC). On or about December 5, 2017, the Law Firm representing Mr. Stieber was made aware of the bankruptcy filing. (JA010) However, the Law Firm took no action to respond to Cumulus's bankruptcy status. (JA010) On May 10, 2018, the United States Bankruptcy Court for the Southern District of New York issued its order approving of the reorganization plan (the "Plan") for Mr. Stieber's former employer. (JA010-11)

The Law Firm failed to file a timely Proof of Claim to protect Mr. Stieber's rights as a potential creditor. (JA010) The Law Firm further failed to make any other filing to protect Mr. Stieber's rights, such as appearing at the initial meeting of creditors, objecting to the Plan, moving for an adversary proceeding, moving to

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Stieber, Mr. Burchell and Ms. Taing formed Burchell & Hughes, PLLC, through

lift the stay or moving to continue his litigation against Cumulus in order to pursue applicable insurance proceeds. (JA010-11)

Following the conclusion of the DCOHR conciliation process, counsel for Mr. Stieber filed a late proof of claim in the amount of $1,160,000.00. (JA023) *See also In Re: Cumulus Media*, Case No. 17-13381-scc Doc 1232 ¶11. However, the Law Firm agreed to reduce Mr. Stieber's $1,160,000.00 claim to $360,000.00 in exchange for Cumulus agreeing not to challenge the late-filing of the proof of claim. (JA023). *See also In Re: Cumulus Media*, Case No. 17-13381-SCC Doc 1232 ¶12; ¶15. The U.S. Bankruptcy Court eventually approved the "*Stipulation and Order Between Reorganized Debtor and Jerome Stieber Allowing Claim No. 1127 in a Reduced Amount, allowing the Claim in the amount of $360,000 as a Class 6 – General Unsecured Claim (as defined in the Plan)[.]"* (JA023). *See also In Re: Cumulus Media*, Case No. 17-13381-SCC Doc 1244.

D. Mr. Stieber's Claim is Paid in Cumulus Stock

The Bankruptcy Plan in effect when the Law Firm and Cumulus negotiated the $360,000.00 settlement of the $1,160,000.00 valued claim provided that General Unsecured Claims, such as Mr. Stieber's claim, were payable on a reduced pro rata basis, through the issuance of stock. *See In Re: Cumulus Media, Inc., et al.*, Case No. 17-13381 (SCC), Doc. 769 ("the Plan"). (JA014). However, Mr.

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which their representation of Mr. Stieber continued. (JA010)

Stieber was not so informed, and he relied on the Law Firm's advice, including that the $360,000.00 settlement would be a "cash payout" in that amount. (JA013) Nonetheless, in accordance with the Plan, following the negotiated agreement between the Law Firm and Cumulus, Mr. Stieber received 911 shares of Cumulus stock, worth only about Twelve Thousand Dollars ($12,000.00). (JA013) Mr. Stieber was never advised by the Law Firm that he was settling his claim for stock valued at less than $360,000.00. (JA013)

E. Mr. Stieber's Claim Was Covered by Insurance Policy

At the time of his wrongful termination and discrimination, Mr. Stieber's employer was an insured under an Executive Protection Portfolio Policy, No. [redacted] (the "Policy" or "Insurance Policy"), with a limit of liability of Ten Million Dollars ($10,000,000.00), which was subject to a $350,000 per claim self-insured retention ("SIR"). (JA011) That Policy was issued to Cumulus by Federal Insurance Company t/a Chubb. (JA024) However, the Law Firm failed to take any action to recover the value of Mr. Stieber's claim through the Policy. (JA011) For example, the Law Firm never filed a motion to lift the stay to pursue a claim covered by insurance. (JA011-12) Nor did the Law Firm move to continue the litigation against Cumulus in order to pursue insurance proceeds. The Law Firm did not seek to have the reduced settlement agreement (or any portion of it) paid by the insurer. The Law Firm did not negotiate a settlement to ensure that the

Insurance Policy would provide payment to Mr. Stieber in the amount of $360,000.00 as he understood he was agreeing to accept to resolve his claim against Cumulus.[3] Instead, despite the existence of this Policy, the Law Firm negotiated Mr. Stieber's claim down to a $360,000.00 General Unsecured Claim to be submitted in the bankruptcy proceedings, and failed to pursue payment from the Insurance Policy in any amount. (JA012)

F. Superior Court Dismisses First Amended Complaint

Mr. Stieber filed a First Amended Complaint against the Law Firm for its alleged negligence and legal malpractice. (JA007) Following the Law Firm's Motion to Dismiss, the Superior Court determined that the First Amended Complaint failed to allege that Mr. Stieber suffered any damage proximately caused by the Law Firm that was "independent of the bankruptcy court[.]" (JA119) The Court determined that any damages alleged in the First Amended Complaint depended on a speculative legal determination by the bankruptcy court:

> THE COURT: But it's all contingent on the bankruptcy court. You don't get to 350. The fact that it wasn't included, that's not on the Defendants. But you don't get to 350 – 350-plus until you go to the bankruptcy court. That's Ms. Steel's point.
> . . .
> THE COURT: Take it up with the Court of Appeals.

(JA125)

[3] For example, if the Law Firm had negotiated a settlement figure of $710,000.00, Mr. Stieber would have received $360,000.00 from the insurer. *See infra.*

IV. SUMMARY OF ARGUMENT

The Superior Court erred by dismissing, with prejudice, Mr. Stieber's complaint for negligence and legal malpractice. The Court erroneously determined that, as a matter of law, Mr. Stieber could not establish that he suffered any damages as a result of the Law Firm's alleged negligence since, to do so, would require a jury to speculate about what might have happened in bankruptcy court. (JA123) This was error.

In reaching this result, the Superior Court failed to consider that bankruptcy courts routinely allow for claims covered by insurance to proceed against bankrupt-insureds to the extent of available insurance coverage. Moreover, the Court failed to consider the well-settled law that an insurance policy that covers a claim continues to apply to that claim even if a bankrupt insured is not able to pay its SIR under the policy. The Court further erred by misinterpreting *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr,* 68 A.3d 697 (D.C. 2013) and *Chase v. Gilbert,* 499 A.2d 1203 (D.C. 1985) as precluding any legal malpractice claim where the damages sought by the plaintiff have not already been established in a legal proceeding.

V. ARGUMENT

A. Standard of Review

This Court reviews the trial court's grant of a motion to dismiss a complaint under Rule 12(b)(6) *de novo. See Fraser v. Gottfried*, 636 A.2d 430, 432, n.5 (D.C. 1994) (quoting *Johnson-El v. District of Columbia,* 579 A.2d 163, 166 (D.C. 1990)). That is, this Court applies the same standard as the trial court; it accepts the allegations of the complaint as true and construes all facts and inferences in favor of the plaintiff. *Atkins v. Industrial Telecommunications Ass'n.*, 660 A.2d 885, 887 (D.C. 1995).

The Court must determine (1) whether the pleading includes well-pleaded factual allegations, and (2) whether such allegations plausibly give rise to an entitlement for relief. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-52 (2009); *see also Mazza v. House Craft, LLC,* 18 A.3d 786, 790 (D.C. 2011) (adopting *Iqbal's* heightened pleading standard); *see also Potomac Dev. Corp. v. District of Columbia,* 28 A.3d 531, 543 (D.C. 2011) (adopting the Supreme Court's plausibility standard for a complaint to survive a motion to dismiss). The pleading need not include "detailed factual allegations," but must include "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Mazza,* 18 A.3d at 790. The allegations must be sufficient "to raise a right to relief above the speculative level[.]" *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008).

Dismissal is warranted where the complaint "fails to allege the elements of a legally viable claim." *Chamberlain v. American Honda Fin. Corp.,* 931 A.2d 1018, 1023 (D.C. 2007).

Under the *Twombly/Iqbal* standard, "'the lack of detail in the complaint is not a basis for dismissing a claim for damages at [an] early state of the litigation[,] as plaintiffs are under no obligation to plead damages with particularity.'" *Silberberg v. Becker,* 191 A.3d 324, 338-39 (D.C. 2018) (quoting *Democracy Partners v. Project Veritas Action Fund,* 285 F.Supp.3d 109, 126 (D.D.C. 2018). Although a plaintiff must prove actual damages and proximate cause to recover on a claim, it is error to dismiss a plaintiff's claim at the initial pleading stage for failure to specify precisely how he was damaged by the breach of duty. *See Silberberg, supra.* Indeed, if a defendant wants to test the ability of a plaintiff to prove damages, it must present a motion for summary judgment or proceed to trial. *In re Curseen,* 890 A.2d 191, 194 (D.C. 2006). A motion to dismiss is not intended to test the evidence available to prove damages.

In this case, the First Amended Complaint was dismissed because the Court found that, as a matter of law, Mr. Stieber could not establish that any damages were proximately caused by the above-outlined breaches of duty. Specifically, the Court determined that any pathway to Mr. Stieber's recovery of damages required approval from the Bankruptcy Court and, therefore, as a matter of law any claimed

damages were too speculative. As shown herein, this was error. The alleged injury suffered by Mr. Stieber was not so speculative that, as a matter of law, it could not be established.

B. Mr. Stieber Stated a Claim for Legal Malpractice

Claims for negligence and legal malpractice require a showing of (1) the applicable standard of care; (2) a breach of the standard of care; and (3) a causal relationship between the violation and the harm complained of. *See Biomet, Inc. v. Finnegan Henderson, LLP,* 967 A.2d 662, 664-65 (D.C. 2009) (citing *O'Neil v. Bergan,* 452 A.2d 337, 341 (D.C. 1982)). With respect to the third element, a plaintiff must establish that he would have "fared better" in the absence of the attorney's negligence. *Chase v. Gilbert,* 499 A.2d 1203, 1212 (D.C. 1985). In this case, the Superior Court erred by determining that, as a matter of law, Mr. Stieber could not establish that he would have "fared better" in the absence of the Law Firm's negligence.

The First Amended Complaint alleges includes at least three different categories of alleged breaches of duty: failure to timely respond in any way to Cumulus's declaration of bankruptcy (FAC 17-22; 25; 36) (JA010-12); failure to investigate, obtain, or pursue Cumulus's applicable insurance coverage (FAC 23-24; 26-29; 37) (JA011-13); and failure to inform Mr. Stieber that he was settling

his claim against Cumulus for less than $360,000 (FAC 38-42) (JA013). Specifically, Plaintiff identified eleven separate breaches of the duty of care:

- Failing to take any action in response to being notified of the existence of the Cumulus bankruptcy proceedings;
- Failing to advise Plaintiff to file a Proof of Claim or to assist Plaintiff in filing a Proof of Claim;
- Failing to advise DCOHR that Cumulus had filed for bankruptcy;
- Failing to read or understand the Plan;
- Failing to pursue any policy of EPLI or other insurance carried by Cumulus;
- **Failing to discover, understand, acknowledge, or pursue that insurance coverage then and there in effect from Chubb;**
- **Failing to take action in the bankruptcy Court to release Plaintiff from any stay so as to pursue Chubb's available policy;**
- **Failing to negotiate in a manner which considered Chubb's Claim retainer amount, in conjunction with Cumulus' bankruptcy status;**
- Failing to take action in the bankruptcy proceedings to protect the $1,160,000.00 value of the claim;
- Failing to advise Plaintiff that he was comprising the value of his claim for substantially less than $360,000.00 by accepting the settlement reached in conciliation; and
- Failing to understand the plain terms of the Plan, which reduced the actual cash payout to Plaintiff to $12,000.00, or 1% of the total value;

(JA015-16) In his First Amended Complaint, Mr. Stieber alleged that, but for the above-described negligence, he would have "fared better," that is, he would have recovered more than a mere $12,000 for his claim against the Law Firm. The Law Firm's negligence resulted in Mr. Stieber settling his wrongful termination and

discrimination claim against Cumulus for far less than it was worth. In the First Amended Complaint, Mr. Stieber specifically alleged that the above violations caused damage:

> [A]s a direct and proximate result of Defendants' negligence and malpractice, Plaintiff has suffered, and continues to suffer, harm and damages, including, but not limited to, the reduction of the value of his action against Cumulus by more than One Million Dollars as described above.

(JA016)

1. First Amended Complaint alleged facts to show that Mr. Stieber would have fared better but for the Law Firm's negligence.

The determination of whether Mr. Stieber would have "fared better" but for the Law Firm's negligence was not presented to the Court; what was before the Court was whether he stated facts that could plausibly support his claim that he would have "fared better" but for the Law Firm's negligence. As shown herein, he plainly did.

It is true that one way to determine the third element of a legal malpractice claim is to apply the "case within a case" doctrine, *i.e.,* would the plaintiff have prevailed in the underlying litigation in the absence of the attorney's alleged breach. *Steele v. Salb,* 93 A.3d 1277, 1281 (D.C. 2014). Here, Mr. Stieber's claim did not depend on whether he could prevail in his discrimination claim against Cumulus; it depends on whether he can show that he would have received more to

settle his claim in the absence of the Law Firm's negligence. In his First Amended Complaint, Mr. Stieber alleged that the parties agreed the value of his claim was $1,160,000.00 and that they further agreed to settle that claim for $360,000.00 in cash. The "case within the case" analysis therefore required Mr. Stieber to show that but for the Law Firm's negligence, he would have recovered more than what he actually did, $12,000.00 in Cumulus stock. Mr. Stieber's First Amended Complaint included facts sufficient to show this proximate cause, such that the claim should be submitted to a fact finder to resolve.

2. Legal Malpractice claim is not precluded because it arises out of a settlement.

Moreover, simply because the negligence in this case arose at the settlement stage of the litigation does not mean that, as a matter of law, the so-called "judgment rule" applies to preclude liability for the Law Firm's conduct. *See Crawford v. Katz,* 32 A.3d 418 (D.C. 2011) (alleged legal malpractice arising out of efforts to negotiate severance package, and prosecution and settlement of wrongful termination lawsuit); *Seed Co., Ltd. v, Westerman* 840 F.Supp.2d 116, 127 (D.D.C. 2012) (denying summary judgment in favor of defendants on plaintiffs' claim that they refused a settlement offer based on the defendants' advice); *and Jones v. Lattimer*, 29 F.Supp.3d 5 (D.C.C. 2014) (denying motion to dismiss claim for legal malpractice arising out of defendant's alleged failure to advise plaintiff to accept settlement offers). The claim at issue is not simply that

the Law Firm provided Mr. Stieber with negligent advice regarding the settlement of his claims with Cumulus; it is that the Law Firm failed to understand the settlement agreement and failed to have the settlement satisfied through the Cumulus Insurance Policy.

C. Bankruptcy Courts Routinely Allow Claims Against Bankrupt-Insureds to Proceed to the Extent of Available Insurance Coverage.

The trial court held that any finding of damages in this case could only be based on speculation. However, a fact-finder would not be required to speculate as to whether Mr. Stieber's claim could have proceeded against Cumulus to the extent of the applicable insurance coverage.

It is well established that "[w]hen the bankrupt debtor is also the defendant in a suit for damages, and has coverage under an applicable insurance policy, the bankruptcy court will typically grant a limited lift of stay for the purpose of releasing the insurance proceeds to the injured plaintiff."[4] Moreover, "[w]hen the bankruptcy proceeding concludes and the bankrupt debtor is discharged of his pre-petition debt, the automatic stay erected under Section 362 (Bankruptcy Code) is replaced with a permanent injunction arising under Section 542(a), 'which prohibits any attempt to hold the debtor liable on discharged debts.'" *Plitt*, n.4.

[4] Steven Plitt and Aeryn Heidemann, Understanding Federal Bankruptcy Court Stays and How to Reach Available Insurance Coverage of the Bankruptcy Debtor Procedurally, 29 No. 21 Ins. Lit. Rep. 821 (December 15, 2007).

This injunction does not, however, "affect the enforceability of any non-debtor liability for pre-petition debt. Rather, Section 524(e) permits a creditor to seek recovery from 'any other entity' that may be liable on behalf of the debtor." (internal citations omitted). *Plitt,* n.4.

Courts across the country, including in New York, where Cumulus's bankruptcy proceeding was pending, interpret Section 524(e) of the Bankruptcy Code "to permit recovery from a debtor's insurer." *Id. See also In re Traylor*, 94 B.R. 292 (Bankr.E.D. N.Y. 1989) (granting creditor's motion for leave to continue pending action against debtor's insurance company); *Lebron v. St. Vincent Medical Center,* 21 Misc.3d 1147(A), 875 N.Y.S.2d 821 (Table) (Sup. Ct. Bronx Cnty., N.Y. Dec. 17, 2008) (noting that "while 11 U.S.C. 524(a) serves to bar any actions where the debtor bears personal liability attaching to his assets, 11 U.S.C. 524(e) does not preclude liability against the debtor provided that any damages stemming therefrom would be paid by another, such as a surety or insurance company" and "New York State law also hold that a bankruptcy discharge does not bar a pending law suit where the defendant has liability coverage for the events forming the basis of the lawsuit").

In affirming a decision of the U.S. District Court for the Western District of New York allowing a tort claimant to proceed against a discharged bankruptcy

debtor in order to obtain a judgment to be recovered from its insurer, the United States Court of Appeals for the Second Circuit explained:

> Numerous courts, confronted with a tort claimant who seeks to proceed against a discharged debtor only for the purpose of recovering against an insurer, have relied on §§ 524(a) and 524(e) and the fresh start policy in concluding that the discharge injunction does not bar such a suit. *See, e.g. In re Jet Florida Systems, Inc.,* 883 F.2d 970, 976 (11th Cir.1989) (section 524(e) permits a plaintiff to proceed against the debtor to establish liability as a prerequisite to recover from an insurer); *In re Greenway,* 126 B.R. 253, 255 (Bankr.E.D.Tex.1991) (discharge order does not bar continuation of state court action to determine liability of debtor solely as a prerequisite to recovery from debtor's insurance carrier); *In re Peterson,* 118 B.R. 801, 804 (Bankr.D.N.M.1990) (injunction provided by § 524 does not bar FDIC from establishing the liability of the debtor so as to proceed against bank employee insurer); *In re Traylor,* 94 B.R. 292, 293 (Bankr.E.D.N.Y.1989) (discharge does not release debtor's insurer from liability); *In re Lembke,* 93 B.R. 701, 702-03 (Bankr.D.N.D.1988) (section 524 injunction permits suit to recover from debtor's insurer); *In re White,* 73 B.R. 983, 984-86 (Bankr.D.D.C.1987) (injunction issued pursuant to debtor's discharge does not bar a lawsuit against the debtor that will affect only the assets of the debtor's insurer); *In re Mann,* 58 B.R. 953, 959 (Bankr.W.D.Va.1986) (section 524 does not prohibit tort claimant from maintaining a pending suit against discharged debtor to effectuate recovery under claimant's uninsured motorist coverage). Some courts have reached the same result by modifying the injunction to permit the tort suit to continue. *See, e.g. In re Walker,* 927 F.2d 1138, 1142-44 (10th Cir.1991) (section 524(e) permits a creditor to bring a direct suit against the debtor where establishment of the debtor's liability is a prerequisite to recovery from a state fund); *In re Dorner,* 125 B.R. 198, 202 (Bankr.N.D.Ohio 1991) (modification of section 524 injunction appropriate to enable defendant in tort action to establish debtor's liability for purposes of setoff and apportionment); *In re McGraw,* 18 B.R. 140, 143 (Bankr.W.D.Wis.1982) (section 524 injunction can be modified to permit continuation of suit provided that creditors are enjoined from collecting any judgment from debtor). Yet other courts have applied

> similar reasoning in deciding to grant a tort claimant relief from the automatic stay. *See, e.g. In re Fernstrom Storage and Van Co.,* 938 F.2d 731 (7th Cir.1991); *Elliott v. Hardison,* 25 B.R. 305 (E.D.Va.1982); *In re Honosky,* 6 B.R. 667 (Bankr. S.D.W.Va. 1980).

Green v. Welsh, 956 F.2d 30, 33–34 (2d Cir. 1992). That Court further elaborated that one case, in *In re Jet Florida Systems, Inc.,* 883 F.2d 970, 976 (11th Cir.1989), which arose out of a debtor's Chapter 11 bankruptcy, was particularly persuasive:

> A plaintiff who had sued the debtor for defamation failed to file a proof of claim with respect to his action prior to the bar date for filing proofs of claims. The bankruptcy court subsequently issued a permanent injunction under § 524 and barred the plaintiff from continuing his suit. On appeal, the district court found that the statutory language and purpose of the § 524(a) injunction, aimed at protecting the debtor, did not preclude a suit tailored solely to determining the debtor's liability as a precondition for recovery against the debtor's liability insurer. The court then held that § 524(e)'s broadly worded limitation on the effect of discharge permitted the plaintiff to proceed against the debtor with such a suit. In reaching this conclusion, the court emphasized that neither the " 'fresh-start' policy" nor § 524 was designed to immunize "third parties such as insurers who may be liable on behalf of the debtor," and the insurer should not gain a benefit that had not figured in the calculation of the premium for the policy. Finally, the court found it highly unlikely that the debtor would incur any expenses in defending the suit because the discharge left it free to default, thus compelling the insurer to pay the costs of litigation. (internal citations omitted)

Green v. Welsh, 956 F.2d 30, 34 (2d Cir. 1992).

Indeed, it is well established that New York law holds that a bankruptcy discharge does not bar a pending law suit when the defendant has liability coverage for the events forming the basis of the lawsuit. *Roman v. Hudson Telegraph Associates,* 11 A.D.3d 346 (1st Dept.2004); *Lumbermens Mutual Casualty*

Company v. Morse Shoe Company, 218 A.D.2d 624 (1st Dept.1995); *Minafari v. United Artists Theatres, Inc.,* 5 Misc.3d 474 (Supreme Court, Westchester County, N.Y. 2004); *Andriani v. Czmus,* 153 Misc.2d 38 (Supreme Court, New York County, N.Y. 1992).

The point is that allowing a liability claim to proceed against the debtor where there is insurance coverage to cover the loss is not a speculative outcome; it is an expected outcome. To the extent that the Superior Court made a legal determination to the contrary, that was error. At this stage of the pleadings, Mr. Stieber was not required to establish liability or damages; he was only required to allege facts from which relief could plausibly be granted. It does not require speculation about the bankruptcy court's anticipated claim allowance to establish damages. Certainly, Mr. Stieber could introduce expert testimony or establish as a matter of law that, had the Law Firm sought leave to proceed against Cumulus only to the extent of insurance coverage, such relief would have been allowed as a matter of course.

D. Insurance Policies Issued to Bankrupt-Insureds Continue to Apply to Covered Claims Regardless of Ability to Pay Self-Insured Retentions.

The Law Firm has argued, and the Superior Court apparently agreed, that regardless of the available Insurance Policy, it could "never" be reached[5] because the Policy included a $350,000 SIR and the debtor-insured, Cumulus, could never pay that SIR. Therefore, the argument continues, Mr. Stieber's claims that he was damaged by the Law Firm's failure to pursue that coverage is wholly speculative, as Mr. Siebert could not possibly show that the Law firm's failure to pursue that Policy proximately caused him damage. In fact, it is well established that a debtor-insured's inability to pay an SIR does not relieve an insurance company of its obligations in a liability insurance policy.

By operation of law in many states, and by the terms of many insurance policies, an insurer's obligation to pay claims is not relieved by the policyholder's bankruptcy. *See* S. Seaman and J. Schulze, Allocation of Losses in Complex

[5] The Law Firm's briefing below included numerous asserted "facts" that are outside of the pleadings and not properly before the Court on a motion to dismiss. These include its unsupported references to Cumulus's counsel making assertions "that there was no insurance that covered Stieber's claims[,]" as well as its further musing that this "statement" was likely a "euphemism" for Cumulus's inability to pay the SIR. (JA035). However, in reviewing the Motion to Dismiss, the Court is required to accept Mr. Stieber's allegation that there was applicable insurance coverage in the amount of $10 million as true. Were the Court evaluating a motion for summary judgment, Mr. Stieber could have introduced evidence to establish this.

Insurance Coverage Claims, § 9.3 (Jan. 2023 update). "Many insurance contracts also contain a specific bankruptcy clause providing that the insurer shall not be relieved of its obligation to pay claims covered under the contract based upon the policyholder's insolvency or bankruptcy. Such a provision is not intended and should not be construed to require the insurer to 'drop down' to assume any self-insured retention." *Id.* It is, however, generally required that the coverage be afforded for amounts in excess of the SIR. *Id*.

Notably, New York insurance law specifically requires that liability insurers should not be relieved of their obligations to pay claims because of a policyholder's bankruptcy. *See* NYCLS Ins. § 3420(a)(1).[6] In *In re Grace Industries, Inc.,* 341 B.R. 399 (Bankr.E.D. N.Y. 2006), *aff'd as modified,* 409 B.R.

[6] (a) No policy or contract insuring against liability for injury to person, except as provided in subsection (g) of this section, or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions that are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors:

> (1) A provision that the insolvency or bankruptcy of the person insured, or the insolvency of the insured's estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract.

NYCLS Ins. § 3420.

275 (Bankr.E.D.N.Y. 2009), the court, applying New York law,[7] held that, despite the insured's bankruptcy and subsequent inability to pay its $50,000 SIR, the liability insurer would have the same obligations that it would in the absence of the insured's bankruptcy – "to pay claims to the extent of the policy limits, and to the extent the claims exceed the amount of the self-insured retention." *Id.* at 404. In response to the insurer's argument that requiring it to pay claims in excess of the unpaid SIR would unfairly require it to defend claims within the SIR to protect against a larger recovery, the New York court stated:

> [I]n defendant claims within the self-insured retention limit, Admiral would be making a business decision that its best financial interest are served by doing so, even if it is not required to do so. To be in this way put in the position of making a choice between the less financially undesirable of two alternative is not the same thing as being legally compelled to make a payment. Admiral is not legally required to fund any claims within the SIR. If it chooses to defend claims that would fall within the retained limit, the choice will be voluntary, to protect is financial interests. This does not constitute an increase of Admiral's obligations under the policy.

Id. See also Home Ins. Co. of Illinois v. Hooper, 691 N.E.2d 65 (1st Dist. 1998) (applying Illinois law); *In re Vanderveer Estates Holdings, LLC* 328 B.R. 18

[7] Mr. Stieber's employer, Cumulus, filed for Chapter 11 bankruptcy protection in the U.S. District Court for the Southern District of New York. (JA010) As the Insurance Policy referenced in the First Amended Complaint is not in evidence for this Court's review of the 12(b)(6) motion to dismiss, it is not established that the Policy follows New York law, but it is certainly likely that New York law would apply.

(Bankr.E.D.N.Y. 2005), *aff'd American Safety Indemn. Co. v. Official Committee of Unsecured Creditors,* 2006 WL 2850612 (E.D.N.Y) (October 3, 2006).

The Insurance Policy at issue is not in evidence. Mr. Stieber must be allowed to show that it would have applied despite the $350,000 SIR, based on applicable law and the terms of the Policy. Notably, the bankrupt-insured agreed that the value of Mr. Stieber's claim far exceeds the applicable SIR, and even the negotiated settlement of $360,000 exceeds the SIR, such that the insurer's coverage would have been triggered. The Law Firm's failure to pursue payment for the same from the liability insurer proximately caused Mr. Stieber damage. This is not speculation; it is a plausible allegation. The Superior Court's conclusion to the contrary was error.

E. Case Law Superior Court Relied Upon Does Not Support Dismissal.

In finding that Mr. Stieber could not establish damages proximately caused by the Law Firm's negligence, the Superior Court relied on two cases, *Chase v. Gilbert,* 499 A.2d 1203, 1222-12 (D.C. 1985) and *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr,* 68 A.3d 697, 710 (D.C. 2013). Neither case supports the dismissal of Mr. Stieber's claim against the Law Firm.

In *Chase*, an attorney filed a lawsuit against his former client, a broadcasting corporation ("GBC"), seeking to recover attorney's fees allegedly owed to him for legal services performed in connection with its application for a radio license from

the FCC. *Chase,* 499 A.2d at 1204. GBC filed a counterclaim for legal malpractice, alleging that the attorney failed to exercise reasonable care in recommending that GBC raise a specific issue with the FCC and failed to eliminate, minimize, or apprise GBC of the risks involved with doing so. *Id.*, 499 A.2d at 1211. GBC claimed that, as a result, the FCC disqualified it and that, in the absence of the attorney's negligence, the FCC would have awarded GBC the license it was seeking. *Id.*

Contrary to the Law Firm's assertion during the hearing before Judge Ross, *Chase* did not arise as a result of a 12(b)(6) dismissal; it arose following a bench trial where the trial court dismissed the legal malpractice claim after the evidence in support thereof was introduced and was found to be insufficient as a matter of law. The claimed damages were found to be speculative because they required the fact-finder to make several guesses about how the FCC would have responded to hypothetical steps that GBC's counsel could have taken. At the conclusion of that bench trial, the Superior Court found that the attorney was not negligent and that, even if he was negligent, GBC failed to show the proximate cause between counsel's conduct and the damages it sustained in the FCC licensing proceedings. *Id.* On appeal, this Court affirmed: "What GBC might have done, and what the result would have been had GBC either put in writing [GBC's principal's] report to his superiors or appealed the FCC's initial decision, involves the kind of

speculation which courts have rejected as grounds for holding that an attorney has been negligent in performing his duty to his client." *Id.* Thus, this Court explained that a claim that certain conduct by counsel would have produced a different outcome was speculative. *Id.*

As shown herein, there is no similar speculation required for a jury to conclude that, had Mr. Siebert's counsel sought to proceed against the Policy insuring Cumulus, or understood the value of a $360,000.00 general unsecured claim in bankruptcy, Mr. Stieber would have received more money for his recovery. It is well established that a legal malpractice plaintiff is not required to allege or establish his damages with precision: "it is sufficient to show that [he] could have 'fared better' in reaching the ultimate goal sought or that there would have been a difference in the trial's outcome." (internal citations omitted) *Chase* at 1212. This case is one where Mr. Stieber alleged that he would have fared better absent the Law Firm's negligence and he was entitled to have the opportunity to prove this at trial.

The trial court also relied on *Pietrangelo*, *supra,* where a plaintiff brought a claim for legal malpractice and other alleged wrongs against the defendant law firm arising out of its *pro bono* representation of him and others in a challenged to the "Don't Ask, Don't Tell" statute. *Id.* at 703. The Superior Court granted a motion to dismiss the legal malpractice claim for failure to state a claim for which

relief can be granted.[8] On appeal, this Court affirmed. The "case within the case" at issue in *Pietrangelo* was a challenge to the statute that the defendant law firm filed in the United States District Court for the District of Massachusetts. *Id.* at 704. That challenge was subsequently dismissed. *Id.* Plaintiff's legal malpractice claim alleged that the law firm "commit[ed] legal malpractice in drafting the complaint for the DADT challenge[.]" *Id.* at 705. Specifically, he claimed that the law firm had an obligation to make two claims: a First Amendment "overbreadth claim"; and an equal protection claim. *Id.* at 712. This Court explained that, even assuming this constituted an allegation of breach of the duty of care, the plaintiff "does not allege sufficient facts showing causation or resulting non-speculative harm from [the law firm's] breach of its professional duty." *Id.* at 713. The harm alleged was that the U.S. Supreme Court would have struck down the DADT law if the law firm had included the above-referenced First Amendment and equal protection claims in its complaint. *Id.* Thus, in order to find any damages as a result of counsel's failure to make certain arguments, the fact-finder would have had to speculate on how the Supreme Court would have ruled on an issue of first impression. Mr. Stieber's claim is wholly distinguishable, as his damages are not based on any similar speculation.

[8] Numerous other claims were dismissed at the same time.

Neither *Pietrangelo* nor *Chase* are as broad as argued by the Law Firm. Unlike *Pietrangelo* and *Chase*, Mr. Stieber alleges damages that are not based on pure speculation. Bankruptcy courts in New York and elsewhere routinely lift stays or allow claims against bankrupt-debtors to proceed to the extent of insurance coverage. Moreover, under well-established law, the $350,000 SIR does not prevent a liability policy from applying above that amount simply because the insured is in bankruptcy. Because Mr. Stieber's claim has already been valued by Cumulus to be far in excess of the SIR, it is not speculative to find that, had the Law Firm pursued that Insurance Policy, Mr. Stieber would have fared better than an $12,000 recovery. Damages do not have to be pled with specificity in order to survive a motion to dismiss. *See also Edelberg v. Roberts,* 2005 WL 1006000 at *5 (D.D.C) (April 29, 2005) (denying motion to dismiss legal malpractice claim despite fact that proof of damages incurred "may involve some speculation" since "the Court also is mindful of the fact that potential litigation outcomes are inherently more speculative than contract terms and hence concludes that the factual allegations pled in the Complaint – the lost claim … and the value estimated by the attorneys involved – are sufficiently concrete and specific to survive a motion to dismiss.")

VI. Conclusion

Wherefore, for all of the foregoing reasons, the Appellant, Jerome Stieber, respectfully requests that this Honorable Court reverse the dismissal of his First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 14th day of February, 2023, a copy of the foregoing Brief of Appellant Jerome Stieber was electronically filed and delivered to:

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Amy Leete Leone
Signature

22-cv-0599
Case Number(s)

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