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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BOUNDARY**

ROBERT MICHAEL,

Plaintiff,

vs.

STEPHEN F. SMITH et al.,

Defendants.

Case No. **S CV 2007 312**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

I. PROCEDURAL HISTORY AND BACKGROUND.

Plaintiff Robert Michael (Michael) was represented by attorney defendant Stephen F. Smith in Boundary County case number CV 2003 432, entitled *Leon's Mfg. Co. Inc., et al., v Robert Michael, et al.* This case resulted in a judgment entered against Michael on September 2, 2005. On October 13, 2005, Michael filed for bankruptcy in Case No. 05-29868-TLM. Affidavit of Bankruptcy Trustee, Barry Zimmerman, p. 1, ¶ 1. The Order of Discharge in that bankruptcy case was filed on January 12, 2007, the bankruptcy was discharged on February 8, 2006, and the bankruptcy was terminated on June 13, 2007.

On August 29, 2007, Michael filed the Complaint in this case alleging legal malpractice by Smith in the *Leon's* case. Michael alleged *inter alia* that Smith failed to properly prepare a counterclaim, failed to properly plead fraud or to request punitive damages for Michael, and committed fraud, misrepresentation, and fraudulent

concealment.

Smith moved this Court for an Order of Summary Judgment arguing that since Michael failed to list or mention the instant legal malpractice case in his bankruptcy case, Michael does not have standing to bring this legal malpractice action, and should be judicially estopped from doing so. This Court denied Smith's Motion for Summary Judgment on July 16, 2008.

Smith then filed a Motion to Dismiss this action for failure to join an indispensable party, the bankruptcy trustee, pursuant to I.R.C.P. 12(b)(7). Michael moved for a continuance of the September 2, 2008, hearing on Defendant's Motion to Dismiss in order to determine what, if anything, the Bankruptcy Court would do. At the September 2, 2008, hearing, this Court heard the reasons for Michael's Motion to Continue, and to allow Smith the opportunity to find out what action the bankruptcy trustee might have taken, this Court granted Michael's Motion to Continue the hearing on Smith's Motion to Dismiss, and re-scheduled the Motion to Dismiss for October 15, 2008. At the October 15, 2008, hearing, no additional filings had been made, counsel for Smith represented to the court that Barry Zimmerman had been appointed bankruptcy trustee, that he had spoken to Zimmerman who indicated he had no intention of coming into this case, that Zimmerman felt that this case should be dismissed as it was never listed as an asset in Michael's bankruptcy case, and that Zimmerman felt he as trustee "owned" this case. The Court indicated that it was uncomfortable dismissing this case unless some admissible evidence regarding the trustee's position was submitted. This Court made it clear on the record that the Motion to Dismiss was not under advisement, and that there would be no ruling on the Motion to Dismiss until an affidavit or sworn testimony from Zimmerman was provided, and that it was up to one of the parties to notice the Motion

to Dismiss up for a future hearing. That earlier Motion to Dismiss has never been ruled upon. Again, the focus of that Motion to Dismiss was failure to join an indispensable party. Michael argues this prior motion based on failure to sue an indispensable party is now moot. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant Stephen F. Smith's Motion to Dismiss, pp. 5-6. This Court agrees the prior Motion to Dismiss is now moot.

Barry Zimmerman was appointed Trustee by the Bankruptcy Court and opted not to enter the instant case as a party. On December 8, 2008, Zimmerman sold Smith this cause of action Michael had against Smith in this case. Affidavit of Bankruptcy Trustee Barry Zimmerman, p. 2, ¶¶ 4, 5. Smith filed a new Motion to Dismiss on December 30, 2008. The focus of this Motion to Dismiss was the fact that in Michael's bankruptcy case, which was previously closed was now reopened, the Bankruptcy Trustee had sold Michael's right title and interest in the case before this Court to Smith, and because "the defendant now owns the cause of action and asks, without further costs or delay, that the Court dismiss the action." Motion to Dismiss, p. 2. On January 7, 2009, Michael filed Plaintiff's Opposition to Defendant Stephen F. Smith's Motion to Dismiss. Smith then filed an Affidavit of Bankruptcy Trustee Barry Zimmerman and Defendant's Memorandum in Support of Motion to Dismiss on January 13, 2009. Oral argument was held on January 21, 2009. Counsel for Smith appeared telephonically, Michael did not appear in person or telephonically.

II. ANALYSIS.

Smith moves this Court to dismiss this action as compromised and settled because the Bankruptcy Trustee has opted to sell Michael's cause of action against Smith, to Smith. Defendant's Memorandum in Support of Motion to Dismiss, p. 4.

Smith argues the Trustee had the option to enter this case as a party, to abandon the case outright, or to sell all right, title, and interest in the case. *Id.* at p. 3. Following an auction in which both parties were given the opportunity to bid (Michael was present, Smith's attorney appeared telephonically), Smith was the highest bidder and the Trustee issued Smith a Bill of Sale for all right, title, and interest in the litigation. *Id.* at pp. 3-4.

Michael appears to now argue that, although the Trustee has "abandoned the asset by auctioning the asset", (Plaintiff's Memorandum in Opposition, p. 6), Michael remains an indispensable party to the action because the Trustee did not have an interest in the entire lawsuit and therefore only sold the bankruptcy estate's interest. Plaintiff's Memorandum in Opposition, pp. 11-12. This argument is without merit and Michael cites no authority for his argument. The cases cited by Michael (*Taylor et al v. Maile IV, et al.*, 142 Idaho 253, 127 P.3d 156 (2005); *Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999); *Holmes v. Henderson Oil Co.*, 102 Idaho 214, 628 P.2d 1048 (1981); *Gladstone Realtors v. Village of Bellwood*, 411 U.S. 91, (1979); *In re Lopez*, 283 B.R. 22 (9th Cir. BAP 2002)) do not support Michael's position.

It is beyond cavil that a Trustee may sell a cause of action. 11 U.S.C. § 541(a)(1). "Causes of action owned by the trustee are intangible items of property of the estate that may be sold." *In re Lahijani*, 325 B.R. 282, 287 (9th Cir. 2005). It is the bankrupt estate, created when the bankruptcy action is commenced, that includes all legal or equitable interests held by the debtor at the time the action is commenced. 11 U.S.C. §541 (a). See *Scarlett v. Barnes*, 121 Bankr. 578 (Bankr.W.D.Mont. 1990) (legal malpractice action is property of the bankrupt estate); see also *Tingley v. Harrison*, 125

Idaho 86, 91, 867 P.2d 960, 965 (1994).

Although dealing with the issue of whether the costs and fees a debtor incurs after reviving a state-court action can be encompassed by a bankruptcy discharge, some of the fact pattern in *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005) is instructive. In that case the debtor had not initially scheduled her cause of action against her employer and the Trustee for the debtor's Chapter 7 bankruptcy estate agreed to settle with the employer "via a compromise in which Rockwell would purchase Ybarra's cause of action for \$17,500." 424 F.3d 1018, 1020. "Although Ybarra objected to the proposed compromise, the bankruptcy court approved it on November 12, 1993. Thereafter the state court granted the trustee's and Rockwell's motion to dismiss Ybarra's lawsuit." *Id.* These facts are quite similar to those in the instant matter, however *Ybarra's* facts then begin to differ as the bankruptcy court later gave Ybarra the option to accept the \$17,500 in full satisfaction and release of all claims or to take ownership of all right, title, and interest in the lawsuit, and she chose the latter.

Here, there was an auction by the trustee, attended by both parties who both bid on the cause of action. There is no evidence in the record that Michael objected to the auction or that he objected to the compromise in any way. The Trustee stated that he opted not to enter the case as a party and instead: "I sold all the right, title, and interest in this cause of action of Robert M. Michael v. Stephen Smith, et al, to Stephen Smith on December 8, 2007, at a bid sale. I gave Stephen Smith a Bill of Sale for all Plaintiff's causes of action." Affidavit of Bankruptcy Trustee, Barry Zimmerman, p. 2, ¶ 5.

Following the sale, Michael no longer had standing in this matter. Standing is a jurisdictional issue and may be raised at any time. *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982).

The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated...[T]o satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.

Thomson v. City of Lewiston, 137 Idaho 473, 477, 50 P.3d 488, 492 (2002). Because Michael has no remaining title, interest or right to his cause of action in this malpractice case before this Court, which malpractice cause of action is now owned by Smith (the party whom Michael alleged committed the malpractice), this Court must grant Defendant's Motion to Dismiss.

III. ORDER.

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is GRANTED, this matter is DISMISSED with prejudice against plaintiff Michael in favor of defendant Smith, and defendant Smith is the prevailing party.

IT IS FURTHER ORDERED that the jury trial scheduled to begin March 30, 2009 is VACATED.

Entered this 21st day of January, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 21st day of January, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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|--------------------|----------------|
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