STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

KEITH B. KRAMER and
KAY BEE KAY PROPERTIES, LLC,
Plaintiffs,

v. **Case No. 18-170457-CB**
Hon. James M. Alexander

SCOTT KWIATKOWSKI, and
GOLDSTEIN BERSHAD & FRIED, PC,
Defendants.
______________________________________/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' Motion for Summary Disposition. Plaintiffs brought this action claiming that Defendants committed legal malpractice when the firm represented them in an underlying bankruptcy case in the United States Bankruptcy Court for the Eastern District of Michigan Southern Division.

A short history of events is necessary. In their Complaint, Plaintiffs state that attorney Mark Pavlic filed Chapter 11 voluntary bankruptcy petitions on their behalf on April 24, 2009. Separate cases were filed on behalf of each Plaintiff.[1] Plaintiffs make several allegations that Pavlic committed legal malpractice throughout the bankruptcy proceedings. Plaintiffs allege that Pavlic failed to advise them that (1) the Chapter 11 proceedings could be converted to Chapter 7, (2) certain IRA accounts could be subject to the bankruptcy, and (3) of non-bankruptcy debt relief options.

The cases were ultimately converted to Chapter 7 proceedings on August 24, 2015. On

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1 *In re: Keith Bradley Kramer* was assigned to the Hon. Thomas J. Tucker, and was given Case No. 15-46671-tjt. *In re: Kay Bee Kay Properties, LLC*, was assigned to the Hon. Thomas J. Tucker, and was given Case No. 15-46666-

December 5, 2015, Attorney Scott Kwiatkowski filed a Notice of Substitution on behalf of Keith Kramer (case no. 15-46671-tjt). The substitution terminated Pavlic's representation. Pavlic filed his "First and Final Fee Application of Counsel for the Debtor, Keith Bradley Kramer" on December 11, 2015. On February 10, 2016, a hearing on the fee application was held, and the court entered an order granting the application.

Plaintiffs allege that Kwaitkowski, who represented Kramer at the time of the hearing, failed to object to Pavlic's fee application. Plaintiffs further allege that by failing to object, Kwiatkowski failed to preserve a legal malpractice claim against Pavlic. Based on the same, Plaintiffs argue that Kwiatkowski committed legal malpractice.

On these general allegations, Plaintiffs filed the present lawsuit on claims of (Count I) legal malpractice: Schott Kwiatkowski; and (Count II) vicarious liability: Goldstein, Bershad & Fried, PC.

Defendants now seek dismissal of Plaintiffs' Complaint under MCR 2.116(C)(7) and (C)(10). A (C)(7) motion considers whether a claim is barred, among other grounds, a prior judgment. And a (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).[2]

Defendants argue that they are so entitled because (1) Plaintiffs did not own the claims against Pavlic (the bankruptcy trustee did), so Plaintiffs had no rights to preserve; (2) Plaintiffs' claims are barred by *res judicata* as the chapter 7 trustee prosecuted the allegations of negligence against Pavlic, and was ultimately overruled; (3) Plaintiffs cannot establish a different outcome

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tjt.

2 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

would have occurred had Defendants objected; and (4) Defendants never represented Kay Bee Kay Properties.

In order to succeed on a legal malpractice claim, a plaintiff must establish: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Bowden v Gannaway*, 310 Mich App 499, 503; 871 NW2d 893 (2015) (internal citations and quotations omitted).

I. Kay Bee Kay Properties, LLC.

Defendants argue that Kay Bee Kay Properties, LLC's (KBK) claims should be dismissed because Defendants never represented KBK, and KBK never regained ownership of its claims against Pavlic.

As stated, in order to succeed on a legal malpractice claim, a plaintiff must first establish the existence of an attorney-client relationship. Defendants argue that since they did not represent KBK, KBK cannot establish the existence of an attorney-client relationship, and therefore, cannot succeed on a claim for legal malpractice. The Court agrees.

As previously discussed, two separate bankruptcy cases were filed on behalf of Plaintiffs in US Bankruptcy Court. Defendants filed a "Notice of Substitution of Attorneys for Debtor" on behalf of Kramer in *In re: Keith Bradley Kramer*, case no. 15-46671-tjt (Defendants' Motion Exhibit A). Defendants sent, and Kramer signed, a letter outlining Defendants' scope of legal representation. (Defendants' Motion Exhibit B). The letter was addressed to Kramer only, and signed by Kramer in his individual capacity. *Id.* Pavlic's "First and Final Fee Application of Counsel for the Debtor,

Keith Bradley Kramer" was filed in *In re: Keith Bradley Kramer*. Finally, the "Order Granting First and Final Fee Application of Counsel: was entered in *In re: Keith Bradley Kramer*. (Defendants' Motion Exhibit F).

Plaintiffs do not present any evidence that supports KBK's claim for legal malpractice against Defendants, specifically; Plaintiffs have failed to establish an attorney-client relationship between KBK and Defendants. As such, Plaintiffs have failed to create a question of fact as it relates to KBK's claim for legal malpractice and vicarious liability against Defendants.

Based on the foregoing, Defendants' motion for summary disposition as it relates to KBK is GRANTED, and KBK's complaint against Defendants is dismissed.

II. Keith Kramer

Next, Defendants argue that Kramer's claims fail because (1) Defendants did not have a duty to object to Pavlic's fee petition; (2) the claims are barred by *res judicata*; and (3) Plaintiff cannot establish causation.

A. Duty to Object to Fee Petition and Preserve Legal Malpractice Claim.

First, Defendants argue that they did not owe a duty to Kramer to object to the fee petition to preserve the legal malpractice claim against Pavlic. Defendants argue that since all of the debtor's assets are transferred to the bankruptcy estate, Kramer's legal malpractice claim also became property of the estate, and only the bankruptcy trustee has standing to prosecute the claim.

Defendants argue that Pavlic's alleged malpractice at issue occurred prior to Kramer's bankruptcy filing. Specifically, Kramer alleges that Pavlic failed to advise him before filing that his

case could be converted from Chapter 11 to Chapter 7 proceedings, that certain assets would not be exempt, and did not advice of bankruptcy alternatives. Therefore, Defendants argue, the bankruptcy estate, not Kramer, owned the legal malpractice claim against Pavlic. Since Kramer did not own the claim, Defendants argue that he had no interest to protect or preserve. As such, Defendants argue they cannot be negligent in failing to preserve a right that did not belong to Kramer. Further, as Defendants point out, both the bankruptcy trustee and a creditor objected to Pavlic's fee petition. Both were overruled.

In response, Plaintiff argues that although the bankruptcy trustee would be the proper plaintiff in the legal malpractice claim, Plaintiff had a pecuniary interest in the outcome of a legal malpractice claim. Plaintiff argues that Defendants were in the best position to raise the issue of the legal malpractice, and failed to do the same. In support of their argument, Plaintiff attached of A. Todd Almassian, his proposed expert. (Resp. Exhibit 3).

In his affidavit, Almassian opines that Defendants "committed legal malpractice that was well outside the scope of the attorney judgment rule" when they failed to object to Pavlic's fee application *Id.* at 6-7. Almassian states that Defendants were in the best position to inform the bankruptcy court of Pavlic's malpractice since they properly identified the malpractice claim on Kramer's amended Statement of Financial Affairs. *Id.* at 10. It is Almassian's position that Defendants' failure to object implied that there was no malpractice, and as a result, failed to preserve the issue. *Id.*

Further, Almassian states that Kramer was a party in interest to the fee petition because he had a pecuniary interest in the outcome because any fees not approved could have reduced his personal liability. *Id.* at 11. Almassian is of the opinion that had Defendants objected, the

bankruptcy court would have held an adversary hearing to resolve disputed facts and damages. *Id.* at 12.

Pursuant to 11 U.S.C § 541, a commencement of a bankruptcy proceeding creates and estate, which includes "all legal or equitable interests of the debtor." "As a result, only the bankruptcy trustee has standing to pursue pre-petition causes of action." *Tyler v DH Capital Management, Inc.*, 736 F.3d 455, 461 (6th Cir. 2013). As such, as Plaintiff admits, the bankruptcy would be the proper plaintiff in a legal malpractice action against Pavlic.

However, "[i]n the bankruptcy context a party in interest is one who has a pecuniary interest in the distribution of assets to creditors." *Grausz v Englander,* 321 F3d 467, 473 (4th Cir. 2003) citing *Willemain v Kivitz,* 764 F2d 1019, 1022 (4th Cir. 1985). The *Grausz* court reasoned that if legal fees were reduced or disallowed, there would be more money available in the bankruptcy estate, and a debtor's personal liability would be reduced. *Id.* Therefore, a debtor does have a pecuniary interest in the outcome of fee applications, making him a party in interest to the same. *Id.* Further, 11 U.S.C § 502(a) provides that a party in interest may object to claims made against the bankruptcy estate, including fee petitions.

Based on the holding in *Grausz*, Plaintiff did have a pecuniary interest in Pavlic's fee petition, and as such, could have filed an objection to the same. Indeed, in their reply, Defendants admit, "when, as here, the debtor has claims that are not dischargeable, courts have found that the debtor is an interested party with the *right to object* the claims made against the estate, including fee petitions." (Defendants' Reply at 3) (emphasis added).

As such, Plaintiff had an interest in Pavlic's fee petition, and could have objected. Plaintiff has submitted evidence establishing a question of fact regarding Defendants' duty to object.

Therefore, questions remain as to whether Defendants did have a duty to object. And if so, did Defendants commit malpractice by failing to object. These questions would necessarily require the Court to make factual determinations, which renders summary disposition inappropriate.

For the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court concludes that there are material questions of fact in dispute, so Defendants are not entitled to judgment matter of law. Therefore, Defendants' motion for summary disposition on this basis is DENIED.

B. *Res judicata.*

Next, Defendants argue that Plaintiffs' claims are barred by the doctrine of *res judicata* because the issue of Pavlic's malpractice was litigated in the prior bankruptcy action.

The parties agree that the Court must apply "federal claim preclusion law in determining the preclusive effect of a prior federal judgment." *Pierson Sand & Gravel v Keller Brass Co,* 460 Mich 372, 380-81; 596 NW2d 153 (1999).

Under federal law, a claim is precluded by a prior judgment when there is (1) a final decision on the merits; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) identity of the causes of action. *Becherer v Merrill Lynch, Pierce, Fenner & Smith*, *Inc*, 196 F3d 415, 422 (6th Cir 1999) (internal citations omitted).

Defendants argue that because the bankruptcy court ruled on Pavlic's fee petition, a final decision on the merits was entered. Further, Defendants argue that Plaintiff is a privy to the action since the claim was later assigned to him. Based on the same, Defendant argues that Plaintiffs'

claims are precluded.

In response, Plaintiff argues that Defendants application is flawed. Plaintiff argues that a malpractice claim against Pavlic would be appropriately barred by *res judicata.* The instant case, however, is a malpractice action against Defendants, not Pavlic. Therefore, Plaintiff argues, this action does not involve the same parties as the bankruptcy action, and *res judicata* does not bar his claim. The Court agrees.

The Court cannot conclude that *res judicata* precludes Plaintiff's claim for legal malpractice against Defendants. Although the bankruptcy court did rule on the issue of Pavlic's fee petition, this action involves a claim against Defendants, not Pavlic. Therefore, this action does not involve the same parties, an issue previously litigated, or an identity in the cases of action as required under the doctrine of *res judicia.*

Based on the foregoing, Defendants motion for summary disposition on this basis is DENIED.

C. <u>Causation.</u>

Finally, Defendants argue that Plaintiff cannot establish causation or damages to succeed on their malpractice claim. The proximate causation element of a legal malpractice claim includes both cause in fact and proximate cause. *Pontiac Sch Dist*, 221 Mich App at 613; *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994). The *Skinner* Court reasoned:

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal

> cause or "proximate cause" to become a relevant issue. *Skinner*, 445 Mich at 163 (internal citations omitted).

"To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich at 164. The *Pontiac School District* Court applied *Skinner*'s causation reasoning to a legal malpractice claim. *Pontiac Sch Dist*, 221 Mich App at 613-615; *Skinner,* 445 Mich at 163-165.[3]

But Defendants argue that Plaintiffs cannot establish either causation or damages because "the fact that Defendants did not join the chorus of objections to Mr. Pavlic's legal services did not cause the bankruptcy court to overrule the objections." (Defendants' Motion, at 13). Rather, Defendants argue that the court made its determinations after considering the evidence and

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3 The *Pontiac School District* Court observed:

> In *Skinner,* the Court relied upon *Kaminski v. Grand Trunk W.R.Co.,* 347 Mich. 417, 421-422, 79 N.W.2d 899 (1956), which adopted the following test of conjecture when there were alternative theories of causation requiring a "rule of conjectural choice between equally plausible inferences":
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> > "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence."
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> > "If, however, plaintiff has proven sufficient facts to justify a verdict upon *one* theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury." *Pontiac Sch Dist*, 221 Mich App at 613-14.

The *Skinner* Court continued:

We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. . . . [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Skinner*, *supra* at 164-165, citing *Kaminski*, 347 Mich 417.

arguments submitted with the objections from the bankruptcy trustee and a creditor.

In response, Plaintiff argues that it can establish causation, and again, relies on Almassian's affidavit. Almassian opines that had Defendants filed an objection to the fee petition identifying Pavlic's malpractice, an Adversary Proceeding would have been initiated, and the court would have held an evidentiary hearing to resolve disputed facts and damages. (Response Exhibit 3, at 12). Further, Plaintiff argues that had Defendants objection, his malpractice claim would have been preserved.

As discussed above, Plaintiff has presented adequate evidence to create a genuine issue of material fact regarding their claim for malpractice against Defendants. If the trier of fact determines that Defendants had a duty to object to Pavlic's fee petition, the trier of fact could reasonably conclude that Plaintiff suffered damages based on Defendants' failure to do the same.

Based on the foregoing, Plaintiff has established a genuine issue of material fact. As such, Defendants' motion for summary disposition on this basis is DENIED.

III. Conclusion.

For all of the foregoing reasons, Defendants' motion for summary disposition as to Kay Bee Kay Properties, LLC's claims is GRANTED, and Kay Bee Kay Properties, LLC's Complaint is DISMISSED. Defendants' motion as to Keith Kramer, however, is DENIED.

Based on the Court's ruling, this lawsuit no longer involves a business or commercial dispute since Kramer, individually, is attempting to pursue legal malpractice claims against Defendants. When a case no longer qualifies as a business or commercial dispute, a business court judge may reassign the action. MCL 600.8035(5).

Accordingly, the Court finds that this action is excluded from business court jurisdiction, and the Court orders the case reassigned back to the general civil docket of the Honorable Cheryl Matthews.

The case code will be changed to NM unless the parties stipulate otherwise.

IT IS SO ORDERED

June 5, 2019________ __/s/ James M. Alexander_________________
Date Hon. James M. Alexander, Circuit Court Judge