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WRITTEN DECISION - NOT FOR PUBLICATION

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ENTERED JAN 28 2014  
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JAN 27 2014

CLERK, U.S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY BE DEPUTY

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re )  
JOHN and THERESE )  
ARMBRUSTER, )  
Debtors, )  
CHRISTOPHER R. BARCLAY, Chapter 7 )  
Trustee )  
Plaintiff, )  
v. )  
JOHN ARMBRUSTER and REMER, )  
DIVINCENZO & GRIFFITH APLC, )  
Defendants. )

12-07718-PB-7 48  
Case No. 09-02350-PB-7  
Adv. No. 09-90301-PB  
13-90038-PB-48  
ORDER ON TRUSTEE'S  
MOTION FOR SUMMARY  
JUDGMENT

INTRODUCTION

Prior to this bankruptcy case, debtor's mother was injured in a slip-and-fall. She sued the store in which it occurred, but passed away before the case was resolved. Before this bankruptcy case was filed, under a California survivor cause of action

1 statute debtor stepped into the case as his mother's successor in  
2 interest. After debtor commenced this bankruptcy case, he and  
3 his counsel continued to prosecute the action, eventually  
4 reaching a settlement agreement with the defendant. Debtor and  
5 the bankruptcy trustee disagree on whether the lawsuit and  
6 proceeds thereof are property of the bankruptcy estate and both  
7 seek summary judgment.

8 Because the Court finds that the action became property of  
9 the estate as of the petition date, the Court grants summary  
10 judgment in favor of the trustee and orders that the remaining  
11 proceeds of the lawsuit be turned over to the trustee.

#### 12 **FACTS**

13 In 2009, Virginia Armbruster, the mother of debtor John  
14 Armbruster (Debtor), was injured in a "slip-and-fall" accident in  
15 a Stater Brothers grocery store. On July 13, 2011, Virginia  
16 filed a lawsuit against Stater Brothers seeking damages for her  
17 personal injuries (Lawsuit). She was represented by attorney  
18 Joseph DiVincenzo of the law firm of Remer, Divincenzo & Griffith  
19 (RDG), which is also a defendant in this adversary proceeding.  
20 Virginia and RDG had entered into a written retainer agreement,  
21 which provided, in part, that RDG would be entitled to 40% of any  
22 recovery.

23 On August 28, 2011, while the Lawsuit was pending, Virginia  
24 passed away.

25 On November 15, 2011, RDG filed an ex parte motion on behalf  
26 of the Debtor to substitute into the Lawsuit as "successor in

1 interest" under California Code of Civil Procedure (CCP) §  
2 377.30. In support of the ex parte application, Debtor declared  
3 "I am the successor-in-interest, of Virginia Armbruster as  
4 defined in C.C.P. § 377.11, and I succeed to the decedent's  
5 interest in the action."

6 On or about November 15, 2011, Superior Court Judge Earl H.  
7 Maas III entered an order granting the ex parte motion and  
8 ordering that "John Armbruster is substituted in as the Plaintiff  
9 in this action and shall continue as to decedent's causes of  
10 action under CCP § 377.20, et seq."

11 On May 31, 2012 Debtor and his wife Therese filed the  
12 petition commencing this bankruptcy case. Plaintiff, Christopher  
13 Barclay, was appointed chapter 7 trustee (Trustee). Despite the  
14 petition, Debtor, through RDG, continued to prosecute the Lawsuit  
15 in the Superior Court. On June 5, 2012, RDG filed a consent to  
16 Alternative Dispute Resolution in Superior Court. At some point  
17 thereafter, the parties participated in a mediation with mediator  
18 Joseph D'Antony.

19 In a letter to the Trustee dated July 3, 2012, attorney  
20 Joseph DiVincenzo acknowledged Debtor's bankruptcy case and that  
21 he was aware that the Trustee was looking into the bankruptcy  
22 estate's interest in the Lawsuit. He confirmed that Debtor was  
23 proceeding with the Lawsuit, but stated that he was authorized by  
24 the Superior Court to do so "as the decedent's personal  
25 representative." Mr. DiVincenzo explained that Debtor was  
26 unlikely to recover anything on the Lawsuit, because any recovery

1 was subject to claims of attorney fees and the claim of Medicare,  
2 for medical payments made on the injuries which underlie the  
3 Lawsuit.

4 On August 16, 2012, Mr. DiVincenzo again wrote the Trustee  
5 insisting that the bankruptcy estate had no interest in the  
6 Lawsuit. Despite the fact that Debtor had been substituted in as  
7 successor in interest, Mr. DiVincenzo again represented to the  
8 Trustee that Debtor "is not an assignee or legal stakeholder, but  
9 merely the estate's representative." Mr. DiVincenzo also  
10 explained that the Lawsuit had been settled and dismissed and  
11 that the settlement proceeds, \$75,000, had been deposited in  
12 RDG's trust account.

13 In an email dated August 17, 2012, the mediator, Joseph  
14 D'Antony, set out the terms of the settlement:

15 Each Plaintiff and Defendant agree to accept the  
16 mediator's proposal of settlement at \$75,000. The  
17 terms set forth by the defendant of: Plaintiff settles  
18 the case (1) as successor in interest to the survial  
19 (sic) action, (2) *as a claimant in a wrongful death*  
20 *claim*. Plaintiff is responsible for own costs, fees  
and liens including Medicare....  
I have spoken with both Plaintiff and Defense attorneys  
and they have agreed to these terms .... (emphasis  
added.)

21 Nothing in the record indicates that Debtor or RDG objected to  
22 the mediator's characterization of Debtor's claims.

23 On or about November 1, 2012, RDG paid the reduced claim of  
24 Medicare (RDG had negotiated the claim down from \$22,278 to  
25 \$18,433.63 on the ground that not all of the expenditures were  
26 related to Virginia's accident). RDG also paid itself \$30,000 in

1 fees and \$2,153.06 in costs in accordance with its retainer  
2 agreement with Virginia. The \$30,000.00 is 40% of the settlement  
3 amount.

4       Though, as noted above, there is no indication that Debtor  
5 or RDG objected to the mediator's characterization of Debtor's  
6 claim as, at least in part, a wrongful death claim, on November  
7 21, 2012, Mr. DiVincenzo wrote the Trustee contending that Debtor  
8 never asserted a wrongful death claim and that he asserted the  
9 personal injury claim merely as the representative of his  
10 mother's probate estate. He went on to explain:

11             Please be advised that the case brought on behalf  
12 of the Estate of Virginia Armbruster, in the Superior  
13 Court, has been dismissed. The case settled in late  
14 August, or early September, of this year. On behalf of  
15 my client, the Estate of Virginia Armbruster, the  
16 settlement funds were deposited into my trust account,  
17 the lien of Medicare was paid, and the fees and costs  
18 to my firm pursuant to a written fee agreement were  
19 paid. The remaining net settlement proceeds belong to  
20 the Estate of Virginia Armbruster, and are subject to  
21 the creditors of that Estate. The net settlement  
22 proceeds do not belong to John Armbruster, the debtor,  
23 and therefore are not the property of his bankruptcy  
24 estate, and are not subject to the jurisdiction of the  
25 trustee. If, after the Virginia Armbruster Estate is  
26 administered, there are any remaining estate proceeds,  
I will then notify you.

20       On February 7, 2013, the Trustee filed the complaint  
21 commencing this adversary proceeding. The Trustee sought a  
22 declaratory judgment that the Lawsuit and the proceeds thereof  
23 were property of Debtor's bankruptcy estate and that Defendants  
24 violated the automatic stay by proceeding with the Lawsuit. He  
25 also sought an order directing Defendants to turn over the  
26 Lawsuit and proceeds thereof. The Trustee has filed a motion for

1 summary judgment. Defendants seek a judgment on the pleadings.  
2 The Court heard argument on both motions and took them under  
3 submission.

4 **DISCUSSION**

5 Under common law a personal injury action expires upon the  
6 death of the plaintiff. Quiroz v. Seventh Avenue Center, 140  
7 Cal.App.4th 1256, 1263 (2006). Prior to 1993, this was the state  
8 of the law in California. In 1993, California enacted survivor  
9 cause of action provisions which are codified in Code of Civil  
10 Procedure §§ 337.11, et. seq. These new code sections provide  
11 that, with certain limitations and under certain circumstances, a  
12 personal injury claim survives the death of the plaintiff and may  
13 be carried on by another.

14 Under CCP § 337.11 et seq., a new plaintiff is substituted  
15 in for the deceased. The new plaintiff takes the helm under one  
16 of two capacities - "decedent's personal representative or, if  
17 none, by the decedent's successor in interest." See CCP §  
18 337.30. "Decedent's personal representative" is not further  
19 defined. "Successor in interest" is defined as "the beneficiary  
20 of the decedent's estate or other successor in interest who  
21 succeeds to a cause of action or to a particular item of the  
22 property that is the subject of a cause of action." See CCP §  
23 337.11.

24 The distinction between personal representative and  
25 successor in interest is described in Dillard v. Curtis, the  
26 unpublished decision relied upon by Debtor:

1           If a person dies having a cause of action for  
2 injuries suffered during life, the claim 'survives' to  
3 his or her estate under California Code of Civil  
4 Procedure § 377.20 (formerly, Probate Code § 573) and  
5 may be prosecuted by a duly appointed executor or  
6 administrator on behalf of the estate. Cal. Civ. P.Code  
7 § 377.20, 377.30. If there is no personal  
8 representative for the estate ( e.g ., the estate is  
9 not probated or probate has been completed), the  
10 "survival" action may be prosecuted by the decedent's  
11 "successor in interest"—the person or persons who  
12 succeed, by will or intestacy, to the cause of action  
13 or to the particular item of property that is the  
14 subject of the action. Cal. Civ. P.Code §§ 377.10,  
15 377.11, 377.30, 377.31; Olson v. Toy, 46 Cal.App.4th  
16 818, 821 n. 2, 54 Cal.Rptr.2d 29 (1996).

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2004 WL 2496130 (N.D.Cal. 2004).

          Of the two options, Debtor was substituted in as Virginia's  
successor in interest. In his declaration filed in support of  
his application to be substituted into the Lawsuit, Debtor made  
it clear that he was proceeding not as representative, but as  
successor: "I am the successor-in-interest, of Virginia  
Armbruster, as defined in C.C.P. § 337.11, and I succeeded to the  
decedent's interest in this action."

          Debtor counsel has claimed in letters to the Trustee and in  
argument before the Court that Debtor was acting as the personal  
representative of Virginia's estate. However, this is contrary  
to Debtor's declaration filed in the Superior Court. Counsel  
also argued that any recovery, net of attorney fees and Medicare  
reimbursement, would go to Virginia's probate estate. However,  
counsel provided no authority for such a procedure, and it is  
contrary to the plain language of the statute. As "successor in  
interest" Debtor has already "succeeded" to any interest Virginia

1 had. Contrary to the assertions of Debtor, he was not acting as  
2 representative of her estate. As explained above, that option  
3 was available under § 337.30, but Debtor proceeded as successor  
4 in interest.

5 Counsel for the Debtor also argued that there is no legal  
6 distinction between "successor in interest" and "personal  
7 representative." The Court disagrees. First, as a matter of  
8 common sense, the California legislature would not use two terms  
9 separated by "or" if they were synonymous. Debtor's argument  
10 would render the "successor in interest" language unnecessary and  
11 redundant verbiage. Second, this argument was raised in and  
12 rejected by the California Court of Appeal in *Exarhos v. Exarhos*:

13 Nicholas asserts that he served "essentially as a  
14 representative of Eleni's estate and its  
15 beneficiaries." We disagree. Section 377.11 provides  
16 that a successor in interest is a person who succeeds  
17 to a particular "cause of action..." Section 377.30  
18 provides that where a "cause of action ... passes to  
19 the decedent's successor in interest," under certain  
20 circumstances, the successor in interest may commence  
the cause of action. Thus, a "successor in interest"  
has the authority to act with respect to the particular  
cause or causes of action to which he succeeds, rather  
than the entirety of the decedent's estate. (See  
Peterson, *supra*, 154 Cal.App.4th at p. 509, 65  
Cal.Rptr.3d 185.)

21 *Exarhos v. Exarhos*, 159 Cal.App.4th at 908-09.

22 As noted above, the mediator indicated that Debtor settled  
23 not only Virginia's personal injury claim, but also his own  
24 wrongful death claim. Debtor, through counsel, has frequently  
25 denied that he asserted a separate wrongful death claim, but  
26 there is no indication that he objected to the mediator's

1 recitation of the settlement terms. The Court cannot be certain  
2 of the existence or not of the wrongful death claim, as the  
3 record contains no copy of the complaint or any amendments  
4 thereto. It seems unlikely, since there is no indication that  
5 Virginia's death was caused by her accident at Stater Brothers.

6 If there was a separate wrongful death cause of action, as  
7 indicated by the mediator, which was also settled, the conclusion  
8 above, that Debtor had already succeeded to the Lawsuit and  
9 proceeds thereof, is bolstered. According to the mediator's  
10 email, both the survivor claim as well as Debtor's wrongful death  
11 claim were settled for a single, undivided payment of \$75,000.  
12 If Debtor truly represented the Virginia Estate with respect to  
13 the survival action, then the settlement payment would have had  
14 to be allocated between himself personally with respect to the  
15 wrongful death claim, and himself as representative of the  
16 Virginia Estate. If there was in fact a wrongful death claim,  
17 the only possible conclusion is that both claims belonged to  
18 Debtor personally, and no claim of the Virginia Estate was  
19 involved.

20 Debtor also argues that the fact that the proceeds of the  
21 Lawsuit are subject to the liens of Medicare and the attorney fee  
22 claims of RDG indicates that the Lawsuit cannot belong to Debtor.  
23 Debtor provides no authority to support this position. This  
24 argument is akin to an argument that a certain asset does not  
25 become property of the bankruptcy estate, because it is subject  
26 to a mortgage, tax claim or some other lien. In the case at

1 hand, Debtor succeeded to Virginia's Lawsuit subject to whatever  
2 liens there were on it. If the claim in Debtor's hands was  
3 subject to secured claims against it, then that is what the  
4 bankruptcy estate succeeded to when the petition was filed.

5 For all of the reasons set forth above, the Court concludes  
6 that Debtor prosecuted the Lawsuit not as the representative of  
7 the Virginia Estate, but rather as her successor in interest, and  
8 therefor, upon the filing of the petition, the Lawsuit and the  
9 proceeds thereof became property of the bankruptcy estate under  
10 Bankruptcy Code § 541.

11 The Trustee seeks to recover the entire \$75,000 settlement  
12 payment despite the fact that any recovery was subject to  
13 reimbursement payment of the Medicare. It seems clear that  
14 Medicare had a legitimate claim/lien against the Lawsuit and  
15 proceeds thereof. The Medicare claim appears to have been  
16 reduced to the proper amount. Had the Trustee taken over and  
17 concluded the Lawsuit, the Medicare claim would have had to have  
18 been paid. The Court sees no reason to undo the payment on the  
19 Medicare claim. Thus, \$18,433.63 of the \$75,000.00 settlement  
20 proceeds need not be turned over.

21 The fees and costs of counsel, on the other hand, must be  
22 turned over to the Trustee. RDG may be entitled to payment of  
23 its fees under the Fee Agreement with Virginia, however, that is  
24 not entirely clear. The Fee Agreement provides that RDG is  
25 entitled to 40% of any recovery after mediation. The settlement  
26 amount was \$75,000, so RDG took 40% or \$30,000. However, so far

1 as the record before the Court reflects, RDG had no Fee Agreement  
2 with the Debtor. In his November 21 letter to the Trustee, Mr.  
3 DiVincenzo explained that his client was the Estate of Virginia  
4 Armbruster, though as discussed above, Debtor was proceeding on  
5 his own behalf as successor in interest. Further, to the extent  
6 the Settlement was attributable at all to the wrongful death  
7 claim (if any), there is no support for RDG's taking 40% of that  
8 amount. Finally, to the extent RDG provided services to the  
9 Debtor post-petition, it would have had to be employed by the  
10 estate. The Trustee, as fiduciary of the bankruptcy estate, has  
11 a duty to ensure that the compensation paid to counsel is in the  
12 best interest of creditors. In re Flugence, 2013 WL 6244758 (5<sup>th</sup>  
13 Cir. 2013). RDG must turnover the settlement payment, less only  
14 the amounts paid to Medicare. RDG may seek employment and fees  
15 in this Court.

16 **CONCLUSION**

17 For the foregoing reasons, the Court hereby enters summary  
18 judgment in favor of the Trustee. Counsel for the Trustee shall  
19 lodge and serve an order consistent herewith within thirty (30)  
20 days of the entry of this Memorandum Decision. RDG's motion for  
21 judgment on the pleadings is denied.

22 IT IS SO ORDERED.

23 DATED: JAN 27 2014

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25 PETER W. BOWIE, Judge  
26 United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
325 West F Street, San Diego, California 92101-6991

In re Bankruptcy Case No(s): 09-02350-PB7  
Adversary No(s), if any: 09-90301-PB

**CERTIFICATE OF MAILING**

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

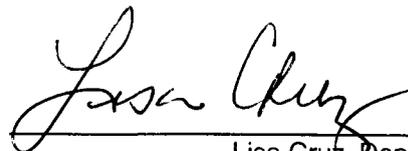
**ORDER ON TRUSTEE'S MOTION FOR SUMMARY JUDGMENT**

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

Lisa Torres  
15373 Innovation Drive, Ste. 170  
San Diego, CA 92128

Joseph P. DiVincenzo  
2121 East Pacific Coast Highway, Ste. 280  
Corona Del Mar, CA 92625

Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on January 27, 2014.



\_\_\_\_\_  
Lisa Cruz, Deputy Clerk