UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ROBERT F. CALLAHAN — CASE NO. 95-62196

Debtor

CHRISTINA ROMAS as assignee of
STAVROULA ROMAS

Plaintiff

vs. — ADV. PRO. NO. 96-70020A

ROBERT F. CALLAHAN

Defendant

APPEARANCES:

ANGELOS PETER ROMAS, ESQ.
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Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This proceeding is before the Court upon the Complaint of Christina Romas ("Plaintiff")[1],

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[1]The caption of the Complaint identifies Plaintiff "as Assignee of Stavroula Romas ("S. Romas").

filed February 12, 1996.[2] Plaintiff objects to the discharge of Robert F. Callahan ("Debtor") pursuant to § 727(a)(2), (3), (4) and (6) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). Plaintiff also contends that Debtor's bankruptcy petition was not filed in good faith.[3] Issue was joined by the filing of an Answer on March 15, 1996. In his Answer, Debtor asserts as an affirmative defense that the Plaintiff lacked standing to commence this adversary proceeding.

A trial was held on October 21, 1996 in Utica, New York. In lieu of closing arguments, the parties were provided with an opportunity to file memoranda of law. The matter was initially to be submitted for decision on November 26, 1996, however, the submission date was consensually extended to December 4, 1996.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), and (b)(2)(J).

FACTS

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[2]Plaintiff in her Complaint demanded a jury trial. The Court found in a Memorandum-Decision and Order, dated March 20, 1996, that she was not entitled to a jury trial since discharge proceedings are characteristically equitable in nature.

[3]At the trial the Court pointed out that bad faith is not a ground under Code §727 to deny a discharge. Allegations of bad faith are generally raised as a contested matter pursuant to Code §707 seeking dismissal of a debtor's petition. If serving as an underlying basis for Plaintiff's allegations pursuant to Code § 727, the Court indicated that it would be Plaintiff's burden to establish any alleged bad faith on the part of the Debtor.

Debtor filed a voluntary petition ("First Petition") pursuant to chapter 13 of the Code on December 8, 1993. *See* Plaintiff's Exhibits 3 and 7. Schedule F, which was filed with the First Petition, lists S. Romas, Assignee of Peter A. Romas, as an unsecured creditor in the amount of $21,000. According to Answers to Interrogatories by the Debtor, a judgment had been obtained against the Debtor and John Calabrisi, identified as a co-lessee, by S. Romas in the amount of $22,332.64. *See* Plaintiff's Exhibit 4. The judgment had allegedly been obtained in September 1993 in state court in connection with a lawsuit for the recovery of rent under a lease of commercial property. *See id.*

The Debtor's prior chapter 13 case was dismissed without prejudice on March 29, 1995. *See* Plaintiff's Exhibit 7. On June 21, 1995, Debtor filed a voluntary petition ("Second Petition) pursuant to chapter 7 of the Code. Schedule F, which was filed with the Second Petition lists S. Romas as an unsecured creditor in connection with the state court judgment on the lease obligation in the amount of $25,000.

At the trial on October 21, 1996, Plaintiff was represented by Angelos Peter Romas, Esq. ("A. Romas).[4] Plaintiff herself was not present at the trial. The only witnesses to testify were the Debtor and his wife, as well as a representative of Binghamton Savings Bank & Trust Co., Mr. Arthur Truesdell. At the close of the Plaintiff's case, Debtor's counsel moved to have the Complaint dismissed on the basis that Plaintiff failed to establish her standing to commence the proceeding now before the Court.[5] Debtor's counsel points out that in his Answer Debtor denied

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[4]According to A. Romas, he is the son of S. Romas, and Plaintiff is the granddaughter of S. Romas.

[5]Debtor also moved to have the Complaint dismissed arguing that Plaintiff had failed to establish a *prima facie* case.

the allegation set forth in ¶6 of the Complaint, which alleged that there had been an assignment of the state court judgment on January 2, 1996, in favor of Plaintiff, based on a lack of knowledge or information sufficient to form a belief. Debtor's counsel asserts that there was no proof of a valid assignment introduced into evidence by the Plaintiff at trial. Debtor's counsel also makes the argument that if the assignment does exist § 5019 of New York Civil Practice, Law and Rules ("NYCPLR") requires that any document purporting to make an assignment of a judgment must be in a form which would permit a deed to be recorded.

A. Romas responded to Debtor's motion by indicating that the assignment had been filed with the Broome County Clerk's Office and that he was prepared to put it into evidence since he allegedly had been the one to file it and had also allegedly been the one to execute it on behalf of his mother under an alleged power of attorney. The Court declined to allow A. Romas to testify. Not only was Plaintiff's proof closed at that point, but the Court also concluded that it would be unethical and inappropriate to reopen the proof and allow A. Romas to appear as a witness for the Plaintiff in a proceeding in which he was also the Plaintiff's attorney. A. Romas responded by requesting that the Court take judicial notice of the alleged assignment.

The Court reserved decision on Debtor's motion to dismiss and requested that Plaintiff provide the Court with law to support the request that it take judicial notice of the assignment.

DISCUSSION

"Standing is a jurisdictional requirement which is open to review at all stages of the

litigation." *In re Cross*, 203 B.R. 456, 457 (C.D.Cal. 1996).[6] The burden of proof on all questions of standing is on the Plaintiff. *See Hall Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1554 n. 18 (9th Cir. 1989) (citation omitted); *see also Cross*., 202 B.R. at 457-58 (stating that the "party invoking federal jurisdiction has the burden of proving that he has standing." (citation omitted)).

A creditor may object to the granting of a discharge under Code § 727(a). *See* Code § 727(c)(1). Code § 101(10)(A) defines "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." A "claim" is defined as a right to payment. *See* Code § 101(5)(A). In his Answer, Debtor asserted that Plaintiff lacked standing to commence the adversary proceeding. Following the close of Plaintiff's direct case, he also made the argument that there had been no proof of an assignment of S. Romas' interest in the state court judgment to Plaintiff to establish her status as a creditor of the Debtor.

As noted above, Plaintiff asserts she is a creditor of the Debtor based on an alleged assignment of the state court judgment of S. Romas to her on January 2, 1996.[7] *See* ¶6 of

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[6]Because standing is a threshold question, the Court will defer any disposition of the adversary proceeding until it has addressed the issue of Plaintiff's standing. *See In re James*, 166 B.R. 181, 182-83 (Bankr. M.D.Fla. 1994).

[7]Although the Complaint alleges that the assignment was made to Plaintiff on January 2, 1996, the Order granting an extension to S. Romas to commence the adversary proceeding herein by February12, 1996, was received by the Clerk's Office on January 8, 1996, from A. Romas and was signed by the Court on January 10, 1996. If the allegation made in the Complaint is true with respect to the assignment to Plaintiff, then the Order was received and signed after the assignment was made to Plaintiff. This raises questions in the mind of the Court concerning the identity of the assignee, validity of the assignment and why A. Romas failed to seek the extension in Plaintiff's name on or about January 8, 1996.

Complaint. Plaintiff, however, failed to appear at trial to testify concerning the alleged assignment. Although the issue of standing had been raised in Debtor's Answer, Plaintiff failed to offer any proof to that effect on her direct case. As indicated following the close of Plaintiff's proof, Plaintiff's counsel, A. Romas, offered to testify to the fact that he had executed the alleged assignment on behalf of S. Romas under a power of attorney. He also stated that he was prepared to offer evidence that the alleged assignment had been filed in the Broome County Clerk's Office in October 1996. The Court declined to reopen the proof and allow him to testify.[8]

The Disciplinary Rules ("DR") found in the New York Code of Professional Responsibility ("NYCPR"), set forth as an appendix to New York's Judiciary Law, governs the conduct of attorneys appearing before a bankruptcy court in this state. *See In re Hunter Studios, Inc.*, 164 B.R. 431, 434 n. 4 (Bankr. E.D.N.Y. 1994). Pursuant to DR 5-101 and 5-102, generally an attorney may not call himself to testify in a proceeding unless appearing *pro se*. *See id.* at 433. The ethical considerations underlying this approach are set forth in Ethical Consideration ("EC") 5-10 of the NYCPR and include the fact that "[a]n advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent." DR 5-102(A) does provide in part that a lawyer "may continue as an advocate and may testify in the circumstances enumerated in DR 5-101(B)(1) through 4."

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[8]In his post trial brief, A. Romas asserts that he "hastily concluded her [Plaintiff's] case (in response to Judge's statement that he had a 4:30 P.M. appointment), without putting in any proof of the Assignment of the Stavroula Romas Judgment to her granddaughter, Christina Romas." *See* ¶7, p.3, of Plaintiff's brief. According to the verbal recordation of the trial maintained by the Electronic Court Recording Officer which began at approximately 9:00 a.m., at the conclusion of the testimony of Plaintiff's first witness, the Debtor, the Court stated, "Let me just say I have got to conclude today's activity by 4:30 so if we don't get it done by 4:30 we are going to have to come back, which I'm sure nobody wants to have to do." The Court did not instruct Plaintiff's counsel to limit the proof he wished the Court to consider.

Specifically, an attorney will be allowed to testify on behalf of a client only if the attorney's testimony will relate to (1) an uncontested issue; (2) a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) the nature and value of legal services rendered in the case by the lawyer; and (4) any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case. NYCPR 5-101(B)(1)-(4). If the lawyer's testimony falls within one of these four situations, he may continue as counsel *and* testify on the client's behalf.

As to the first exception, the issue to which Plaintiff's attorney would have testified, namely, the validity of the assignment, is clearly contested. In his Answer Debtor denies Plaintiff's allegation that S. Romas assigned her rights in the state court judgment to Plaintiff based on a lack of knowledge or information. Debtor also challenged the validity of the assignment at the close of Plaintiff's proof and sought dismissal of the Complaint. Specifically, Debtor challenges the sufficiency of evidence supporting the validity of the assignment, its authenticity, and the authority of A. Romas as agent of the alleged assignor, S. Romas. Debtor also disputes whether the purported assignment complies with the requirements set forth in NYCPLR § 5019. The first exception, hence, is inapplicable.

Likewise, the second exception is inapplicable since the validity of the assignment is not a matter of mere formality. While the filing of an assignment may be a formality, the validity of an assignment is not. Furthermore, as discussed above, the Debtor has raised concerns about the validity of the purported assignment, including whether the Plaintiff actually exists and is competent to bring this action. She did not appear at trial. Although the Complaint was filed on

her behalf by A. Romas, there is no affidavit signed by the Plaintiff indicating any personal knowledge of the assignment and her status as a creditor included with the Complaint or found elsewhere in the record.

The third exception is equally inapplicable because A. Romas' proposed testimony had nothing to do with the value of his legal services. Instead, he proposed to identify the alleged assignment he indicated he executed on behalf of S. Romas under a power of attorney.

In regards to the fourth exception to the general prohibition against allowing an attorney to testify as a trial witness, namely that disallowing Plaintiff's attorney from testifying may impose a hardship on Plaintiff, Plaintiff had other avenues she could have pursued in seeking to have the assignment admitted into evidence. Having been put on notice that Debtor disputed the validity of the assignment, as set forth in his Answer, it was incumbent on Plaintiff to employ another attorney at the trial if A. Romas' testimony was the only means by which to have the document admitted into evidence. There was no evidence presented that this was not possible.

As an alternative method of having the alleged assignment admitted into evidence, A. Romas also requests that the Court take judicial notice of it. "Judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347-48 (5th Cir. 1982). Pursuant to Rule 201(f) of the Federal Rules of Evidence ("Fed.R.Evid.") judicial notice may be taken at any stage of the proceeding.[9]

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[9]The Court admittedly has certain reservations about considering Plaintiff's request in light of the fact that she had notice of Debtor's concerns about her standing well prior to trial and apparently chose to ignore them until a motion to dismiss the Complaint was made by the Debtor following the close of Plaintiff's proof.

Judicial notice is a substitute for formal proof which would otherwise be received through the testimony of witnesses. In order for a document such as an assignment to be admitted into evidence it must first be authenticated. *See* Fed.R.Evid. 901. Certified copies of public records, i.e. documents recorded or filed in a public office, are self-authenticating and require no extrinsic evidence of authenticity. *See* Fed.R.Evid. 902. Plaintiff has provided the Court with an "exemplified copy" of an "Assignment of Interest - Stavroula Romas as Assignee of Peter A. Romas vs. Robert F. Callahan and John Calabrisi, a/k/a John Calabrisi Jr.", certifying that it was filed and entered in the Broome County Clerk's Office on October 16, 1996.[10] The Court consents to taking judicial notice that said assignment was filed in the Broome County Clerk's Office for purposes of authentication. *See Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1992). The Court, however, makes no finding as to the truth of the matters set forth in said assignment or the circumstances surrounding its creation. In the absence of any other evidence, the Court concludes that whether or not the assignment is valid and actually transferred S. Romas' interest in the judgment to Plaintiff has not been established.

Based on the foregoing, it is

ORDERED that Debtor's motion to dismiss the Complaint is granted on the basis of Plaintiff's failure to establish standing to maintain this adversary proceeding.

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[10]Along with the exemplified copy of the assignment, A. Romas also provided the Court with copies of a power of attorney and a death certificate. At the trial there was no request that the Court take judicial notice of any documents except the assignment. As Debtor was not afforded notice of any other documents for which Plaintiff might be seeking judicial notice, the Court will not consider them.

Dated at Utica, New York

this 20th day of March 1997

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge