IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2008

MITCHEL KALMANSON,

Appellant/Cross-Appellee,

v. Case No. 5D07-4395

NANCY ADAMS, ET AL.,

Appellee/Cross-Appellant.

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Opinion filed July 18, 2008

Appeal from the Circuit Court
for Seminole County,
John D. Galluzzo, Judge.

T.W. Ackert of T.W. Ackert, P.A., Winter Park, for Appellant/Cross-Appellee.

Michael A. Paasch and Chad K. Alvaro of Mateer & Harbert, P.A., Orlando, for Appellee/Cross-Appellant.

PER CURIAM.

Appellant challenges the order dismissing his amended complaint with prejudice. The court dismissed the amended complaint with prejudice as to Appellee but without prejudice as to several other defendants. The only explanation for the lower court's disparate treatment of the defendants is the fact that Appellee had been discharged in bankruptcy prior to the filing of the amended complaint. Appellant asserts that this fact does not justify the lower court's ruling because the complaint is for conspiracy and

Appellee re-joined and participated in the conspiracy after she was discharged. Appellee concedes that it is theoretically possible to bring a claim against her even though she was discharged, provided that the claim is based on conduct occurring after the discharge. She argues nevertheless that the lower court's order should be affirmed because the amendment was made without leave of court. Although Appellee is correct, this is not the reason the court dismissed the claim with prejudice as to Appellee but granted leave to amend as to the other defendants.

Discharge in bankruptcy is an affirmative defense. Fla. R. Civ. P. 1.110. As such, it cannot be a basis for dismissing a complaint unless it is apparent from the face of the complaint. *Sanchez v. Mercy Hosp.,* 386 So. 2d 42, 42 (Fla. 3d DCA 1980). Here it is not apparent that the claim against Appellee was discharged in bankruptcy. Therefore, dismissal with prejudice was not appropriate. Accordingly, we reverse the order to the extent that it dismissed the complaint with prejudice. In ruling as we have, we express no opinion as to whether Appellant can state a cause of action.

Finding no abuse of discretion, we affirm as to the cross-appeal.

REVERSED in part; AFFIRMED in part, and REMANDED.

ORFINGER and COHEN, JJ., concur.

TORPY, J., concurring and concurring specially with opinion.

TORPY, J., concurring specially.

I agree that the court erred in dismissing the complaint based on the bankruptcy discharge. Even though the complaint does not state a cause of action, Appellant should be permitted to file a second amended complaint. I write to express my pessimism that Appellant can ever state a cause of action against Appellee under the theory advanced. Appellant labels his claim a *"Churruca"* conspiracy, which is based on *Churruca v. Miami Jai-Alai, Inc*., 353 So. 2d 547 (Fla. 1977). This theory of conspiracy has very limited application. It only applies when two or more people are able to use their combined power to inflict an economic injury. The power must be peculiar to the combination and distinct from the power an individual would possess. Here, Appellant complains about various improprieties in connection with his divorce/custody case, none of which necessarily flow from any peculiar power of the alleged combination. Pleading the word "conspiracy" repeatedly does nothing. Appellant must plead **facts** to show that the combination exists and that the combination has some unique coercive power that was used to cause economic harm to Appellant. *Compare Walters v. Blankenship,* 931 So. 2d 137 (Fla. 5th DCA 2006).