

[Case Title]C.J. Rogers, Debtor, Grabscheid, Ptif v Demaria/Hall, Deft

[Case Number] 91-20388

[Bankruptcy Judge] Arthur J. Spector

[Adversary Number] 94-3245

[Date Published] March 6, 1996

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

In re: C.J. ROGERS, INC.,

Case No. 91-20388
Chapter 7

Debtor.

_____ /

WILLIAM H. GRABSCHIED, Trustee,

Plaintiff,

-v-

A.P. No. 94-3245

DEMARIA/HALL JOINT VENTURE and
HOME INSURANCE,

Defendant.

_____ /

APPEARANCES:

MICHAEL ZOUSMER
Attorney for Plaintiff

D. DOUGLAS MCGAW
Attorney for Defendant DeMaria

KATHLEEN MCNICHOL BAIN
Attorney for Defendant Home Insurance

**OPINION REGARDING DEFENDANT HOME INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT AND
AFFIRMATIVE DEFENSE OF LACHES**

Introduction

DeMaria/Hall Joint Venture served as a general contractor on a construction project calling for improvements to a Ford Motor Company facility in Dearborn, Michigan. One of the Joint Venture's subcontractors was C.J. Rogers, which subsequently filed for bankruptcy relief. On November 14, 1994, the trustee filed a four-count complaint against the Joint Venture and the Home Insurance Company. The first three counts are directed to the Joint Venture, and seek payment for project services rendered by the Debtor based on various legal theories. In count IV,

directed to Home Insurance, the trustee asked that, "in the event . . . the Debtor is found legally liable for damages incurred while performing his duties" pursuant to its contract with the Joint Venture, the Court "[d]etermine . . . that Home Insurance is obligated to pay the Debtor" for such damages under the terms of a policy insuring the Debtor. Complaint at p. 5.

On February 13, 1996, Home Insurance filed a Motion for Summary Judgment with respect to Count IV. On that same date, the Joint Venture filed a brief regarding its affirmative defense of laches. Although a motion, as such, was not filed by the Joint Venture in conjunction with this brief, the latter "requests that this Court bar Plaintiff's [action] against . . . [the] JOINT VENTURE under the doctrine of laches." Home Insurance's Brief at p. 6. Thus I will treat the brief as constituting a motion for dismissal. For the reasons which follow, the Defendants' motions will be denied.

Discussion

The Debtor's insurance policy states that Home Insurance "will pay those sums that the [Debtor] becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies." Commercial General Liability Coverage Form at ¶1A (Exhibit 1 of Home Insurance's Motion for Summary Judgment). This provision is potentially pertinent to this case because, according to the Joint Venture, the Debtor was responsible for property damage at the construction site, which prompted the Joint Venture to "withh[o]ld the repair costs from [the Debtor's] contract balance." Brief in Support of Joint Venture's Response to Motion for Summary Judgment at p. 3.

As suggested earlier, the premise for Count IV is that, to the extent the Debtor is in fact liable for the property damage in question, then it is entitled to compensation from Home Insurance pursuant to the insurance policy. In asserting a right to summary judgment as to this count, Home Insurance reasoned as follows: (1) Under Mich. Comp. Laws §600.5805(8), a lawsuit alleging property damage must be commenced within three years after the date of injury; (2) the Joint Venture did not sue the Debtor within the time period prescribed by this statute; (3) because such a lawsuit is time-barred, the Debtor cannot be held liable for the damages; and (4) since the Debtor cannot be saddled with such liability, neither can Home Insurance.

The Joint Venture points out one problem with this argument: since it withheld money from the Debtor in an amount sufficient to compensate for the property damage allegedly caused by the Debtor, it may well be

that the Joint Venture had no reason--or basis--for filing a lawsuit against the Debtor. See id. at pp. 3-4. But even if it did, there are two other flaws in Home Insurance's argument which are independently fatal to its motion.

The first relates to part three of its four-part argument, to the effect that the Debtor is insulated from liability because the Joint Venture is barred by the three-year statute of limitations. In this regard, the trustee appropriately directed the Court's attention to the case of Insurance Company of North America v. Southeastern Electric Co., 405 Mich. 554, 275 N.W.2d 255 (1979) (per curiam). See Trustee's Brief in Opposition at p. 3.

The plaintiff in Southeastern was an insurance company that had paid its insured, a general contractor, for property damage sustained at a construction site. 405 Mich. at 555. The insurance company then sued the subcontractor, asserting the insured's rights under an agreement between the insured and the subcontractor, wherein the latter promised to hold the former harmless from damages resulting from the latter's negligence. See id. at 555 n.1 and accompanying text. The defendant/subcontractor argued that the action was time-barred, citing Mich. Comp. Laws §600.5805(7) (since recodified, with modifications not relevant here, as Mich. Comp. Laws §600.5805(8)--the statute cited by Home Insurance). See id. at 556 n.2 and accompanying text.

The Supreme Court summarily rejected this argument, holding that the action was instead governed by the six-year statute of limitations for breach-of-contract actions, as set forth in Mich. Comp. Laws §600.5807(8). See id. at 556 n.3 and accompanying text. The Court's reasoning was simple: in contrast to other cases in which courts applied the three-year statute of limitations, "[t]he instant plaintiff's complaint . . . rest[s] on an alleged breach of a contract to indemnify The action is not one to 'recover damages for injuries to persons and property', but, rather, is one 'to recover damages or sums due for breach of contract' so that the period of limitations is six years, running from . . . when the indemnitee sustained the loss." Id. at 556-57 (quoting, respectively, Mich. Comp. Laws §§600.5805 (7) and 600.5807(8)).

The contract between the Joint Venture and the Debtor has not been put into evidence. But since no party argued otherwise, I assume that the Joint Venture is correct in asserting that the Debtor was explicitly obligated thereunder to reimburse the Joint Venture for property damage caused by the Debtor. See Brief in Support of Joint Venture's Response to Motion for Summary Judgment at p. 2 ("Pursuant to Paragraphs 5 and 6 of the subcontract agreement between DeMARIA/HALL and C.J. ROGERS, C.J. ROGERS accepted responsibility for any damages it caused to the Owner's property or other contractor's work."). Contrary to Home Insurance's assertion, then,

the Joint Venture had at least until June 27, 1996--the sixth anniversary of the date the property in question was damaged--to file a lawsuit against the Debtor alleging breach of that obligation. See id. at p. 3; Mich. Comp. Laws § 600.5807(8); Southeastern, 405 Mich. at 556-57.

The second crucial flaw inheres in Home Insurance's contention that the Debtor is time-barred from suing on the insurance policy. The trustee cited a case which stands for the proposition that an insured may sue his insurer for failure to pay a claim (if the suit is filed within Mich. Comp. Laws §600.5807(8)'s six-year limitation period), even though the insured is time-barred by Mich. Comp. Laws §600.5805(7) (now Mich. Comp. Laws §500.5805(8)) from suing the tort-feasor. Detroit Automobile Inter-Insurance Exchange v. Hafendorfer, 38 Mich. App. 709, 716, 197 N.W.2d 155 (1972) (cited in Trustee's Brief in Opposition at p. 4).

Although not explicitly stated, the obvious gist of Count IV of the trustee's complaint is that Home Insurance wrongfully denied an insurance claim filed by the Debtor. See Complaint at pp. 5-6. Because the trustee is alleging breach of the insurance contract, Count IV is subject to the six-year statute of limitations, and it makes no difference whether an action by the Joint Venture against the Debtor is subject to, or would be time-barred by, the three-year statute of limitations. See Hafendorfer, 38 Mich. App. at 716-18.

In short, Home Insurance failed to establish that the Joint Venture is time-barred from suing the Debtor, and also failed to prove that the Debtor is time-barred from suing Home Insurance. Thus there is no merit to its contention that it is entitled to summary judgment as to Count IV.

Home Insurance argued in the alternative that Count IV should be dismissed "based on laches." Home Insurance's Motion at p. 5. I reject that contention because Home Insurance did not explain its underlying factual basis. See In re Campbell, 58 B.R. 506, 507-08 (Bankr. E.D. Mich. 1986) ("Our function is to evaluate the legal arguments proposed by the parties, not to make those arguments for them.").

Unlike Home Insurance, the Joint Venture did make an effort to explain its invocation of the laches defense. Alluding to Home Insurance's contention that Count IV is time-barred, the Joint Venture claimed that "[i]t would be inequitable to permit [the trustee] to recover from [the Joint Venture] an amount [the Debtor or trustee] would have recovered from HOME INSURANCE if [the Debtor] had exercised due diligence in submitting its claim." Brief Regarding Affirmative Defense of Laches at p. 6.

The trustee suggested that the Joint Venture had waived the right to assert the laches defense

because that defense was not explicitly set forth in its answer to the complaint. See Trustee's Brief in Response to Defendant's Affirmative Defense of Laches at pp. 3-4. However, the Joint Venture's fifth affirmative defense states "[t]hat Plaintiff's claims are barred by the doctrine of laches." Answer of DeMaria/Hall Joint Venture at p. 6. The trustee's waiver argument is therefore misguided.

Turning to the substance of the Joint Venture's motion, it would seem that it could only be required to disgorge the funds it withheld from the Debtor if the Debtor is absolved of responsibility for the property damage which resulted in the withholding. It would also seem that that issue is totally independent of the question of whether the Debtor complied with the applicable statute of limitations in asserting its rights under the insurance contract with Home Insurance. See Trustee's Brief in Response to Defendant's Affirmative Defense of Laches at p. 5 (The Joint Venture "cannot show that it was prejudiced by C.J. Rogers' purported delay in filing a claim under the [insurance] Contract."). I therefore do not understand how the Debtor's alleged tardiness vis-à-vis Home Insurance entitles the Joint Venture to avail itself of the laches doctrine.

In any event, for the reasons already explained, there is no merit to the contention that Count IV is time-barred. Consequently, the Joint Venture's laches argument must be rejected.

Based on the foregoing, the motions will be denied.

Dated: March 6, 1996.

ARTHUR J. SPECTOR
U.S. Bankruptcy Judge