McGlynn v AERCO Intl. Inc.
2017 NY Slip Op 30492(U)
March 15, 2017
Supreme Court, New York County
Docket Number: 190219/2016
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK
---X
IN RE NEW YORK CITY ASBESTOS LITIGATION Index No. 190219/2016
---X
THOMAS MCGLYNN,

Plaintiff, Motion Seq. Number 002

-against-

AERCO INTERNATIONAL INC., et al.,

Defendants.
--x
PETER H. MOULTON, J.S.C.:

In this asbestos-related personal injury litigation, Thomas McGlynn (Plaintiff) seeks recovery against Special Electric Company, Inc. (Special Electric), one of many defendants in the above-captioned action. By the instant motion (sequence number 002), Special Electric seeks to dismiss Plaintiff's complaint with prejudice, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action under applicable state corporate dissolution law. Plaintiff opposes the motion. For the reasons stated herein, the motion to dismiss is granted.

Background

Special Electric, a company formed under the state laws of Wisconsin, allegedly sold and distributed asbestos products from the late 1960s to 1980. It filed for bankruptcy relief under Chapter 11 of the United States Bankruptcy Code in April 2004, as a result of a series of lawsuits against it by claimants who allege personal injuries suffered from asbestos-containing products. Special Electric filed its Second Amended Plan of Reorganization in August 2006 (the Plan), which was confirmed by the United States Bankruptcy Court for the Eastern District of Wisconsin (the Bankruptcy Court) on December 21, 2006.

When Special Electric filed for bankruptcy relief, its liability insurance policies were its only significant remaining asset, as it had not operated as a business for more than a decade. Thus, the Plan does not provide for a distribution to asbestos personal injury claimants from Special Electric's assets, but instead allows such claimants to seek recovery against the insurance policies purchased by Special Electric, to the extent of available insurance coverage subject to the terms and conditions thereof, and in a judicial tribunal of appropriate jurisdiction in accordance with applicable state law. Pursuant to the Plan, asbestos claimants are required to serve their complaints upon a designated registered agent named CT Corp., which tenders the claims to the insurance companies, which then defend and/or settle such claims. The relevant insurance companies, for the purpose of this motion, are American Casualty Co., Continental Casualty Co. and Transcontinental Insurance Co. (collectively, the CNA Insurers).

John Erato, Special Electric's president and director when it filed for bankruptcy relief, resigned from his post in November 2009. At or about that time, Special Electric's bankruptcy counsel informed the insurance companies of the resignation and suggested that they appoint a successor. In response, the CNA Insurers asserted that it was Erato's responsibility to appoint a successor, and if no successor was appointed, it would constitute a breach of the policy provision requiring cooperation and assistance in the defense of asbestos claims. The CNA Insurers also reserved the right to deny insurance coverage for asbestos claims asserted against Special Electric. After Erato's resignation, no successor director or officer was ever appointed. Consequently, Special Electric stopped filing and submitting annual reports and registration fees to the Wisconsin Department of Financial Institutions (WDFI), which were required to maintain Special Electric's corporate existence. On or about September 11, 2012, WDFI issued a Certificate of Administrative

Dissolution dissolving Special Electric, based upon several years of filing delinquencies.

Upon learning of Special Electric's dissolution, asbestos claimants Thomas Morehouse and Mary Planer filed an action in the Wisconsin state court seeking a declaration that Special Electric could be sued whether or not it existed (Count I), and an injunction requiring Special Electric, or those acting on its behalf, to take all steps necessary for its reinstatement (Count II). After the Wisconsin state court action was filed, and 20 months subsequent to its administrative dissolution, Special Electric's asbestos defense lawyers published the Notice of Dissolution on May 8, 2014, which triggered the running of a two-year statutory period for filing claims against a dissolved corporation under Wisconsin law. Wis. Stat. § 180.1407 (2). Significantly, the statutory period for filing claims against dissolved Specific Electric expired on May 8, 2016, and Plaintiff's complaint in this action was filed after the expiration date.

In the interim, on September 23, 2014, the Wisconsin state court denied the declaratory relief (Count I) sought by Morehouse/Planer, and held that it lacked the authority to rule that Special Electric continued to exist. Thereafter, on April 14, 2016, the Wisconsin state court also denied the requested injunctive relief (Count II), and held that it lacked the authority to order the relief. Thereafter, on or about August 5, 2016, Morehouse/Planer voluntarily dismissed their appeal of the Wisconsin trial court's decisions to the appellate court.

On May 3, 2016, five days prior to the expiration date for filing complaints against dissolved Special Electric, Thomas Morehouse and Candace Noll, as representative future asbestos personal injury claimants, filed a motion with the Bankruptcy Court to reopen Special Electric's long-closed bankruptcy case and to enforce the Plan. In their motion, the movants sought, among other things, a court ruling that the dissolution of Special Electric pursuant to Wisconsin law did not relieve the

CNA Insurers of their obligations under the Plan, and that the dissolution could not be used as an affirmative defense against asbestos claims.

On October 7, 2016, the Bankruptcy Court issued an oral decision, which denied all forms of relief requested by the Morehouse/Noll movants. Thereafter, on October 14, 2016, the Bankruptcy Court entered an order denying the motion based upon the reasons stated in the oral decision, including the findings of fact and conclusions of law, which were all incorporated, by reference, into the order.

Oral argument for this motion was heard on October 4, 2016, and at its conclusion, this court reserved decision. On October 20, 2016, in compliance with this court's instructions, Plaintiff and Special Electric submitted supplemental letter briefs addressing the effects of the Bankruptcy Court's decision upon this motion. Additionally, in compliance with this court's instructions, Plaintiff and Special Electric submitted supplemental letter briefs addressing two issues concerning Wisconsin's direct action statute, which permits an injured party to bring a lawsuit directly against the insurer.

Arguments

Special Electric's motion seeks dismissal of the complaint based on Wisconsin's corporate dissolution statute, which provides, in relevant part, that "if the dissolved corporation publishes a newspaper notice . . . a claim against the dissolved corporation . . . is barred unless the claimant brings a proceeding to enforce the claim within 2 years after the publication date of the newspaper notice . . . ." Wis Stat § 180.1407 (2). Because it is undisputed that Plaintiff's complaint was filed more than two years after publication of Special Electric's notice of dissolution, the motion requests entry of an order dismissing the complaint with prejudice. The memorandum of law in support of the motion also points out that various actions filed by other asbestos claimants seeking relief

substantially similar to that sought by Plaintiff were dismissed by the courts of Wisconsin, California and Pennsylvania. Defendant's Brief at 1-2.

In opposition to the motion, Plaintiff asserts that his claim is nonetheless viable under Wisconsin law because Plaintiff's filing of a motion to reopen the bankruptcy, less than 2 years after the notice of dissolution, constitutes "a proceeding to enforce claims within the meaning of § 180.1407(2)." Plaintiff's Opposition at 9. Plaintiff also contends that "to the extent Wisconsin law might arguably conflict with any parties' obligations under the Plan, the Plan takes precedent [sic]" but does not specify what conflicts exist. Plaintiff's Opposition at 9-10. Plaintiff further asserts that he is entitled to pursue a direct action against Special Electric's insurers. To the extent that dismissal is appropriate, Plaintiff requests that the motion be granted "without prejudice" so that Plaintiff can "name and serve the CNA Insurers." Plaintiff's Opposition at 6. Plaintiff cites to the decision of *Germain v A.O. Smith Water Prods. Co.* (41 Misc 3d 1228 [A] [Sup Ct, NY County 2013]), *affd* 113 AD3d 571 [1st Dept 2014]), which held that a dissolved corporation could be sued under a New Jersey corporate dissolution statute. *Id.* at 7.

In a memorandum in further support, Defendant points out that Plaintiff did not file a cross-motion to amend the complaint in order to bring a claim against Special Electric's insurers. Defendant further asserts that any amendment would be futile in light of the Wisconsin Supreme Court's decision in *Casper v American Intl. South Ins. Co.* (336 Wis 2d 267 [2011]). *Casper* involved a car accident that occurred in Wisconsin, but not a Wisconsin-issued insurance policy. After completing a thorough analysis of the direct action statute, Wisconsin Statute § 632.24, the Wisconsin Supreme Court held that the statute "applies to any policy of insurance covering liability, irrespective of whether that policy was delivered or issued for delivery in Wisconsin, *so long as the*

accident or injury occurs in this state." *Id.* at 301 (emphasis added). Based on this language, Defendant asserts that *Casper* stands for the proposition that the direct action statute only applies where the injury occurred in the State of Wisconsin (regardless of whether the policy was issued or delivered in or outside of Wisconsin). Defendant points out that Plaintiff is a resident of New Jersey who was allegedly exposed in connection with his employment in or around New York City. Therefore, because Plaintiff was not injured in Wisconsin, Defendant asserts that Plaintiff cannot assert a direct action under Wisconsin Statute § 632.24.

In a letter response, Plaintiff explains that he did not seek leave to serve an amended complaint because this motion only relates to dismissal against Special Electric and "on what terms." Nevertheless, Plaintiff seeks a dismissal without prejudice so that he has an opportunity to move to amend the complaint to add the insurers in their own names. Plaintiff also asserts that *Casper* merely stands for the proposition that the direct action statute applies when the policy of insurance is issued or delivered outside of Wisconsin, so long as the injury occurred in the State of Wisconsin. Plaintiff explains that *Casper* extended the application of Wisconsin's direct action statute to a situation where the policy was issued or delivered outside Wisconsin, overruling *Kenison v Wellington Ins. Co* (582 N.W.2d 69 [Wis. App. 1998]).[1] Here, however, it is undisputed that the insurance policies were issued or delivered in the State of Wisconsin, and therefore involves a factual situation which was not before the *Casper* court.

Discussion

Plaintiff's attempt to avoid the effect of Wisconsin's dissolution statute fails. The motion

[1]*Kenison* held that the Wisconsin direct action statute applied only where the policy was issued or delivered in Wisconsin.

to dismiss must be granted because Plaintiff did not timely file a claim against Special Electric under Wisconsin Statute § 180.1407 (2). Plaintiff does not dispute that Special Electric filed the requisite notice in compliance with Wisconsin Statute § 180.1407 (1), nor does Plaintiff dispute that he did not bring a proceeding in state court to enforce the claim by May 8, 2016 (within two years afer the publication date of the notice).[2] Plaintiff argues that his Bankruptcy Court motion, filed five days before expiration of the two year period, is the equivalent of such a proceeding.[3] Even if the filing of the bankruptcy motion could be considered the equivalent of bringing a proceeding to enforce a claim, that motion/claim was denied. Moreover, Plaintiff cannot use of the filing date of the Bankruptcy Court motion to proceed against Special Electric in a second, separate proceeding in state court.[4]

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[2]Wisconsin Statute § 801.01 defines proceedings in the courts to include actions and special proceedings, and defines an action to include a special proceeding, unless a specific provision of procedure in special proceeding exists.

[3]In denying the motion to reopen, the Bankruptcy Court, in its oral decision, cited the long delay in reopening the closed bankruptcy. It further stated that reopening the bankruptcy would be futile because neither the Plan nor Wisconsin law allows for the requested relief of declaring that Special Electric exist for a future finite period of time, along with the insurance coverage. The Court also stated that it cannot order the CNA entities to take actions inconsistent with the terms of their insurance policies. Bankruptcy Court Oral Decision, dated 10/7/2016, at 27 (NYSCEF no. 150).

[4]Plaintiff also relies upon *Security Natl. Bank v Cohen* (31 Wis 2d 656 [1966]), where an action to foreclose a mortgage on the property of a dissolved corporation was not barred by a predecessor statute to Wisconsin's Statute §180.1407 (2). Plaintiff's Opposition at 7. Plaintiff's reliance upon *Security National* is misplaced because as that court noted, it has been consistently held that "the extinguishment of an obligation by the running of the statute of limitations does not prevent the foreclosure of a mortgage given to secure the debt." *Id.* at 661 (citations omitted). A limited exception which involves mortgage foreclosures, does not support Plaintiff's non-compliance with Wisconsin's corporate dissolution statute and the Plan's procedures for resolving asbestos claims. Moreover, Plaintiff's argument that the decision of *U.S. acting for and on behalf of Small Bus. Admin. v Palakow* (438 F2d 1177 [7th Cir 1971]), supports his argument is also misplaced. Plaintiff's Supplemental Brief at 4. In *SBA*, the claim was brought

Plaintiff's reliance upon *Germain* (41 Misc 3d 1228 [A], *supra*), which involved the application of the New Jersey corporate dissolution statute, does not compel a different result. In *Germain*, the trial court noted that under some state statutes, such as Alabama, "a dissolved corporation is competent to be sued for two years after publication of its dissolution notice," but "no such statute exists in New Jersey" which would bar plaintiffs' claim. *Germain*, 41 Misc 3d 1228 (A), at *8. The appellate court affirmed, noting that in New Jersey, "the statute places no restriction on how long a dissolved corporation maintains its capacity to be sued for its tortious conduct committed pre-dissolution," because the New Jersey statute "provides for a corporation that has been dissolved to 'sue and be sued in its corporation name.'" *Germain*, 116 AD3d 571, 572 (1st Dept 2014), citing NJSA §14A:12-9 (2). In this case, however, Wisconsin's corporate dissolution statute (unlike New Jersey's) specifically provides that a lawsuit against a dissolved corporation must be brought within two years of publication of the dissolution notice.[5]

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by the United States on behalf of SBA, as a shareholder of the corporation where its loan to the corporation was secured by corporate shares, against directors of the dissolved corporation. The Seventh Circuit reasoned that, because SBA's claim was not against the dissolved corporation or its shareholders or directors, but alleged personal liability against the defendant directors, the claim was not barred by the two year limitations in a predecessor to Wisconsin's current corporate dissolution statute. *Id.* at 1179. Here, Plaintiff's claim is against the dissolved corporation, and therefore, *SBA* is inapplicable.

[5]As *Germain* reflects, States have varying dissolution statutes. Illinois, for instance, has a corporate dissolution statute which, like Wisconsin, has a date by which claims must be brought against a dissolved corporation (*see Matter of Sager Corp.*, 967 NE 2d 1203, 1210 [Sup. Ct. Ill. 2012] ["Claimants here cannot overcome the lack of existence of the Sager Corporation, nor can they deny the Illinois five-year survival statute, which allowed claims to be commenced against Sager only until June 17, 2003. Because Sager no longer exists and because it no longer has the capacity to be sued, no judgment can be taken against it]). Delaware's dissolution statute however, does not extinguish a dissolved corporation's liability to third parties (see *Matter of Kraft-Murphy Co., Inc., v Kraft-Murphy Co., Inc.*, 82 A3d 696 [Sup. Ct. Del. 2013] [8 Del. C. §

Plaintiff's argument that the Plan, or the Bankruptcy Court's order confirming the Plan, preempts contrary state laws, including Wisconsin law, is without merit. Under the Plan, asbestos claims that were not yet settled are included in the definition of "Unliquidated Personal Injury Claims." The Plan provides, in relevant part: "[e]ach Insurance Company shall defend and/or settle Unliquidated Personal Injury Claims . . . in accordance with and in a manner consistent with the language of the applicable Insurance Policies and *applicable state law*." Plan, § 8.1 (c) (i) (emphasis added). The Plan also provides that "[t]he obligations, if any, of the Insurance Companies to pay holders of Unliquidated Personal Injury Claims shall be determined solely pursuant to the terms of the Insurance Policies and *applicable [state] law."* Plan, § 8.1 (c) (iii) (emphasis added). Thus, the Plan's plain language states that the defense or settlement of asbestos personal injury claims, and any obligation of the insurance companies to pay such claims, must be in accordance with the terms of the applicable insurance policy as well as applicable state law.[6] Even if this were not the case, Plaintiff does not explain what it is about the Plan that would yield Plaintiff a more favorable result.

Plaintiff's invocation of Wisconsin's direct action statute involves a far more complicated analysis. Wisconsin's "direct action against insurer" statute provides, in relevant part: "[a]ny bond or policy of insurance covering liability to others for negligence makes the insurer liable . . . to the

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278 does not extinguish the corporation's underlying liability to third parties in light of § 279 "which enables a dissolved corporation to (through a receiver) 'sue and be sued' after the expiration of the § 278 three year period"]).

[6]The Plan also states that "[f]or purposes of determining any rights or obligations of the Insurance Companies with respect to the Insurance Policies, neither confirmation of the Plan or Plan Documents by the Bankruptcy Court . . . shall constitute or operate as a judgment or settlement of any Unliquidated Personal Injury Claim." *Id.*

persons entitled to recover against the insured . . . irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured." Plaintiff's Opposition, quoting Wis. Stat. § 632.24. Thus, Plaintiff correctly notes that "the insolvency of the insured does not prevent a tort victim from proceeding with a direct action against the insured" (Plaintiff's Opposition at 5). However, Plaintiff has not filed a direct action. Additionally, Plaintiff's request, that any dismissal be "without prejudice thereby allowing plaintiffs to name and serve the CNA Insurers" (Plaintiff's Opposition at 6) is puzzling. As Special Electric notes, Plaintiff has not cross-moved for any relief. Nor does Plaintiff explain why a dismissal in favor of Special Electric "without prejudice" is needed when direct action statutes permit an injured party to sue the CNA Insurers directly, obviating the need to sue the insured. Plaintiff also explains, cryptically, that he did not seek any relief because the motion only relates to a dismissal against Special Electric. While Plaintiff cites *D'Amico v Johnson Partners* (866 A2d 1222 [Sup. Ct. Rhode Is. 2005]), that case involved plaintiff's substitution of the insurer under a Rhode Island direct action statute. Here, Plaintiff did not move to substitute the CNA Insurers.

The language cited by Special Electric in *Casper* does not answer the question of whether Wisconsin's direct action statute applies where the policy is issued or delivered in Wisconsin, but the injury occurred outside of Wisconsin. *Casper* did not have that issue before it. Thus, whether the statute applies in that instance, and, whether an insurer can assert the insured defense of Wisconsin's dissolution statute's two year time limit requires further analysis.[7] However, because Plaintiff did not actually move for any relief, not all the relevant issues have been briefed. For instance, in the supplemental briefing, Defendant made additional arguments concerning choice of

[7]The parties have briefed these two issues at the request of the court.

law principles and New York's policy regarding direct action statutes. Plaintiff did not have the opportunity to respond. Therefore, the court declines to issue what amounts to an advisory opinion regarding the viability of a claim by Plaintiff against defendant's insurers under Wisconsin's direct action statute, when Plaintiff has not moved for any relief.[8]

Conclusion

Based upon all of the foregoing reasons, it is hereby

ORDERED that the motion of defendant Special Electric Company, Inc. to dismiss the complaint is granted, with prejudice, and the complaint as against said defendant is dismissed in its entirety, without costs and disbursements, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that by granting this motion, the court makes no ruling as to the viability of any claim by Plaintiff against defendant's insurers under the Wisconsin direct action statute; and it is

ORDERED that the action is severed and continued against the remaining defendants.

Dated: March 15, 2017
New York, New York

ENTER:

Peter H. Moulton, J.S.C.

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[8]CPLR § 1003 provides in relevant part that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it."