

In the United States Bankruptcy Court

for the Northern District of Iowa

FORT DODGE CREAMERY CO.

Bankruptcy No. X88-01550F

Debtor(s).

Chapter 7

JAMES H. COSSITT Bankruptcy
Trustee in these proceeding Adversary No. X89-
0158F

Adversary No. X89-0158F

Plaintiff(s)

vs.

ALLEN R. LOOMIS; NORWEST BANK
Des Moines N.A. Executor of
the Estate of A. Robert Loomis
deceased; MAURICE STARK;
ROSEDALE FARMS INC.; FIRST
AMERICAN STATE BANK OF FORT
DODGE; the IOWA DEPARTMENT OF
REVENUE; and the INTERNAL
REVENUE SERVICE

Defendant(s)

MEMORANDUM OF DECISION AND ORDER RE: MOTION TO DISMISS FILED BY NORWEST BANK DES MOINES N.A.

Norwest Bank Des Moines, N.A. (NORWEST) has moved to dismiss the trustee's complaint against it. A preliminary hearing on the motion was held May 8, 1990. Final hearing was held June 14, 1990. Although not specified in the motion, the court considers Norwest's motion to be made under Bankr. R. 7012(b) which incorporates Fed.R.Civ.P. 12(b)(5) and (6). The motion under Rule 12(b)(5) relates to Norwest's allegations that it was never served with process in this adversary proceeding. The motion under Rule 12(b)(6) relates to Norwest's contention that trustee's complaint against Norwest is barred by state statutes of limitation.

At final hearing, the parties submitted exhibits and through their attorneys, made representations of fact. Because with regard to the Rule 12(b)(6) motion, the court is considering at least some of the exhibits and the representations of counsel, Norwest's motion will be considered one for summary judgment under Rule 12(b). Therefore, as to the statute of limitations issue, the court must consider whether there is any genuine issue as to any material fact, and if not, whether Norwest is entitled to judgment as a matter of law. Based on the representations of counsel and the exhibits introduced into evidence, the court finds that the only disputed fact is whether attorney Wilke, on behalf of the A. Robert Loomis estate, orally agreed to accept service of process from Cossitt. However, because summary judgment may be denied Norwest on other grounds, the court does not consider this

disputed fact material for the purposes of this motion. The court now issues its ruling which includes findings of fact and conclusions of law as required by Bankr. R. 7052.

FINDINGS OF FACT

This bankruptcy case was commenced by the filing of an involuntary petition in the fall of 1988. An order for relief under chapter 7 of the Code was filed February 8, 1989. One day later, James H. Cossitt (COSSITT) was appointed trustee.

On September 5, 1989, Cossitt filed this adversary proceeding against A. Robert Loomis and others. The clerk issued "summons and notice" on September 5, 1989. A return of service was not filed as provided in Fed.R.Civ.P. 4(g) as incorporated by Bankr. R. 7004(a). Cossitt had mailed a copy of the summons and complaint to Kurt L. Wilke on September 6, 1989. A. Robert Loomis died on September 8, 1989. The initial summons and original complaint were never served upon the executor of the Loomis estate.

On September 20, 1989, Cossitt filed an application for preliminary injunction and a request for expedited hearing. Cossitt served a copy of the application upon Wilke whom he identified as "attorney for Loomises and debtor." The court scheduled a hearing on Cossitt's request for expedited treatment of his application. Cossitt served notice of the hearing on John Galley for A. Robert Loomis. At the telephonic hearing, attorney Galley appeared for the estate of A. Robert Loomis. As a result of the hearing, the court scheduled a final hearing on the injunction application. It was scheduled for October 26, 1989.

On October 10, 1989, attorney Wilke filed an answer to the complaint on behalf of Allen R. Loomis and Rosedale Farms, Inc. Allen R. Loomis was a relative of and not the same person as A. Robert Loomis. An answer was not filed on behalf of A. Robert Loomis.

Wilke participated in the telephonic hearing on Cossitt's application for preliminary injunction and made his appearance for Allen R. Loomis, the estate of Loomis and Rosedale Farms, Inc. (ROSEDALE). The court inquired of Wilke whether his appearance meant that Mr. Galley and Mr. Bennett would not be appearing. Wilke responded, "No, I will be representing Bob Loomis, his estate." The court was told that settlement had been reached among the parties with regard to the preliminary injunction. Prior to the hearing, a consent order had been presented to the court. The court asked Wilke whether the proposed consent order was satisfactory to the estate and he responded that it was. The consent order was executed and filed October 26, 1989. The order included the following paragraphs:

FINDINGS OF FACT

1. On September 5, 1989 the trustee commenced this action by the filing of a complaint; the complaint was duly and properly served on all parties by U.S. Mail on September 6, 1989; all parties to this action are within the personal jurisdiction of the court.

* * *

ORDERS

* * *

4. Terms and provisions of this injunction shall be binding upon Rosedale Farms, Inc., Allen R. Loomis, the estate of A. Robert Loomis and any agent, employees or other persons (Trees Farm Management) acting on behalf or for the entities enjoined herein.

The consent order had been prepared and submitted by Cossitt. It was "approved as to form and content" by attorney Wilke on behalf of Allen Loomis, Rosedale Farms, Inc. and Fort Dodge Creamery Co. Wilke also signed the document on behalf of Herbert R. Bennett, as "ATTORNEY FOR THE ESTATE OF A. ROBERT LOOMIS."

In his representation to the court at the hearing, Wilke explained that John Galley had originally been hired to represent the estate after Loomis' death. The principal beneficiary, however, wanted the Wilke & Bennett firm to act in that capacity. Norwest Bank was appointed as executor sometime in October, 1989. On October 16, 1989, Norwest designated Herbert R. Bennett of the law firm Bennett & Wilke as the attorney for the A. Robert Loomis estate. Wilke now says that he signed the consent order on behalf of Herb Bennett for the executor, Norwest, believing that Norwest had been served with the original summons and complaint. He later learned that Norwest had not been served, and he was directed, therefore, not to file an answer.

A day after the order was filed, Cossitt wrote to Wilke regarding this adversary proceeding. The second paragraph of the letter contained the following:

Second, you indicated during the teleconference that an estate had been opened and you had been appointed by the District Court to represent the estate in this litigation. As you and I have discussed several times on the phone I have never received any notice of the existence of the estate despite my repeated request for same. Under the Mennonite Board of Missions case I think it is incumbent upon the estate, at minimum to mail to me a notice that the estate exists and a description of the Bar date for filing claims.

Cossitt, on February 14, 1990, filed a motion for leave to amend his complaint. This motion included a request that he be allowed to amend so as to substitute the executor of the A. Robert Loomis estate for Loomis as a party defendant pursuant to Bankr. R. 7025. A copy of the motion for leave to amend was served on Wilke.

Also on February 14, 1990, Cossitt filed his "First Amended and Substituted Complaint." This complaint was much the same as the original complaint. In paragraph 10 it described Norwest Bank, Des Moines, N.A. as the executor for the A. Robert Loomis estate (paragraph 10). Cossitt demanded relief against Norwest in Count III. Under Count VII (formerly Count VIII), he alleged various actions of A. Robert Loomis, and sought relief against Norwest. Cossitt's motion for leave to amend was granted on March 6, 1990. Shortly thereafter, Cossitt served the previously filed "First Amended and Substituted Complaint." Return of service was filed March 12, 1990. In it, Cossitt certified that he had sent a copy of the First Amended and Substituted Complaint to Norwest Bank, N.A. in care of Bennett & Wilke. Wilke concedes that Norwest has also received the amended complaint. Wilke filed an answer on behalf of Rosedale and on behalf of Allen R. Loomis. On behalf of Norwest, he filed the pending motion to dismiss.

DISCUSSION

Norwest contends that it was never served with the original Complaint or the First Amended and Substituted Complaint and that because of such failure and the running of the statute of limitations, it is entitled to dismissal.

I.

Insufficiency of Service of Process

A defendant may waive objections regarding lack of personal jurisdiction. Barach v. Greathouse, 407 F.Supp. 1399, 1400 (D. Md. 1975). A party may also waive, by voluntary appearance, potential defects founded upon service. Murphy v. Travelers Ins. Co., 534 F.2d 1155, 1159 (5th Cir. 1976).

Parties may voluntarily submit themselves to the jurisdiction of a court. Giannakos v. M/V Bravo Trader, 762 F.2d 1295, 1298 (5th Cir. 1985), or parties may by agreement consent to jurisdiction. Burger Chef Systems, Inc. v. Baldwin, Inc., 365 F.Supp. 1229, 1232 (S.D. N.Y. 1973), rev'd. on other grounds, 507 F.2d 841 (1974).

Norwest, through its counsel, consented to the jurisdiction of the court by execution of the consent order filed October 26, 1989. Attorney Wilke says that he executed that order on behalf of Norwest in error, mistakenly believing that the executor had been served with summons and complaint. Wilke does not say when the "mistake" was discovered. Once it was discovered, however, Norwest made no effort to seek relief from the order under Bankr. R. 9024, which incorporates Fed.R.Civ.P. 60. Even now it does not seek such relief. Instead, more than five months after the consent order entered, it filed its motion to dismiss claiming there was insufficiency of service. Such insufficiency is irrelevant. Norwest has consented to the court's jurisdiction over it.

Even if the court were to find that there was no consent and service had not been obtained, it would still not dismiss Cossitt's complaint against Norwest. Norwest contends that because service has not been obtained, the statute of limitations has expired. The court disagrees. Cossitt's suit against A. Robert Loomis had been commenced and was pending at the time of Loomis' death. Cossitt sought to substitute the executor of Loomis' estate as a party defendant by his application filed February 14, 1990. Leave was sought pursuant to Bankr. R. 7025, which incorporates Fed.R.Civ.P. 25. Although filed more than 90 days after Loomis' death, Cossitt's application was still timely, because even now there has been no formal suggestion of death upon the record as required by the rule. Fed.R.Civ.P. 25(a)(1), see also, Dolgow v. Anderson, 45 FRD 470, 471 (D. N.Y. 1968). There is nothing to indicate that a formal suggestion of death was filed in this adversary proceeding or served upon Cossitt.

Although Federal Rules of Civil Procedure govern Cossitt's time limit for substituting Norwest as a party defendant, Iowa law, by its service requirements, would arguably prescribe the statute of limitations for making claims against the decedent's estate. Ransom v. Brennan, 437 F.2d 513, 520 (5th Cir. 1971), cert. denied, 403 U.S. 904 (1971). This view is not unanimous. Boggs v. Blue Diamond Coal Co., 497 F.Supp. 1105 (E.D. Ky. 1980); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d 1952 (1986).

The court need not decide whether Fed.R.Civ.P. 25 preempts Iowa statutory law as to the deadlines for service of the motion for substitution. Under either, Iowa statutory law or Fed.R.Civ.P. 25(a)(1), Cossitt's claims against Loomis' estate are not time barred.

Iowa law provides that causes of action survive death. Iowa Code § 611.20. A pending action may be continued against the legal representative of a deceased defendant. Iowa Code § 611.22. Fed.R.Civ.P. 25(a)(1) does not specify a deadline for serving the motion to substitute on the executor or administrator for a deceased defendant.

However, under Iowa law, if an action pending against a decedent at the time of his death survives, the action may be considered a claim against the decedent's estate if notice of substitution is served upon the decedent's personal representative within the time limits provided by Iowa Code § 633.410. Iowa Code § 633.415.

Section 633.410 (as amended July 1, 1989) provides:

All claims against a decedent's estate . . . whether due or to become due, absolute or contingent, liquidated or unliquidated, grounded on contract or otherwise, are forever barred against the estate, the personal representative, and the distributees of the estate, unless filed with the clerk within the later to occur of four months after the date of the second publication of the notice to creditors or, as to each claimant whose identity is reasonably ascertainable, one month after service of notice by ordinary mail to the claimant's last known address.

There is no proof that the estate provided mailed notice to Cossitt of the probate of Loomis' will or the administration of his estate. The court finds that under the facts of this case, Cossitt's identity as a claimant was reasonably ascertainable to Norwest. Therefore, the court concludes that the one month time period for Cossitt to serve the substituted complaint on Norwest has not yet begun to run. Moreover, even without such notice to Cossitt, Norwest has now received the Substituted and Amended Complaint. The court cannot conclude that Cossitt's claim is barred as untimely by state or federal time limitations relating to the substitution for decedent parties.

III.

Statute of Limitations

At the center of Cossitt's amended complaint are two events. First is a corporate reorganization of Fort Dodge Creamery which he alleges took place in February, 1985. Created as part of the reorganization plan was Rosedale Farms, Inc. which Cossitt alleges was incorporated on or about January 18, 1985. The second event was the transfer of farm real estate from Fort Dodge Creamery to Rosedale. This took place on or about February 11, 1985. Cossitt alleges that the transfer of the real estate from Fort Dodge Creamery to Rosedale was a fraudulent conveyance under Iowa law. He seeks to recover the property and the rents and profits emanating from it since the transfer. Cossitt also contends that in devising and participating in the reorganization, the Loomises, as managers, directors and controlling shareholders of debtor, breached fiduciary obligations to the other shareholders and creditors. Cossitt also alleges that the reorganization and transfer were violations of the debtor's Articles of Incorporation and by-laws and that the reorganization and transfer took place without approval of the debtor's Board and in violation of Iowa corporation law. Cossitt further contends that the reorganization and transfer were a fraud on debtor's creditors.

Norwest does not deny that the corporate reorganization of Fort Dodge Creamery and the transfer of real estate from it to Rosedale took place in approximately February, 1985. An action to set aside a fraudulent conveyance in Iowa is governed by a five-year statute of limitations. Iowa Code S 614.1 (4); Olson v. Larson, 233 Iowa 1032, 8 N.W.2d 697, 700 (1943). Fraud is also governed by that five-year statute of limitations. Iowa Code 614.1(4). Violations of Articles of Incorporation or by-laws are governed by a ten-year statute of limitations under Iowa Code 614.1(5) because they are written contracts between the corporation and its stockholders. Bankers' Trust Co. v. Rood, 211 Iowa 289, 233 N.W. 794, 801 (1930). The court rejects Norwest's argument that the trustee's claims are

governed by a two-year statute because the trustee seeks recovery for personal injuries or injuries to relative rights. See Iowa Code § 614.1(2).

Based on uncontroverted allegations by Cossitt, the conduct complained of took place in February, 1985. Cossitt's action, filed September 5, 1989, was thus commenced against A. Robert Loomis within five years. Cossitt's filing of his complaint commenced the proceeding pursuant to Bankr. R. 7003, as it incorporates Fed.R.Civ.P. 3. Iowa law provides that "for the purpose of determining whether an action has been commenced within the time allowed by statutes for limitation of actions, whether the limitation inheres in the statutes creating the remedy or not, the filing of a petition shall be deemed a commencement of the action." Iowa R.Civ.P. 55 (1987). The court concludes, therefore, that Cossitt's complaint against A. Robert Loomis was commenced within the applicable statutes of limitation.

CONCLUSIONS OF LAW

Norwest, as executor of the estate of A. Robert Loomis, participated in this adversary proceeding thereby waiving any objections to defects in service. The court, therefore, has personal jurisdiction of defendant Norwest.

Cossitt's motion to substitute Norwest as defendant following the death of A. Robert Loomis was timely under Fed.R.Civ.P. 25. Had there been any failure of Cossitt to obtain service of the personal representative of the estate, it would not bar Cossitt's claims against the estate.

Cossitt's claims against the estate of A. Robert Loomis are not barred by Iowa statutes of limitation.

Norwest is not entitled to judgment of dismissal.

ORDER

IT IS ORDERED that Norwest's motion to dismiss plaintiff's complaint is denied.

SO ORDERED this 4th day of October, 1990.

William L. Edmonds
Chief Bankruptcy Judge