Filed 11/26/18 Hart v. Special Electric Co. CA1/5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SHARON HART, individually and as successor in interest to DAVID HART, Plaintiff and Appellant, v. SPECIAL ELECTRIC COMPANY, INC., Defendant and Respondent.	A151293 (Alameda County Super. Ct. No. RG16833060)

David Hart appeals from a summary judgment entered in favor of respondent Special Electric Company, Inc. (Special Electric), a bankrupt Wisconsin corporation that was dissolved in 2012. Hart alleged that his mesothelioma was caused by exposure to asbestos supplied by Special Electric and other defendants. The trial court concluded that his claims against Special Electric are time-barred under Wisconsin law. On appeal, Hart[1] argues (1) the operative Wisconsin statute is preempted by Special Electric's Chapter 11 bankruptcy plan, and (2) Special Electric failed to show that its notice of dissolution complied with Wisconsin law and triggered the two-year claims period. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Special Electric was incorporated in Wisconsin in 1957. It brokered the sale of asbestos from suppliers to manufacturers of asbestos-containing products. (*Webb v.*

[1] David Hart died in 2017, while this appeal was pending. We granted the unopposed motion to substitute Sharon Hart, his surviving spouse, as his successor in interest.

Special Elec. Co., Inc. (2016) 63 Cal.4th 167, 177.) Over several decades, Hart worked with, or was otherwise exposed to, asbestos-containing products such as asbestos-cement pipe and drywall joint compound. Hart was diagnosed with mesothelioma in late 2015. He alleges Special Electric is at least partly responsible for the asbestos exposure he claims caused his disease.

In 2004, Special Electric petitioned for relief under Chapter 11 of the United States Bankruptcy Code. The United States Bankruptcy Court for the Eastern District of Wisconsin issued an "Order Confirming Second Amended Plan of Reorganization" of Special Electric (Plan) in 2006. When the Plan was confirmed, Special Electric had no operations, its assets had been sold, and it had no officers or directors other than John Erato, who served as its post-bankruptcy director and president. (*Melendrez v. Superior Court* (2013) 215 Cal.App.4th 1343, 1348 (*Melendrez*).)

One purpose of the Plan was to facilitate the defense against, and any payment of, asbestos personal injury claims brought against Special Electric. Under the Plan, "a registered agent was appointed for the service of asbestos claims and was required to forward those claims to [Special Electric's] insurers." (*Melendrez, supra,* at p. 1347.) "The insurers, in turn, were required to defend and/or settle the claims 'in accordance with and in a manner consistent with the language of the applicable [i]nsurance policies and applicable state law.' " (*Ibid.*; Plan, § 8.1(c).)

Erato resigned in 2009. Left with no employees, Special Electric failed to submit the required annual reports or fees to the Wisconsin Department of Financial Institutions. Pursuant to Wisconsin law, the Department of Financial Institutions administratively dissolved Special Electric effective September 11, 2012.

On May 8, 2014, Special Electric's insurers published a "Notice of Dissolution of Special Electric Company, Inc." (Notice) in three Wisconsin newspapers of general circulation, purportedly triggering a two-year statutory period to bring any claims against Special Electric. Pursuant to the Notice and the Wisconsin statute, the claims period ended in May 2016.

Approximately four months after the claims period ended, Hart filed a personal injury complaint in Alameda County Superior Court. Special Electric demurred on the ground that Hart's claims were time-barred under the Wisconsin statutes. Hart argued, among other things, that the Wisconsin statutes were preempted by the Plan. The trial court overruled the demurrer because the demurrer had relied on "proof of publication affidavits" – showing when the post-dissolution claims period began to run – which were beyond the face of the complaint and not subject to judicial notice. The court did not expressly address Hart's argument that the Wisconsin statutes were preempted, other than to say it did not find Hart's demurrer arguments persuasive.

In a motion for summary judgment, Special Electric argued there was "no triable issue of material fact that [it] is a dissolved Wisconsin corporation against whom suits have become time-barred under the State of Wisconsin's dissolution and survival statutes." The motion relied upon the Notice and the affidavits indicating that the Notice had been published in three Wisconsin newspapers on May 8, 2014.

Hart opposed the motion, contending the Notice did not comply with Wisconsin's statutes because it lacked "[a] description of the information that must be included in a claim" and because it was published by Special Electric's insurers instead of Special Electric itself. Hart also renewed his argument that Wisconsin's corporate dissolution and survival statutes were preempted by the Plan.

The trial court granted summary judgment to Special Electric. The court explained: "Defendant's evidence shows that Defendant was administratively dissolved, and that notice was published. [Citation.] Having reviewed the form of such notice, the court concludes that the language of the notices themselves was sufficient to satisfy Wisc. Stat. section 180.1407(1). The court also rejects [Hart's] argument that a notice published by or at the direction of an insurer on behalf of its insured does not serve to trigger the running of the two-year claims period." The court stated that Hart's preemption argument had been "rejected by the court on demurrer" and dismissed Hart's complaint as to Special Electric.

The court entered judgment pursuant to its order, and Hart timely appealed.

II. DISCUSSION

A. Standard for Summary Judgment and Standard of Review

Summary judgment is appropriate if "there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) For a defendant to meet its initial burden when moving for summary judgment, it must demonstrate " 'that a cause of action has no merit' " by showing either " 'that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action.' " (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, quoting Code Civ. Proc., § 437c, subd. (o)(2).) Once a defendant satisfies its initial burden, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).)

We review a grant of summary judgment de novo based on the evidence in the moving and opposing papers, except any evidence to which objections were sustained. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.) We liberally construe the evidence in support of the party opposing summary judgment and resolve any doubts about the evidence in favor of that party. (*Ibid.*)

B. The Plan Does Not Preempt Wisconsin's Corporate Survival Statutes

Hart contends summary judgment should not have been granted because Wisconsin's two-year period for claims against dissolved corporations is preempted by Special Electric's reorganization plan. The argument is unavailing.

Under 11 U.S.C. § 1142(a), a reorganization plan shall be implemented "notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition." Thus, "a reorganization plan under Chapter 11 of the Bankruptcy Code expressly preempts otherwise applicable nonbankruptcy laws." (*Pacific Gas and Elec. Co. v. California Dept. of Toxic Substances Control* (9th Cir. 2003) 350 F.3d 932, 937.)

Here, however, the Plan specifically *allows* for the application of state law, such as Wisconsin's two-year period for claims against dissolved corporations. Paragraph

8.1(c)(i) of the Plan reserves for Special Electric's insurers the right to "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*." (Italics added.) The Plan does not define "applicable state law" or limit which state laws the insurers may invoke.

Because the Plan explicitly allows for the application of state law in defending against claims, it cannot be said that invocation of the two-year statutory deadline for asserting claims hinders the implementation of the Plan. The Plan therefore does not preempt or otherwise preclude the application of Wisconsin's two-year claims period in the defense against Hart's claim.[2]

C. The Notice Was Sufficient Under Section 180.1407

Hart contends that summary judgment was nonetheless improper because the Notice triggering the two-year claims period was defective. The parties agree that Wisconsin law applies in analyzing the sufficiency of the Notice.

1. Applicable Wisconsin Law

"A dissolved corporation may publish notice of its dissolution and request that persons with claims, whether known or unknown, against the corporation or its directors, officers or shareholders, in their capacities as such, present them in accordance with the notice." (Wis. Stat., § 180.1407, subd. (1).) "The notice shall include all of the following: [¶] (a) A description of the information that must be included in the claim[;] [¶] (b) A mailing address where the claim may be sent[; and] [¶] (c) A statement that a claim against the dissolved corporation or its directors, officers or shareholders is barred

[2] The United States Bankruptcy Court for the Eastern District of Wisconsin addressed this issue, albeit indirectly, in *In re Special Electric* (Bankr. E.D.Wis. 2005, 0425471-11-MDM [nonpub. opn.]), involving another claimant. The court there concluded that "[t]he plan itself, Section 8.1(c)(1), expressly reserves the [insurers'] rights under the applicable insurance policies and state law, which include the right to assert defenses to liability based on the debtor's dissolution." Because we reach the same conclusion independently, we need not and do not address any precedential effect the bankruptcy court's ruling in *In re Special Electric* might have here. We further conclude that Hart fails to show the Plan precluded the issuance of the Notice.

unless a proceeding to enforce the claim is brought within 2 years after the publication date of the notice." (Wis. Stat., § 180.1407, subd. (1).)

"[I]f the dissolved corporation publishes a newspaper notice in accordance with [section 180.1407, subd. (1)], a claim against the dissolved corporation or its directors, officers, or shareholders is barred unless the claimant brings a proceeding to enforce the claim within 2 years after the publication date of the newspaper notice," and if the claimant satisfies other conditions. (Wis. Stat., § 180.1407, subd. (2).)

Wisconsin requires strict compliance with its rules of statutory service. (*Johnson v. Cintas Corp. No. 2* (2012) 339 Wis.2d 493, 507.) If there is a defect in service, the task is to decide whether the defect is a fundamental error – because it defeats the purpose of the statute – or is merely a technical error. (*Burnett v. Hill* (1997) 207 Wis.2d 110, 121; *Logic v. City of South Milwaukee Bd. of Canvassers* (2004) 277 Wis.2d 421, 425.) If the error is merely technical, relief is granted only if the defendant was prejudiced. (*Burnett, supra,* 207 Wis.2d at p. 121.)

2. Special Electric's Notice

In support of its summary judgment motion, Special Electric presented evidence of the text of the Notice and affidavits of its publication. The Notice read: "NOTICE is hereby given that SPECIAL ELECTRIC COMPANY, INC. was dissolved on September 11, 2012 pursuant to Wisconsin Business Corporation Law, s. 180.1420 and s. 180.1421. Process for any suit or claim brought against Special Electric Company, Inc., a dissolved corporation may be sent to CT CORPORATION SYSTEM 8040 Excelsior Drive, Suite 200 Madison, WI 53717. A claim brought against Special Electric Company, Inc., a dissolved corporation or its directors, officers or shareholders is barred unless a proceeding to enforce the claim is brought within 2 years after the publication date of this notice. s. 180.1407."

3. Analysis

Hart contends that Special Electric failed to show that the Notice complied with section 180.1407 because the Notice (1) was not published by the corporation itself and

(2) did not include a description of the information to be included in a claim. Hart's arguments are unavailing.

a. The Plan Authorized Special Electric's Insurers to Publish the Notice

Wisconsin Statute section 180.1407 requires the "dissolved corporation" to publish the dissolution notice. Although here the Notice was published by Special Electric's insurers rather than a corporate officer or director, Special Electric's officers and directors had authorized the insurers to act on their behalf.

Paragraph 8.1(c)(i) of the Plan reads: "Each *Insurance Company* shall defend and/or settle Unliquidated Personal Injury Claims and *shall make defense and settlement decisions*, fund defense costs arising from Unliquidated Personal Injury Claims, and, if appropriate, pay Unliquidated Personal Injury Claims, all in accordance with and in a manner consistent with the language of the applicable Insurance Policies and applicable state law." (Italics added.) The plain language of this provision requires Special Electric's insurers to defend against Unliquidated Personal Injury Claims.

Hart's argument that the Plan authorizes the insurers to act only "defensively," responding to claims as they arise, is unpersuasive. The Plan broadly defines "Personal Injury Claim" to mean any claim, demand, debt, obligation or liability before or after April 15, 2004, "whenever arising or asserted" and "whether or not diagnosable or manifested before the Confirmation Date or the close of the Case[.]" Moreover, the Plan places no discernible limit on the insurers' efforts, other than to be consistent with the insurance policies and state law. The insurers' publication of the Notice pursuant to Wisconsin state law falls within the broad scope of defense acts and decisions that the insurers were authorized to make.

As the court observed in *Melendrez*: "[T]here is no ongoing management at [Special Electric]. Beyond forwarding asbestos claims to [its] insurers, there is no further winding up activity at [Special Electric]. Based on counsel's declaration, [Special Electric's] only existence is as an empty shell to process asbestos actions. *Therefore, the only persons authorized to act on [Special Electric's] behalf during the winding up process are its insurers.*" (*Melendrez, supra*, 215 Cal.App.4th at p. 1356, italics added.)

In light of the language of the Plan and the evidence that Special Electric had no corporate officers or directors after Erato's 2009 resignation, Special Electric established that the insurers were authorized to publish the Notice on Special Electric's behalf.

b. The Defect in the Notice is Not Fundamental in Light of the Statutory Purpose

Section 180.1407, subdivision (l)(a) requires that a dissolution notice contain a "description of the information that must be included in a claim." Hart points out that the Notice omitted this description, and he contends the defect is "fundamental" because it defeats the statute's "very purpose of telling unknown 'claimants' what they need to do to avoid the two-year claim bar."

There is no dispute that the Notice fails to specify what information must be included in a claim, and that we must decide if this defect is fundamental based on whether it defeats the purpose of section 180.1407. (See *Logic v. City of South Milwaukee Bd. of Canvassers*, *supra*, 277 Wis.2d at p. 425.) We are unaware of any published decision defining the purpose of section 180.1407 specifically. The statute is modeled, however, on section 14.07 of the Model Business Corporation Act (MBCA), which is substantially identical to section 180.1407 except that it provides a three-year claims period rather than a two-year period.[3]

[3] In pertinent part, section 14.07 reads: "(a) A dissolved corporation may publish notice of its dissolution and request that persons with claims against the dissolved corporation present them in accordance with the notice. [¶] (b) The notice must: [¶] (1) be published (i) one time in a newspaper of general circulation in the county where the dissolved corporation's principal office. . . is or was last located or (ii) be posted conspicuously for at least 30 days on the dissolved corporation's website; [¶] (2) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and [¶] (3) state that a claim against the dissolved corporation will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of the notice. [¶] (c) If the dissolved corporation publishes a notice in accordance with subsection § 14.07(b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim within three years after the publication date of the notice: [¶] (1) a claimant who was not given written notice under section 14.06; [¶] (2) a claimant whose claim was timely sent to the dissolved corporation but not acted on by the corporation; [¶] (3) a claimant whose claim

The "Official Comment" to MBCA section 14.07 indicates that the purpose of the provision is to provide a reasonable time to file a claim against a corporation after its dissolution. The comment reads in part: "Section 14.07 addresses the problems created by possible claims that might arise long after the dissolution process is completed and the corporate assets distributed to shareholders . . . On one hand, the application of a mechanical limitation period to a claim for injury that occurs after the period has expired may involve injustice to the plaintiff. On the other hand, to permit these suits generally makes it impossible ever to complete the winding up of the corporation, make suitable provision for creditors, and distribute the balance of the corporate assets to the shareholders." (Model Bus. Corp. Act, § 14.07, 2016 revision, com. at p. 338.) The three-year cutoff "provides a reasonable compromise between the competing interests of potential injured plaintiffs, the ability of dissolved corporations to distribute remaining assets free of all claims, and the interests of shareholders in receiving those assets secure in the knowledge that they may not be reclaimed." (Model Bus. Corp. Act, *supra*, com. to § 14.07, p. 338.) Thus, the MBCA's corporate-survival scheme "extends some level of fairness to claimants of the dissolved corporation while providing a level [of] certainty for the corporation's directors and shareholders." (4 Cox & Hazen, Treatise on the Law of Corporations (3d ed.) Dec. 2017 update, § 26:10.)

Many states have adopted statutes that are based on versions of MBCA section 14.07 and are similar to section 180.1407. (16A Fletcher Cyc. Corp. 2012 § 8144.10, pp. 312–313; see also 4 Cox & Hazen, Treatise on the Law of Corporations (3d ed.) Dec. 2017 update, § 26:10.) Several courts have described these corporate survival statutes as allowing a limited period for claimants to sue a dissolved corporation.[4]

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is contingent or based on an event occurring after the effective date of dissolution." (Model Bus. Corp. Act, *supra*, com. to § 14.07, pp. 336–337.)

[4]See, e.g., *Blankenship v. Demmler Mfg. Co.* (1980) 89 Ill.App.3d 569, 574 [main purpose of statute "is to extend the life of a corporation for two years following dissolution so that suits which ordinarily would have abated may be brought by and against the corporation" and "establish a definite point in time when a corporation ceases to exist"]; *Gilliam v. Hi-Temp Products Inc.* (2003) 260 Mich.App. 98, 111–112, 121

The question is whether this statutory purpose is defeated by the mere omission of a description of information to be included in a claim. Instructive in this regard is *Lewis Oil Inc. v. Bourbon Mini-Mart Inc.* (2014) N.E.3d 1008, involving section 23-1-45-7 of the Indiana Code, which, like the MBCA's section 14.07 and Wisconsin's section 180.1407, requires a dissolved corporation to publish a dissolution notice that includes, among other things, a description of the information that must be included in a claim.

As the Indiana Court of Appeals observed, the requirement of describing the information to be included in the claim is "clearly intended for the benefit and protection of the dissolved corporation, which could deny a claim on the basis that it does not include the information described in the notice." (*Lewis Oil, supra,* 16 N.E.3d at p. 1014.) Thus, "[o]mitting a description of 'the information that must be included in a claim' could actually benefit potential claimants, because the corporation might be precluded from denying a claim solely on the basis that it lacked sufficient information." (*Ibid.*) The omission therefore does not prejudice the claimant in pursuing a claim under the statute.

[statute "is part of a legislative scheme intended to avoid the consequences of corporate dissolution at common law" and "putting to rest all late-arising claims against a dissolved corporation and bringing finality to corporate dissolution"]; *Kachler v. Taylor* (M.D. Ala. 1994) 849 F.Supp. 1503, 1514 [" 'The purpose of Alabama's survival statute is to provide a two year period in which to wind-up corporate affairs following dissolution of a corporation' "]; *In re ABZ Ins. Services, Inc.* (Bankr. N.D. Texas 2000) 245 B.R. 255, 259 ["The primary purpose of this three year survival statute is two fold: first, to allow claimants to sue a dissolved corporation for pre-dissolution activity for three years after its dissolution and, second, to protect shareholders, officers, and directors of dissolved corporations from prolonged and uncertain liability"]; *Mitchell v. Miller* (2000) 27 Kan.App.2d 666, 671 ["[Kansas's] corporate survival statute…prevents the abatement of a dissolved corporation's right of suit and is therefore remedial in nature"]; *MBC, Inc. v. Engel* (1979) 119 N.H. 8, 12 ["We deem that the policy of New Hampshire's corporation continuance statute is to insure that there is " 'a definite point in time at which the existence of a corporation and the transaction of its business are terminated' "]; *Williams v. Clark Sand Co., Inc.* (2015) 212 So.3d 804, 807 ["These [corporate-survival statutes] temporarily extend the life of a corporation for the limited purpose of winding up and allowing parties to bring any claims they may have against the corporation"].)

Considering these authorities and the language of section 180.1407, we conclude that the primary purpose of the statute is to extend the life of a corporation for two years after dissolution so lawsuits that otherwise would have abated may be brought by and against the corporation. We agree with Special Electric that this purpose is satisfied under section 180.1407 by publication of a dissolution notice that informs a claimant of the period during which claims can be brought and where claims can be sent. The statute's additional requirement that a dissolution notice include a "description of 'the information that must be included in a claim' " is not fundamental to this purpose: it does not *facilitate* the filing of such claims, but instead might *limit* the right to do so successfully, since it is "intended for the benefit and protection of the dissolved corporation, which could deny a claim on the basis that it does not include the information described in the notice." (*Lewis Oil, Inc.*, *supra*, 16 N.E.3d at p. 1011, 1014.) The omission of the description of information to be included in the claim was therefore only a technical defect.

c. The Technical Defect Did Not Prejudice Hart

A technical defect is not fatal to the Notice unless it prejudiced Hart. (*Burnett v. Hill*, *supra*, 207 Wis.2d at p. 121.) Special Electric had the burden of showing that Hart was not prejudiced. (*American Family Mut. Ins. Co. v. Royal Ins. Co. of America* (1992) 167 Wis.2d 524, 533.)

Lewis Oil suggests the defect does not prejudice the claimant. (*Lewis Oil Inc.*, *supra*, 16 N.E.3d at p. 1014.) Here specifically, Special Electric points out that the record reflects no evidence that Hart would have acted differently, or that the outcome of the motion for summary judgment would have been different, had the Notice included a description of the information that Hart needed to include with his claim. In any event, there is no reasonable inference of prejudice to Hart from the defect because his claim was rejected as untimely under the Notice, not because it failed to include certain information.

Hart fails to establish that the court erred in granting Special Electric's motion for summary judgment.

III. DISPOSITION

The judgment is affirmed. Special Electric is entitled to recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

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