19-P-638 Appeals Court

PACIFIC INSURANCE COMPANY, LTD.,[1] & another[2] vs. CHAMPION STEEL, LLC, & others.[3]

No. 19-P-638.

Worcester. February 4, 2020. - July 6, 2020.

Present: Rubin, Kinder, & McDonough, JJ.

Limitations, Statute of. Practice, Civil, Statute of limitations, Judgment on the pleadings. Conflict of Laws.

Civil action commenced in the Superior Court Department on May 16, 2014.

The case was heard by Janet Kenton-Walker, J., on motions for judgment on the pleadings.

Evan K. Buchberger for the plaintiffs.
Michael J. Mascis for Ultra-Safe, Inc.
Kelly B. Gaertner, of Connecticut, for Dimeo Construction Company.

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[1] A writing company of the Hartford Financial Services Group, Inc., individually and as subrogee of Stanford Dulaire, doing business as Connecticut Reliable Welding, LLC.

[2] Stanford Dulaire, doing business as Connecticut Reliable Welding, LLC.

[3] Shepard Steel Co., Inc.; Dimeo Construction Company; and Ultra-Safe, Inc.

Paul Erickson, for Shepard Steel Co., Inc., was present but did not argue.

RUBIN, J. This case arises out of a serious injury to an individual, James Doughty, who was injured on a construction site at Grafton High School in Grafton. The question before us is whether, as the plaintiffs, Doughty's employer and workers' compensation insurer, argue, the Massachusetts three-year statute of limitations for tort actions applies, G. L. c. 260, § 2A, or instead whether, as the defendants, who include the contractor and subcontractors on the project, aver, it is Connecticut's two-year negligence statute of limitations that governs this action. Conn. Gen. Stat. § 52-584. The motion judge concluded that the defendants were correct and granted their motions for judgment on the pleadings, as Connecticut's two-year statute of limitations for negligence actions had expired in 2013, before the plaintiffs filed these claims on May 16, 2014. The plaintiffs now appeal. Some background is in order.

Background. Defendant Dimeo Construction Company (Dimeo), a Rhode Island corporation, was contracted to perform construction work at Grafton High School. Dimeo contracted with defendant Shepard Steel Co., Inc. (Shepard), a Connecticut construction company, to perform decking work on the project. Shepard contracted with defendant Champion Steel, LLC

(Champion), a Connecticut company, for steel construction work on the decking. Plaintiff Stanford Dulaire, doing business as Connecticut Reliable Welding, LLC (Dulaire), a Connecticut resident, entered into a contract with Champion to perform metal work on the project. Dulaire employed James Doughty, a Connecticut resident, to perform decking work at the Grafton High School construction site.

On May 17, 2011, Doughty was working on a platform at the construction site and wearing a retractable life line that was manufactured by IKAR GmbH, a German company,[4] and marketed by defendant Ultra-Safe, Inc. (Ultra-Safe), an Arizona corporation. As pleaded, defendants Champion, Shepard, and/or Dimeo provided this life line to Doughty for his services. While he worked on the platform that day, Doughty's life line failed, causing him to fall eighteen feet to the ground and sustain serious injuries.

Plaintiff Pacific Insurance Company, Ltd. (Pacific), is the workers' compensation insurer for Doughty's employer, plaintiff Dulaire. Pursuant to its policy with Dulaire, Pacific has paid out workers' compensation to the injured Doughty under Connecticut's workers' compensation statute.

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[4] The plaintiffs originally named IKAR GmbH as a defendant to this action but voluntarily dismissed their claims on October 6, 2014.

Under Connecticut law, an employee who receives workers' compensation payments may, nonetheless, bring suit if "any injury for which compensation is payable . . . has been sustained under circumstances creating in a person other than [the] employer . . . a legal liability to pay damages for the injury." Conn. Gen. Stat. § 31-293(a). Connecticut's statute also creates a right of action by which employers like Dulaire who are obligated to pay workers' compensation can sue such third parties for recovery of any amounts paid or which they are obligated to pay. "[A]ny employer . . . having paid, or having become obligated to pay, compensation under the provisions of this chapter may bring an action against such person [i.e., the third party with legal liability to the injured employee] to recover any amount that he has paid or has become obligated to pay as compensation to the injured employee." Id.

In a prior proceeding between these parties, the Connecticut Supreme Court recognized a right of equitable subrogation under Conn. Gen. Stat. § 31-293. An insurer who has paid workers' compensation benefits to an employee pursuant to its policy with the employer may bring an action under Conn. Gen. Stat. § 31-293 as the subrogee of the employer. See Pacific Ins. Co. v. Champion Steel, LLC, 323 Conn. 254, 274 (2016). Pacific brings the instant suit against the defendants

as the subrogee of Dulaire,[5] claiming its right of action as an employer under Conn. Gen. Stat. § 31-293.

The plaintiffs allege that the defendants are liable for all payments that Pacific has made, and may be obligated to make, because they are legally liable to the injured employee Doughty. Pacific and Dulaire allege that Doughty's injuries were caused by the negligent acts of defendants Champion, Shepard, and Dimeo in supplying, inspecting, maintaining, and using the life line.[6] The plaintiffs also brought claims for breach of implied warranty against all of the defendants, breach of contract claims against Champion and Shepard, a breach of

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[5] Pacific initially brought its individual claims under the Massachusetts workers' compensation statute, G. L. c. 152, § 15. Pacific conceded at the hearing on the defendants' motions for judgment on the pleadings, however, that the Massachusetts statute would not give Pacific a right of action as an individual plaintiff because the workers' compensation benefits had been paid under the Connecticut, rather than the Massachusetts, workers' compensation law. Pacific does not contend otherwise on appeal.

[6] Specifically, the plaintiffs allege that each of these defendants breached its duty of care to Doughty by failing to provide safe access to the platform and unreasonably requiring Doughty to rely on the life line, failing to select a better fall protection plan and to supply working fall-arrest gear, and failing to inspect and maintain its fall-arrest gear and retractable life lines and remove defective equipment from service. The plaintiffs allege that the defendants knew or should have known that Doughty and Dulaire had no way to inspect the equipment for suitability, and that the defendants failed to train Doughty as to fall hazards or warn him of the risks of a defective lifeline.

bailment claim and a breach of implied contract claim against Champion, and G. L. c. 93A claims against all of the defendants.

Analysis. We review de novo an order allowing a motion for judgment on the pleadings. Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 600 (2010), S.C., 465 Mass. 297 (2013). The defendants argue that, because this is not a tort suit, and the plaintiffs' rights are all created by Connecticut statute, the Connecticut statute of limitations for negligence should apply.

As a matter of choice of law with respect to statutes of limitations, our rule is that "the forum State generally will apply its own statute of limitations to permit a claim unless: '(a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence'" (emphasis added). Nierman v. Hyatt Corp., 441 Mass. 693, 695-696 (2004), quoting Restatement (Second) of Conflict of Laws § 142 (Supp. 1989).

The defendants argue that Massachusetts has no substantial interest in this suit. First, they argue in essence that this is not a tort suit by an injured party, nor is it a suit by someone at least formally standing in his shoes. Rather, they assert that this suit, brought by Dulaire based only on its

right of action under the Connecticut workers' compensation statute, and by Pacific as a subrogee under that same Connecticut statute, is merely about how Connecticut has decided to provide remedies to those who pay out workers' compensation payments.[7]

Given that the Massachusetts court in this case will be enforcing the norms of Massachusetts tort law with respect to conduct undertaken at a worksite here in the Commonwealth, though, we disagree. Massachusetts has a substantial interest in enforcing its tort law for the full three-year period that the Massachusetts Legislature judged proper to allow individuals to seek redress for injuries caused by negligence in the Commonwealth. G. L. c. 260, § 2A.

The defendants attempt to analogize this case to a case involving a choice of law question in a suit based on a vehicular accident, Khan v. Royal Ins. Co., 429 Mass. 572, 573

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[7] Although the complaint states that Pacific has a right of action as a matter of Massachusetts law, because we are a notice pleading State, the fact that the complaint contains an erroneous legal theory is not dispositive. See Lichoulas v. Lowell, 78 Mass. App. Ct. 271, 275 (2010) ("A complaint is sufficient against a motion to dismiss if it appears that the plaintiff may be entitled to any form of relief, even though . . . the theory on which he seems to rely may not be appropriate" [citation omitted]); Colorio v. Marx, 72 Mass. App. Ct. 382, 386 (2008). For this reason, we reject the defendants' alternative argument that the case should be dismissed because Pacific did not plead in the complaint that it was a subrogee under Connecticut law.

(1999). But the plaintiffs in Kahn asserted that Massachusetts had a substantial interest in their claim against an insurance company in a case in which the plaintiffs, having been injured in a car accident in Massachusetts, sought to litigate their contract claim for underinsured motorist benefits involving "an insured under a Florida insurance policy issued in Florida by a Florida producer to a Florida motor vehicle owner, covering a vehicle bearing Florida plates and operated by a vice-president of the Florida insured." Id. at 575. It was not a suit to establish tort liability for the car accident in Massachusetts. The plaintiffs had already settled their claim against the driver of the other car in that accident. Khan, 429 Mass. at 573-574. Here, the issue that the plaintiffs seek to litigate in order to hold the defendants liable is precisely the tort liability of the defendants for their alleged negligence in Massachusetts. Massachusetts has a substantial interest in seeing this claim litigated for the full period allowed by our statute of limitations.

The defendants also argue that Massachusetts has no substantial interest in the case because "[t]he only connection that Massachusetts has to this case is that the incident happened to occur there." They argue that where a tort occurs here in Massachusetts, but the parties' contact with the State

is "fleeting," the Commonwealth lacks a substantial interest in the suit.

To begin with, the case which uses the word "fleeting," and on which the defendants would rely, is inapposite. See Andersen v. Lopez, 80 Mass. App. Ct. 813, 818 (2011). That case involved a suit brought in Massachusetts, based on an accident on a ferry in New Brunswick between motorcyclists from Maine and Massachusetts. The court specifically noted that "New Brunswick has an interest in ensuring compliance within its borders of the standards of behavior its tort law embodies and that interest may give New Brunswick an interest in the extraterritorial application of its tort law," id. at 817, just as we have concluded that Massachusetts has a substantial interest in this case in enforcement of the norms embodied in its tort law.

What we actually decided there was that the ordinary apply-the-forum-State's-statute-of-limitations rule, applying the Massachusetts statute of limitations to the claim, was not displaced by any "exceptional circumstance[]." Andersen, 80 Mass. App. Ct. at 816. We held that Massachusetts had a substantial interest in that lawsuit, not that (the question analogous to whether Massachusetts has an interest in this suit) New Brunswick did not: "Massachusetts has an interest in application of its own statute because the defendants are Massachusetts residents, made the trip on a vehicle they

purchased in Massachusetts, and are insured by a Massachusetts insurer." Id. What we concluded because of the fleeting nature of the parties' presence in New Brunswick was merely that that Canadian province had "no discernible interest in setting the time by which two nonresidents must resolve their disputes in foreign courts." Id. at 817.

In any event, even if fleeting contacts by all parties with the Commonwealth might lead to a conclusion that Massachusetts has no substantial interest in a lawsuit about tort liability for negligence committed here, the contacts in this case can hardly be described as "fleeting." The parties were not visitors passing through our State. Rather, this case involves allegedly tortious conduct doing injury to a worker at a worksite at a Massachusetts high school by defendants contracted to do work there over the course of months.[8] Although the plaintiffs and the injured party reside in Connecticut, and the defendants are out-of-State companies, their contacts with the Commonwealth were not transitory. Consequently, we conclude that the Massachusetts three-year statute of limitations applies.

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[8] As alleged, Champion contracted to perform its work on the site in November of 2010 and Dulaire entered its contract with Champion in January of 2011. Doughty was injured in May of 2011.

We also note that, even were we to conclude that the defendants were correct, and that Connecticut law provides the statute of limitations, they would fare no better. That is because, under Packtor v. Seppala & AHO Constr. Co., 33 Conn. App. 422, 431 (1994), cited in the plaintiff's brief but not addressed by the defendants, Connecticut law incorporates into actions like this, brought under its workers' compensation statutory scheme, the statute of limitations that would apply had the injured party brought a tort suit in the forum court. In Packtor, the Connecticut Appeals Court was required to "determine which statute of limitations governs the rights of an employer seeking to recover workers' compensation benefits from a third party tortfeasor." Packtor, 33 Conn. App. at 431. Here, Dulaire brings suit directly as an employer. Pacific, as Dulaire's subrogee, stands in the shoes of Dulaire as an employer; the same statute of limitations thus must apply to Pacific's claims as would apply to the employer under the statute. As the Packtor court explained, "[s]ince an . . . employer's statutory right to reimbursement depends on the liability of the third party to the employee, the statute of limitations applicable to the employer's right of action must be the same as that governing the employee's underlying action against the tortfeasor." Id. This is true whether the employer intervenes in the employee's own action or the employer

initiates the action directly, both of which are permitted under Connecticut law: in either case, the employer is not "prosecuting its own action, but the action of the employee." Id.

Determining the statute of limitations that would be applicable had the injured employee himself brought suit in the Superior Court against these defendants is straightforward. Because the injury was caused by the alleged negligence of the defendants performing work and providing equipment and safety planning for that work, at the construction site in Massachusetts, despite the residency of the injured worker, the Commonwealth would have a substantial interest in the litigation. Consequently, the Massachusetts three-year statute of limitations would apply.

The amended judgment of dismissal is reversed.[9]

So ordered.

[9] Our conclusion obviates the need to address the plaintiffs' alternative arguments for reversal.