

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BERSCHAUER PHILLIPS)	
CONSTRUCTION COMPANY, a)	No. 66643-6-I
Washington state corporation,)	
)	DIVISION ONE
Respondent,)	
)	UNPUBLISHED OPINION
v.)	
)	
MUTUAL OF ENUMCLAW)	
INSURANCE COMPANY, an insurance)	
company,)	
)	
Petitioner,)	
)	
)	
W. SCOTT CLEMENT, an adult)	
individual along with "JANE DOE")	
CLEMENT and any marital community;)	
JOHN E. DROTZ, an adult individual)	
along with "JANE DOE" DROTZ and)	
any marital community; and JENNIFER)	
FOWLER, an adult individual,)	
)	
Defendants.)	FILED: June 27, 2011
)	
)	

Appelwick, J. — Berschauer Philips Construction Company (BPCC) held a default judgment against Concrete Science Services of Seattle LLC (CSS), a terminated Minnesota limited liability company. In an effort to collect upon the

judgment, BPCC sued upon claims CSS purportedly held against its insurer, against two attorneys hired by the insurer on CSS's behalf, and against the CSS employee who managed the work. BPCC attached, but did not own these claims when the action was filed. The defendants filed a motion to dismiss for lack of standing, but the trial court instead granted BPCC's request for a stay under CR 17, pending BPCC's efforts to execute on those claims. This was error. The trial court lacked the subject matter jurisdiction to hear the case. We reverse for dismissal.

FACTS

In the summer of 2002, BPCC, a Washington corporation, subcontracted with CSS, a Minnesota limited liability company, regarding the staining of concrete floors at Redmond Junior High School. On September 12, 2003, following the project with BPCC, CSS was terminated by the State of Minnesota.

On March 15, 2004, BPCC filed a lawsuit in the King County Superior Court against CSS and other subcontractors involved in the work at Redmond Junior High School. CSS did not appear in the action, and on August 30, 2005, BPCC obtained an order of default and default judgment in the amount of \$318,611.97 against CSS.

In September 2005, BPCC informed CSS's insurer, Mutual of Enumclaw Insurance Company (MOE), of the lawsuit and default judgment and demanded payment of the judgment. MOE retained attorneys W. Scott Clement and John Drotz on behalf of CSS. Clement and Drotz filed a motion to vacate the default judgment on August 10, 2006, approximately 10 months after being retained to

represent CSS. On August 29, 2006, the King County Superior Court denied the motion to vacate.

CSS appealed from the trial court's order denying the motion to vacate the default judgment. On July 30, 2007, this court affirmed the trial court's ruling: "Considering the length of the delay [in filing the motion to vacate] and the absence of a sufficient excuse, we conclude CSS'[s] motion to vacate was not brought within a reasonable time." Berschauer Phillips Constr. Co. v. Concrete Sci. Servs. Nw., noted at 120 Wn. App. 1088, slip op. at 6 (2007) (footnote omitted). According to BPCCC, MOE paid the attorney fees awarded to BPCCC on appeal but did not pay the underlying judgment.

Thereafter, on October 31, 2008, BPCCC filed a lawsuit on CSS's "choses in action" against MOE in the Thurston County Superior Court. BPCCC alleged in its complaint that it had "attached all available choses in action [CSS] had against the MOE insurance policy." These "choses in action" purportedly arose due to MOE's failure "to act reasonably and promptly in dealing with the default judgment against its insured." Thus, BPCCC contended that MOE was responsible for the delay in moving to set aside the default judgment against CSS.

On July 16, 2009, BPCCC filed an amended complaint, alleging that it attached CSS's purported claims against MOE. It also alleges that it attached CSS's "choses in action" against attorneys Clement and Drotz and Jennifer Faller,¹ employee manager of and investor in CSS. The amended complaint

¹ Faller's last name was misspelled as "Fowler" in the complaint.

alleges that Clement and Drotz, “[b]y failing [to] remove the default judgment in a timely manner and in failing to put their client’s interests above those of MOE,” had “failed to meet the standard of care for attorneys in Washington State.” It further alleges that Faller “failed to timely tender claims to her company’s insurance carrier” and “failed to reasonably assist MOE, Clement, and Drotz in resisting the default judgment.”

In December 2009, the King County Superior Court issued three writs of execution, directing the Sheriff of Thurston County to levy on CSS’s claims against MOE, Clement, and Drotz. A sheriff’s sale of the claims was set for February 10, 2010.

Clement and Drotz filed a motion in the King County Superior Court to quash the writ of execution and strike the sheriff’s sale, contending that “there are no such claims that plaintiff seeks to attach, and even if there were, such claims are not subject to being executed upon.” The motion was granted, and the sheriff’s sale stricken, in January 2010. MOE and Faller also filed similar motions to quash, which Judge Paris Kallas of the King County Superior Court granted on February 9, 2010, “on the alternative and equally applicable grounds that” (1) “CSS has no property on which to execute” and (2) any property, if it exists, “is not property capable of execution because it is too uncertain.”

BPCC appealed both orders to this court. On March 28, 2011, this court affirmed the trial court’s order quashing the writs of execution. Berschauer Phillips Const. Co. v. Concrete Sci. Servs. of Seattle, LLC, noted at ___ Wn. App. ___, 2011 WL 1107228, at *3.

While the appeal on that matter was still pending, MOE, Clement and Drotz filed motions for summary judgment in the trial court, arguing that the case should have been dismissed, since BPCC had not acquired the claims before filing suit, and thus lacked standing. BPCC responded, asking the trial court to stay the entire action based on CR 17, until this court had resolved the first issue. The trial court heard argument of these motions on February 19, 2010, and decided to stay the suit while awaiting this court's decision on the writs of execution, in the parallel case. The trial court noted that this court's decision on appeal would be "determinative" of whether BPCC could acquire standing to assert the claims it was making.

The defendants requested reconsideration, and the trial court denied that motion on March 1, 2010. MOE, Faller, Clement, and Drotz timely sought discretionary review from the trial court's orders.²

DISCUSSION

Whether a party has standing to sue and whether a court has subject matter jurisdiction to hear a claim are questions of law that are reviewed de novo. Spokane Airports v. RMA, Inc., 149 Wn. App. 930, 939, 206 P.3d 364 (2009), review denied, 167 Wn.2d 1017, 224 P.3d 773 (2010).

Where there is no justiciable controversy before the court, the court lacks jurisdiction to consider it. See Reid v. Dalton, 124 Wn. App. 113, 122, 100 P.3d 349 (2004); High Tide Seafoods v. State, 106 Wn.2d 695, 701-02, 725 P.2d 411

² Before oral argument, BPCC entered into a stipulated agreement with Faller and Clement and Drotz, settling its claims against those defendants. MOE, as the sole remaining petitioner, was unaffected by that agreement.

(1986); Skaqit Surveyors & Eng'rs, LLC v. Friends of Skaqit County, 135 Wn.2d 542, 556-57, 958 P.2d 962 (1998). Where a trial court lacks subject matter jurisdiction, dismissal without prejudice is the limit of what that court may do. Housing Auth. v. Kirby, 154 Wn. App. 842, 850, 226 P.3d 222, review denied, 169 Wn.2d 1022, 238 P.3d 503 (2010).

Defendant MOE argues that the trial court should have granted its motion for summary judgment, since BPCC had no interest in the claims it was pursuing, and thus lacked standing. MOE contends that the trial court erred by granting BPCC's request for a stay. A plaintiff may not avoid dismissal by acquiring standing after filing suit. Amende v. Town of Morton, 40 Wn.2d 104, 106, 241 P.2d 445 (1952).

BPCC responds that the trial court was entitled to grant a stay in accordance with CR 17(a), which allows a plaintiff to perfect standing or status as a real party in interest, even if it did not have proper standing at the time the suit was filed.

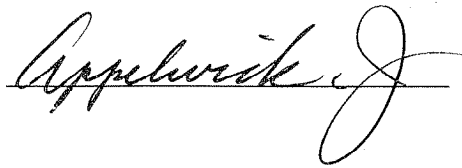
CR 17(a) is a narrow exception to the general rule that lack of standing requires dismissal. It provides, in relevant part:

Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

CR 17(a). BPCC asserts this provision applies here, or that at the very least, it

was a fairly debatable point that justified the trial court's decision to grant a stay. But, by its plain language, CR 17(a) is inapplicable to BPCC. CSS, as the owner of the choses in action that BPCC hoped to sue on, is the real party in interest. BPCC was not seeking ratification, or joinder, or substitution of CSS, and likely could not do so since CSS ceased to exist. Instead, BPCC was seeking outright ownership of the choses in action, via the execution and levy process. Since CR 17(a) was inapplicable on its face, it did not grant the trial court the authority to stay the case for a reasonable time. BPCC had no standing at the time it filed the action, nor did it have standing at the time the stay was issued.³ The trial court lacked subjected matter jurisdiction to hear the case and thus erred in granting BPCC's request for a stay, rather than dismissing the case.

We reverse for dismissal.

A handwritten signature in cursive script, appearing to read "Appelwick J.", written over a horizontal line.

WE CONCUR:

³ Moreover, this court's opinion in Berschauer Phillips Const. Co. v Concrete Science Servs., LLC, noted at ___ Wn. App. ___, 2011 WL 1107228, at *3, eliminated the possibility of acquiring ownership of those claims. It held that the choses in action were too uncertain to be subject to execution. Id.

Schiveller, J Grosse, J