United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions

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Bankruptcy Caption: HA-LO INDUSTRIES, INC., et al.

Bankruptcy No.: 02 B 12059

Adversary Caption: Ha-Lo Industries v. John R. Kelley

Adversary No.: 02 A 02456

Date of Issuance: **January 5, 2004**

Judge: **Carol A. Doyle**

Appearance of Counsel:

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re:	)	Chapter 11
	)	
HA-LO INDUSTRIES, INC., et al.,	)	
	)	Case No. 02 B 12059
Debtor.	)	
_____	)	
	)	Honorable Carol A. Doyle
HA-LO INDUSTRIES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 02 A 02456
	)	
JOHN R. KELLEY, JR.,	)	
	)	
Defendant.	)	
_____	)	
	)	
JOHN R. KELLEY, JR.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
CREDIT SUISSE FIRST BOSTON CORP., and NEAL, GERBER & EISENBERG, LLP,	)	
	)	
Third-Party Defendants.	)	

MEMORANDUM OPINION

This matter is before the court on the motion of John R. Kelley for leave to file a third-party complaint for contribution against Neil, Gerber, and Eisenberg ("NGE") and Credit Suisse First Boston Corp. ("CSFB"). For the reasons stated below, the motion is denied.

I. Issue

Kelley is the former CEO and president of HA-LO Industries (the debtor). HA-LO sued Kelley for allegedly breaching his fiduciary duty in connection with HA-LO's acquisition of Starbelly.com, Inc. ("Starbelly"), an event HA-LO asserts led to its bankruptcy filing. HA-LO filed its adversary complaint against Kelley on August 30, 2002. Discovery is closed and the trial is set to begin on February 19, 2004. Kelley now seeks to file a third-party complaint for contribution against NGE, HA-LO's principal legal advisor in the Starbelly acquisition, and CSFB, an investment bank that provided HA-LO with financial advice concerning the acquisition. Kelley's proposed complaint alleges an action for contribution against CSFB under The Joint Tortfeasor Contribution Act ("Contribution Act"), 740 ILCS 100/2.

The issue before the court is whether Kelley should be allowed to file a third-party complaint for contribution. The court will not allow Kelley to file this complaint for two independent reasons. First, Kelley is not alleged to have committed a tort and therefore the Contribution Act does not apply. Second, Kelley's motion comes too late in the process. Discovery is closed and the trial is about to begin. Allowing Kelley to file his complaint at this late date would cause either a significant delay in resolution of this case or potential prejudice to NGE and CSFB, and Kelley has offered no justification for his delay. His motion is therefore denied.

II. Standard for Allowing Third Party Complaints

Rule 14 of the Federal Rules of Civil Procedure provides that a third party complaint may be filed by a defendant against any person "who is or may be liable to [him] for all or part of the plaintiff's claim against [him]." The decision to permit a third-party complaint is "within the sound discretion of the trial court, based on timeliness of the motion and reasons for delay." Highlands Ins. Co. v. Lewis Rail Service Co., 10 F.3d 1247, 1251 (7th Cir. 1993). "Motions presented on the eve of trial or those that will delay the trial are generally denied." Albino v. City of Chicago, 578 F.Supp. 1487, 1489 (N.D. Ill. 1983) (Citations omitted). "Late motions may also be denied if they will prejudice the plaintiff or result in a proliferation of the issues." Id. (Citations omitted). A court may also deny a motion for leave to file a third party complaint if it determines that the defendant's claims "appear to be without merit." Creek v. Village of Westhaven, No. 83 C 1851, 1989 WL 24088 at *5 (N.D.Ill. March 15, 1989). See also Villa v. City of Chicago, 924 F.2d 629, 632 (7th Cir. 1991) (leave to amend is inappropriate where there is "undue delay... or futility of the amendment").

III. The Joint Tortfeasor Contribution Act

NGE and CSFB argue that Kelley's proposed third party complaint against them is futile on the merits because no tort is alleged against him and therefore he cannot recover under the Contribution Act. That act provides that "where two or more persons are subject to liability in tort arising out of the same injury to person or property... there is a right of contribution among them, even though judgment has not been entered against any or all of them." 740 ILCS 100/2. There is no right to contribution unless the party seeking contribution and the party against whom contribution is sought are both

"subject to liability in tort." People ex rel Hartigan v. Community Hosp. of Evanston, 189 Ill. App. 3d 206, 212, 545 N.E.2d 226, 229 (1st Dist. 1989).

The complaint alleges that Kelley breached his fiduciary duty to HA-LO. Under Illinois law, a claim for breach of fiduciary duty is not a tort. Instead, an action for breach of fiduciary duty is "controlled by the substantive laws of agency, contract and equity." Kinzer v. City of Chicago, 128 Ill. 2d 437, 445, 539 N.E.2d 1216, 1220 (1989). Illinois courts have made clear that one accused of breaching his fiduciary duty cannot rely on the Contribution Act in filing third-party claims. See, e.g., Wiebolt Stores, Inc. V. Schottenstein, 111 B.R. 162, 169 (N.D. Ill. 1990); American Envtl., Inc. v. 3-J Co., 222 Ill. App. 3d 242, 247, 583 N.E.2d 649, 653 (2d Dist. 1991); Community Hospital of Evanston, 189 Ill. App. 3d at 212, 545 N.E.2d at 230.

Kelley acknowledges that breach of fiduciary duty is not a tort under Illinois law, but argues that he nonetheless has a viable claim for contribution for three reasons. First, he asserts that HA-LO alleged the tort of waste in Count III of the complaint against him. Second, Kelley argues that HA-LO could have sued him for negligence or gross negligence (subject to his defenses), and therefore he is potentially "subject to liability in tort" and can recover under the Contribution Act. Third, Kelley argues that Illinois courts have broadly applied the Contribution Act to permit contribution among parties who are liable to the injured party under non-tort law.

A. Is the Waste Claim Alleged Against Kelley in Count III a Tort?

HA-LO alleges in its complaint that Kelley breached his fiduciary duty of care (Count I) , his fiduciary duty of loyalty (Count II), and his fiduciary duty not to waste HA-LO's assets (Count III).

Complaint, ¶¶ 56-59. While Kelley does not dispute NGE and CSFB's assertions that the Contribution Act does not apply to claims for breach of fiduciary duties, Kelley argues that he may recover under the Contribution Act because he is also alleged to have committed the tort of corporate waste.

This argument is flawed for two reasons. First, Count III of the complaint alleges that "Kelley owed a *fiduciary duty* to HA-LO not to waste HA-LO's assets." Id. at ¶ 57 (emphasis added). The charge of waste is part and parcel of HA-LO's underlying assertion that Kelley breached his fiduciary duties toward the company in a variety of ways. See Community Hosp. of Evanston, 189 Ill. App. 3d. at 213-14, 545 N.E.2d at 230 (similar allegations of waste treated as breach of fiduciary duty claim that did not support action under the Contribution Act). Second, the cases Kelley cites in support of his argument stand only for the proposition that waste may, in certain circumstances, be a tort. They do not hold that waste, much less corporate waste, is necessarily a tort. Serfecz v. Jewel Food Stores, Inc., No. 92 C 4171, 1998 U.S. Dist. LEXIS 3816 (N.D. Ill. March 26, 1998) (discussing common law duty of tenants not to waste leased premises); P.S.L. Realty Co. v. Granite Inv. Co., 42 Ill. App. 3d 697, 701, 356 N.E.2d 605, 608-09 (5th Dist. 1976) (discussing exception to rule regarding injunctions in cases involving tort of waste). The waste claim in Count III is based on Kelley's fiduciary duty to HA-LO. Therefore, under Kinzer, he cannot recover under the Contribution Act. 128 Ill. 2d 437, 539 N.E.2d 1216 (1989).

B. Do Potential but Unalleged Tort Claims Against Kelley Support a Claim for Contribution?

Next, Kelley asserts that he has a viable contribution claim because HA-LO could have sued him for negligence or gross negligence. Kelley argues that he is potentially liable in tort to HA-LO and therefore can sue others who are also potentially liable in tort to HA-LO, such as NGE and CSFB. Kelley relies on Doyle v. Rhodes, 101 Ill. 2d 1, 461 N.E.2d 382 (1984) in asserting that he can sue for contribution even though no one has actually alleged a tort against him. In Doyle, a road construction worker sued a motorist who injured him, but did not sue his employer. 101 Ill. 2d at 4, 461 N.E.2d at 384. The motorist filed a third party complaint against the employer for contribution under the Contribution Act, alleging that the employer's negligence and violation of a worker safety statute contributed to the employee's injury. Id. The employer argued that it was not liable in tort, and therefore not liable under the Contribution Act, because of its immunity under the Workers Compensation Act. 101 Ill. 2d at 5, 461 N.E.2d at 384. The Doyle court held that the motorist could sue the employer under the Contribution Act because the employer was indeed "subject to liability in tort" to its employee. 101 Ill. 2d at 13, 461 N.E.2d at 388. It reasoned that the Workers Compensation Act simply provided an affirmative defense to any tort action by an employee. 101 Ill. 2d at 12, 461 N.E.2d at 387. The court concluded that an employer is potentially liable in tort until the immunity defense is established, so the requirement that the employer be "subject to liability in tort" was satisfied. 101 Ill. 2d at 14, 461 N.E.2d at 388. Thus, the court allowed the employer to be sued for contribution even though the plaintiff employee chose not to sue it. Id.

Applying this reasoning, Kelley argues that HA-LO need not have filed an actual tort claim against him in order for him to recover in contribution. Kelley asserts that HA-LO could have sued him for negligence or gross negligence, subject to his defenses. He therefore claims he is "subject to liability in tort" to HA-LO for purposes of the Contribution Act, even though HA-LO chose not to allege any tort claim against him. Kelley argues in effect that a plaintiff should not control whether the defendant has a viable contribution claim by failing or refusing to allege tort theories that could have been asserted against the defendant. The Doyle court implicitly recognized that a defendant is not limited to the causes of action actually filed by the plaintiff when it permitted the defendant in that case to allege a contribution claim against the employer even though the plaintiff chose not to sue his employer under any theory. 101 Ill. 2d at 14, 461 N.E.2d at 388.

However, Kelly's argument fails because only Kelley himself is asserting that he is liable in tort to HA-LO, and thus no tort liability will ever be established against Kelley at trial. In Doyle, the motorist alleged the employer's negligence and would therefore be obliged to prove that negligence at trial in order to recover under the Contribution Act. 101 Ill. 2d at 4, 461 N.E.2d at 384. Here, HA-LO has not sued Kelley under any tort theory, so no one will prove his tort liability at trial. In order to recover in contribution, both Kelley and any third party defendant must be found liable in tort to HA-LO. Kelley cannot satisfy the "subject to liability in tort" requirement of the Contribution Act merely by asserting that a theoretical tort claim that no one will prove could have been alleged against him.

C. Is Tort Liability Necessary Under the Contribution Act?

Finally, Kelley argues that he can recover under the Contribution Act even if he is not liable in tort to HA-LO. Kelley relies on Joe & Dan Int'l Corp. v. United States Fidelity & Guar. Co., 178 Ill. App. 3d 741, 533 N.E.2d 912 (1st District 1989), and Cirilo's, Inc. v. Gleeson, Sklar & Sawyers, 154 Ill. App. 3d 494, 507 N.E.2d 81 (1st District 1987). In both cases, the same division of the same Illinois Appellate Court district held that a party can be deemed "subject to liability in tort" based on potential liability in tort, even though the duty to the injured party arose under contract, not tort law. 154 Ill. App. 3d at 497, 507 N.E.2d at 83; 178 Ill. App. 3d at 750, 533 N.E.2d at 918. The court in both Cirilo's and Joe & Dan relied on a statement in Doyle that the Contribution Act "focuses, as it was intended to do, on the culpability of the parties rather than the precise legal means by which the plaintiff is ultimately able to make each defendant compensate him for his loss." Doyle, 101 Ill. 2d at 14, 461 N.E.2d at 382. However, these cases ignore the next sentence in the Doyle opinion, in which the court states "'The theory is that *as between the two tortfeasors* the contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done.' (Citations omitted)." Id. (emphasis added). The Doyle court makes clear that it applied the Contribution Act as between two tortfeasors, not between parties liable under any legal theory. Two later decisions have rejected the reasoning in Joe & Dan and Cirilo's. Community Hosp. of Evanston, 189 Ill. App. 3d at 213-214, 545 N.E.2d at 230-31; Wieboldt Stores, Inc., 111 B.R. 162, 169-71 (N.D.Ill. 1990). This court agrees with those decisions, and concludes that the Doyle decision does not eliminate the "subject to liability in tort" requirement of the Contribution Act.

For all of these reasons, the court concludes that Kelley cannot state a viable claim for contribution. Therefore, he will not be permitted to file his third-party complaint.

IV. Timeliness

Kelley's motion is also denied because his request for leave to file a third party complaint comes too late in this adversary proceeding. The Illinois Supreme Court mandates that where there is an action pending, "the party seeking contribution must assert a claim by counterclaim or by third-party claim *in that action*." Laue v. Leifheit, 113 Ill. 2d 191, 196, 473 N.E.2d 939, 941 (1984). Filing a third-party claim as part of the ongoing case is preferable because "one jury should decide both the liability to the plaintiff and the percentages of liability among the defendants, so as to avoid a multiplicity of lawsuits in an already crowded court system and the possibility of inconsistent verdicts." 113 Ill. 2d at 197, 473 N.E.2d at 942.

Although Kelley is attempting to file his third party complaint to comply with the Laue rule that third party complaints be filed in the underlying tort action, he waited until the underlying case against him is ready for trial. A trial court has discretion to deny a motion to file a third party complaint when a party does not file its motion until discovery is complete and offers no justification for the delay. In Highlands Ins. Co. v. Lewis Rail Serv. Co., 10 F.3d 1247, 1251 (7th Cir. 1993), the court held that a district court did not abuse its discretion in denying a similar motion when the defendant "waited until after discovery and three weeks before summary judgment motions were due to file its motion, with no excuse other than that its counsel was trying to save money for his client." The court noted that "adding

parties at such a late date would have substantially delayed the proceedings and unnecessarily complicated them." Id. at 1251.

The same is true here. HA-LO initiated its adversary complaint against Kelley well over a year ago, in August 2002. Discovery is closed and the deadline for filing dispositive motions has passed. The trial was set for January 12, 2004, and was recently delayed until February 19, 2004 solely to accommodate serious health issues of Kelley's lead trial counsel. Kelley has known from the beginning the role that NGE and CSFB played in the Starbelly transaction but waited until now to raise the issue of third-party contribution. He has offered no explanation whatsoever of why he waited so long to file his third-party complaint.

Recognizing that his motion is late, Kelley offers two ways of dealing with his third-party complaint that would not require changing the scheduled trial date of HA-LO's claims against him: (1) forcing NGE and CSFB to conduct discovery in less than two months, or (2) bifurcating trial of the claims against him and the contribution claims. Neither suggestion is viable.

Regarding Kelley's first suggestion, the court will not force NGE and CSFB to complete in less than two months discovery that Kelley and HA-LO conducted over the course of a year. Regarding his second suggestion, although bifurcation could be permitted in unusual circumstances, no such circumstances exist here. Kelley argues that his complaints against NGE and CSFB can be tried separately after the trial of HA-LO's claims against him, and that NGE and CSFB could take discovery while the first phase of the trial proceeded. He asserts that this approach would allow trial to go forward as scheduled between HA-LO and Kelley without violating the Laue rule that the contribution claims be brought in the original tort case. Kelley contends that the Laue rule is flexible and permits

separate trials of the underlying tort and contribution claims. In Cook v. General Elec. Co., 146 Ill. 2d 548, 588 N.E.2d 1087 (1992), the Illinois Supreme Court recognized that Laue does not require that a contribution action be tried together with the original tort action in every case. However, the Cook court emphasized that joint trial of the original tort action and the contribution action is strongly preferred in order to avoid multiple lawsuits regarding the same facts and the possibility of inconsistent verdicts, and to minimize trial time and attorney fees. 146 Ill. 2d at 556, 588 N.E.2d at 1091. The Cook court made clear that a joint trial should occur unless there is a compelling justification for a different approach. In this case, however, there is no justification at all for bifurcating the claims against Kelley from his contribution claims against CSFB and NGE.

Kelley also relies on Anderson v. Alberto-Culver USA, Inc., 337 Ill. App. 3d 643, 789 N.E.2d 304 (1st Dist. 2003) to support his bifurcation argument. In Anderson, the Illinois Appellate Court affirmed the trial court's bifurcation of trial of the underlying tort claim and the contribution claims. The trial court in Anderson found that bifurcation was necessary to exclude evidence of settlement agreements that were not relevant to the underlying tort claims and would be highly prejudicial to certain defendants. 337 Ill. App. 3d at 665, 789 N.E.2d at 320. The contribution claim was supposed to have been heard by the same jury deciding the underlying tort claims, and all parties participated in the first phase of trial. Relying on Cook, the appellate court concluded that bifurcation of the underlying tort claims and contribution claims was permissible under Laue. Id. However, no similar evidentiary circumstances or other unusual reasons exist to justify bifurcation in this case.

Finally, Kelley relies on Wingstrom v. Evanston Hospital Corp., 1992 U.S. Dist. LEXIS 6641 at *3 (N.D. Ill. May 5, 1992), to support his argument for separate trials. In Wingstrom, the court

allowed a separate trial of a third-party contribution claim only because "the jury... did not consider the issue of liability, and hence, there is no possibility of an inconsistent verdict." Id. at *7. Therefore, "the policy concerns stated in *Laue* [were] not relevant." Id. The Wingstrom court noted that prejudice, lack of explanation for delay, and the potential for duplicative litigation were "not present." Id. at *4. However, in this case, Kelley has offered no explanation for his delay and there is significant potential for prejudice and duplicative litigation.

Under Kelley's proposed bifurcated approach, the central question of Kelley's liability would be tried without any meaningful participation by NGE and CSFB. Kelley can only recover from NGE or CSFB if there is a finding that he is liable in tort to HA-LO. Serious collateral estoppel issues could be raised if Kelley is found liable to HA-LO in the proposed first phase of trial. See Laue, 105 Ill. 2d at 197, 473 N.E.2d at 942 (court recognized but did not decide collateral estoppel issue). If NGE and CSFB are bound by any finding of liability against Kelley in the first trial, NGE and CSFB could be seriously prejudiced by permitting a trial between HA-LO and Kelley to proceed without them. If they are not bound by any such finding, there would be duplicative litigation of whether Kelley is liable to HA-LO. These are precisely the kinds of issues the Laue court intended to eliminate. Kelley has offered no good reason to force NGE or CSFB to face these risks, or to complicate or delay a trial that has been set for months.

Therefore, the court denies Kelley's motion to add third party defendants because the motion is too late and Kelley has not alleged a viable contribution claim.

DATED: January 5, 2004

ENTERED:

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Carol A. Doyle
United States Bankruptcy Judge