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MAR 13 2008

STATE OF VERMONT
CALEDONIA COUNTY, SS

CALEDONIA COURTS

Susan Crane
Plaintiff

v.

Barclay Stetson, Tina Stetson and
New England Stone Crafters, Ltd.
Defendants

SUPERIOR COURT
Docket No. 91-5-05 Cacv

Decision on:

Motion to Dismiss by Defendants Tina Stetson and New England Stone Crafters, Ltd;

-and-

Plaintiff's Motion to Enlarge Time for Service;

-and-

Defendant Barclay Stetson's Motion to Dismiss Count I

On May 10, 2005, Plaintiff brought a complaint against Barclay Stetson only, seeking to hold Stetson personally liable on a New Hampshire consumer-protection judgment for \$51,459.32, which judgment was awarded to Plaintiff in a dispute about garage shingles. The judgment was not against Stetson personally, but rather against a corporation in which he and his wife were shareholders, Down Under Masonry, Inc.

Plaintiff's original Complaint was troubled. First, it asserted a count for consumer fraud in Vermont, pursuant to 9 V.S.A. § 2451 *et seq.*, although Plaintiff already was a judgment creditor of Defendant's corporation consequent to the New Hampshire consumer-protection action on what appear to be the selfsame facts, all of which related to a consumer transaction in New Hampshire. Second, it asserted a count for "piercing the corporate veil," on the undeveloped idea that "The shareholder's [*sic*] of a corporation are personally liable for their torts." Third, it asserted a count for "misrepresentation," on the argument only that "Barclay Stetson misrepresented [*sic*] to Susan [C]rane." In customary usage, "misrepresented" would take a direct object – i.e., it would be said what it is that Stetson is alleged to have misrepresented. Fourth, it asserted a count for "Attorney's fees under 9 V.S.A. 2451, and 9 V.S.A. 4011," on the argument that, "Susan Crane is entitled to her attorneys [*sic*] fees for bringing this lawsuit. Susan Crane has been a 'prevailing party' in her claims to recover payment." Of course, if Susan Crane had prevailed in her claims to recover payment, the action would have been unnecessary. She was a judgment creditor in New Hampshire; she had at the time of filing prevailed in nothing in Vermont. Notwithstanding the peculiar form of pleading,

the claim was clear enough: Plaintiff accused Barclay Stetson of torpedoing Down Under Masonry, Inc., in order to avoid the New Hampshire judgment.

The parties warred for some time over procedural details and discovery, and the matter was further delayed while the parties and the court awaited resolution of a summary judgment motion in the matter of *Down Under Masonry, Inc v. Peerless Ins. Co.*, 9-1-05 Cacv, wherein Down Under Masonry apparently sought indemnification from its insurer in relation to Plaintiff's judgment. The decision in that matter is not part of this record, but Attorney Spaneas, for the Plaintiff, wrote the clerk, on June 15, 2007, to advise that "Down Under Masonry's summary judgment motion was denied. Therefore, my client will not be getting paid from Down Under Masonry's insurance carrier, and she would like to continue her collection efforts." That rendering is inconsistent with the Decision and Order of this court, Manley, J., of June 25, 2007, which noted that "judgment was entered in favor of the insurance company." There is a difference between being denied summary judgment in your favor and having it entered against you. It is not for the court to refer to a judgment not in the record; so we will leave that mystery be. Judge Manley's June 25 Order compelled Defendant – at the time singular – to get going with production of tax returns, tax bills, and bank statements, all of which were germane to Plaintiff's veil-piercing argument, and all of which Defendant theretofore had not produced. Judge Manley expressly threatened sanctions.

On February 23, 2007, Plaintiff moved to amend her complaint and to add parties. This motion at last cast light on the veil-piercing arguments alluded-to in the original Complaint. The motion alleged, at ¶¶ 4-12, that Barclay Stetson and Tina Stetson had created a new corporate entity, New England Stone Crafters, Ltd., as part of a sham to carry on Down Under Masonry's business whilst avoiding the New Hampshire judgment. On June 23, 2007, this court, Manley, J., granted the motion. On July 30, 2007, the parties filed a stipulated discovery and alternative dispute resolution order.

Plaintiff inexplicably formed the belief that the motion to amend, once granted, became self-executing and obviated any need actually to file an amended complaint or to serve the parties added. See, by way of explanation, Objection to Motion to Strike at ¶ 5, advancing the errant argument, "There was no requirement that an amended complaint be filed. The granted Motion to Amend became part of the Complaint."¹ Eventually, when Defendant refused to respond to discovery requests propounded to parties not added or served, Plaintiff came to see what was happening² and filed an Amended Complaint on October 24, 2007. Defendant, still alone in the suit, moved to strike it.

¹ Having reviewed both, the court cannot say that the motion was so clear as to advise Defendant(s) unambiguously of the specific claims in the Amended Complaint as it actually was drafted. Hinting at a cause of action is different from pleading one.

² In a letter of October 16, 2006, Attorney Gregory Clayton explained to Attorney Spaneas, in response to the latter's protest that he "practice[d] procedural law in a petty and unreasonable manner." Attorney Spaneas relied on something of a burden-shifting clause in his Motion to Amend, which read, "Nevertheless, Plaintiff will serve Tina Stetson and New England Stone Crafters, Ltd. with the original Complaint and a copy of this Motion and an amended Complaint if Attorney Clayton does not represent either." Attorney Clayton, accused of letting his opponent run the clock unknowingly, responded, "The issue here is not whether or not I can accept service on behalf of Tina Stetson and New England Stone

In Vermont, one has sixty days from filing to serve a summons and complaint upon a defendant. V.R.C.P. 3. "The summons and complaint shall be served together." V.R.C.P. 4(d). On November 9, 2007, Plaintiff served some papers on Tina Stetson and New England Stone Crafters, but omitted summonses. Plaintiff concedes the summonses were omitted. See Pl's Objection to Motion to Dismiss, filed January 31, 2008, ¶ 8.

On November 21, 2007, this court, Eaton, J., issued a decision quite favorable to Plaintiff under the circumstances: The court found no prejudice from the delayed filing of the Amended Complaint and therefore denied the Defendant's – still singular – motion to strike it. The court noted in that decision, "The court has no indication of service here and therefore the only defendant of record at this time is Barclay Stetson." *Id.* p.2. The court expressed considerable displeasure with the tenor of Plaintiff's filings, and ordered counsel to support his accusations of dishonest conduct or else withdraw them with a written apology.³ The court's November 21 decision also cautioned the parties on delay and warned, "in any event, this case is to be trial ready by May 1, 2008 with all parties properly joined participating."

I. New Defendants' Motion to Dismiss for Failure of Process

Plaintiff waited until January 18, 2008 to serve summonses on Tina Stetson and New England Stone Crafters, Ltd. On January 23, 2008, the new defendants moved to dismiss for failure of process. V.R.C.P. 12(b)(5).

The question thus becomes: When a new party is added by amended complaint, when must that party be served? Vermont law on this point is settled. The clock starts with the filing of the motion to amend. *Children's Store v. Cody Enterprises, Inc.*, 154 Vt. 634 (1990)⁴. In this case, the clock began to run on February 23, 2007, the date Plaintiff moved to amend the complaint to add the new parties. Plaintiff persists in misunderstanding the service requirement, by relying on a quotation from *Children's Store*, "... the action is commenced when the plaintiff files the motion to amend and the proposed complaint." Pl's Objection to Motion to Dismiss, filed January 31, 2008, ¶ 7 (emphasis Plaintiff's). This quotation does not establish that a plaintiff may indefinitely delay filing an actual amended complaint, but rather reflects the common-sense expectation that a motion to amend would contain the proposed amendment along with it.

Crafters, as I expect I would be retained by both and would be authorized to do this. The issue, instead, is the fact that there has never been an amended pleading so I do not know what your claims are against these parties."

³ Plaintiff's counsel did subsequently appear at a status conference and make satisfactory amends for the objectionable tenor of the filing.

⁴ "The state and federal courts that have confronted this question have held that an action against a new party, brought in through amendment to a preexisting complaint, is commenced when the motion to amend, and the new complaint, is filed even though permission to make the amendment is given at a later date." *Children's Store v. Cody Enterprises, Inc.*, 154 Vt. 634, 640-41 (1990). It has not escaped this court's attention that *Children's Store* determined the date of commencement for limitations purposes; however, we find no salient difference when commencement is computed for purposes of service. Furthermore, as explained *infra*, Plaintiff was late even under the theory the court declines to adopt.

See V.R.C.P. 3 (“When an action is commenced by filing, summons and complaint must be served upon the defendant within 60 days after the filing of the complaint.”); V.R.C.P. 4(d) (quoted *supra*: “The summons and complaint shall be served together.”)

Plaintiff is asking to build one procedural deviation upon another. The court is more inclined to regret the first indulgence than to grant the second. Indeed, even if the court were to adopt Plaintiff’s inaccurate argument that she had sixty days from the dilatory filing of the Amended Complaint on October 24, 2007, the action *still* would not have been timely commenced against Tina Stetson and New England Stone Crafters, Ltd with service on those parties accomplished January 18, 2008.

To put in perspective how inefficient has been the litigation here, we note that, when it was rendered on October 14, 2004 by the Grafton County, New Hampshire Superior Court, in the matter of *Susan and John Crane v. Barclay Stetson, d/b/a Down Under Masonry, Inc., et al.*, the New Hampshire judgment to be enforced was calculated by \$15,000 consumer-fraud damages, plus \$32,680 attorney’s fees, plus \$3,779.32 costs. That is, damages constituted less than one-third of the judgment on the day it was issued. We shudder to think how miniscule must be the original damages in relation to the expenses thus far incurred by the parties.

The root of the procedural misunderstanding here can be found at p. 4, ¶ 13 of Plaintiff’s Motion to Amend and to Add Parties. Plaintiff offered, incorrectly:

It is more practical and efficient to allow these amendments rather than require Plaintiff to file a new lawsuit. Barclay Stetson and his wife Tina were the sole directors and shareholders of [Down Under Masonry, Inc.]. Now they are the sole owners and directors of New England Stone Crafters, Ltd. They both obviously know the issues involved. Having to file a new complaint against New England Stone Crafters, Ltd. and Tina Stetson seems like nothing more than unnecessary delay and cost.

Recall that the New Hampshire judgment in this case was against Down Under Masonry, Inc. only, and that the New Hampshire court expressly declined to enter damages against Barclay Stetson personally. Plaintiff’s opinion that the corporate form is a hassle does not change the Vermont Rules of Civil Procedure. It is regrettable that the court let Plaintiff’s peculiar assertion go unremarked. Down Under Masonry, Inc., Barclay Stetson, Tina Stetson, and New England Stone Crafters, Ltd., are separate and distinct legal entities. Those entities’ actual structures, and their actual knowledge, whatever those may be, are not the only ends of service of process—the procedure serves also to protect officers, other shareholders, employees, and would-be lenders and insurers from claims unknown. What Plaintiff is asking in the above quotation is that the court and the parties real and imagined simply come together and assume the veil-piercing that she is obligated to prove in her lawsuit, and to assume un-articulated causes of action as they might appear viable.

“At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.” V.R.C.P. 4(j). That is, tolerance for procedural transgressions is discretionary when there is no prejudice to the party in receipt but impermissible when prejudice appears. We have reached a point in this litigation where further procedural liberality would be an inappropriate exercise of discretion. More important, Plaintiff’s procedural deviations have crossed into prejudice. The court at this late stage has no idea who else might hold an interest in New England Stone Crafters, Ltd.⁵, nor what business relationships that entity might have entered into unaware of- or fundamentally confused about the claims against it. It would be prejudicial to say to these parties that this litigation has gone on around them, with discovery now closed and the claims still deeply ambiguous, but that they should be defendants on par with Barclay Stetson, all because they have some relationship with a corporate judgment debtor in New Hampshire. Allowing Plaintiff to cast about wildly and ambiguously for any entity with any relationship to the corporate judgment debtor, with disregard to the rules of pleading, prejudices the parties accused but not added.

Process against putative defendants Tina Stetson and New England Stone Crafters, Ltd. is defective in form, timing, and clarity. The court in its discretion declines to indulge further procedural transgressions. Furthermore, the court has no discretion to forgive procedural transgressions which cause material prejudice, and the missteps in this case have deprived Tina Stetson and New England Stone Crafters, Ltd. of their substantial rights to timely know, understand, discover, and defend against those facts and claims pled against them.

II. Barclay Stetson’s Motion to Dismiss Count I

On February 4, 2008, Defendant Barclay Stetson moved to dismiss Count I of the Amended Complaint, which alleges that he violated 9 V.S.A. §§ 2451 and 2461 by “misrepresent[ing] the quality, grade and goods and materials, namely the wood roof shingles that were actually installed on [Plaintiff’s] garage.” Defendant claims that the New Hampshire court’s judgment on the New Hampshire consumer-protection claim is *res judicata* as to his personal liability on the consumer transaction in New Hampshire.

It is clear from the Post-Trial Order of the Grafton County, New Hampshire Superior Court in the matter of *Susan and Jonathan Crane v. Barclay Stetson d/b/a/ Down Under Masonry, Inc., and Brian Moore*, No. 03-C-016 (Houran, J., June 4, 2004) that personal liability on a consumer-fraud theory was sought by Plaintiff in New

⁵ Defendant’s Answer to the Amended Complaint, at ¶ 13 admits “only that Barclay Stetson and Tina Stetson are some of the directors, officers and shareholders of New England Stone Crafters, Ltd.” It is thus unknown whether other entities may have a financial interest in the business. Plaintiff is, in one breath, accusing Barclay and Tina Stetson of fraud, while in another asking everyone to assume that they would simply share with their business partners or shareholders the bad news of New England Stone Crafter’s potential liability. If there are other shareholders, they are entitled to know of claims against the entity, and trusting alleged fraudsters to share actual knowledge is inadequate to the ends of justice and due process. This is one among many reasons that proper service is more than an empty formality.

Hampshire and denied after trial. Plaintiff objected and sought clarification as to whether Barclay Stetson was personally liable on the judgment. New Hampshire's Judge Houron issued an Order on Motion for Clarification, dated September 10, 2004, which clarified, "The jury was properly instructed and questioned, without objection in this regard, and returned its verdicts against Down Under Masonry, Inc."

Defendant's motion does not cite the portion of our dismissal rule, V.R.C.P. 12, under which he moves. *Res judicata* is an affirmative defense which is generally inappropriate to a motion to dismiss for failure to state a claim. *White Current Corp. v. State*, 140 Vt. 290, 292 (1981) (overruled on other grounds) ("The affirmative defenses of estoppel and statute of limitations which must be specially pleaded, V.R.C.P. 8(c), are unavailable for consideration on a motion to dismiss pursuant to V.R.C.P. 12(b)(6).") That is to say, a pleading that *res judicata* bars a claim typically must come in the form of a motion for summary judgment. However, in rare circumstances, the court may conclude *sua sponte* that a defect bars a claim where the defect is apparent on the face of the claim and no prejudice results. See, for example, *DaimlerCrysler Services North America v. Ouimette*, 175 Vt. 316 (2003).

The court is at a loss to explain why Plaintiff would plead a separate Vermont Consumer Fraud claim when she has a New Hampshire consumer-protection judgment in hand based on the same facts. The true effort in this action does not appear to the court to be one to relitigate the shingle-related contract and consumer-protection claim that arose in New Hampshire—indeed Plaintiff's own pleadings *invite* the court to treat the New Hampshire judgment as *res judicata* on the facts of the consumer fraud there, see Amended Complaint ¶¶ 5-10—but to allege post-judgment misconduct in Vermont to hide funds that should have satisfied the New Hampshire Judgment. It is, as Plaintiff repeatedly casts it, a collection action.

The important and substantive part of Plaintiff's Amended Complaint can be found at ¶¶ 12 *et seq*:

Barclay and Tina Stetson have intentionally and purposefully depleted [Down Under Masonry, the judgment debtor] and bankrupted DUM in order to avoid paying the judgment owed to Plaintiff. On January 16, 2007, at a hearing in New Hampshire, it was discovered that Barclay and Tina Stetson decided to let DUM become insolvent and defunct because of the \$51,459.32 judgment Plaintiff has against DUM (¶12) ... Tina and Barclay Stetson, rather than properly managing DUM so that DUM could pay its creditors, instead decided to create New England Stone Crafters, Ltd (¶ 13) ... New England Stone Crafters, Ltd. has the same address, location, office and office supplies that previously were used and controlled by DUM. Employees of DUM have now become the employees of New England Stone Crafters, Ltd. Tina and Barclay Stetson with the intent to cheat DUM's creditors and avoid paying Plaintiff's judgment, simply let DUM go and instead began operating their business under a new name. (¶ 14).

Plaintiff's Amended Complaint, at Count I, incorporates the New Hampshire consumer-protection judgment by reference and alleges violation of "9 V.S.A. §§ 2451 and 2461." Section 2451 is the "purpose" provision; section 2461 is the "civil penalty" provision. It is clear from Plaintiff's Objection to Motion to Dismiss Count I, at p.2, that she meant to allege violation of § 2453(a), which prohibits, "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Remedies are available, as Plaintiff indicates, to "any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited ..." 9 V.S.A. 2461(b). "'Consumer' means any person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business ..." 9 V.S.A. § 2451a(a). Plaintiff's status in Vermont is that of a judgment creditor seeking to pierce the corporate veil protecting a judgment debtor's officers. She has pled no consumer transaction here, and she has pled no facts that would make her a consumer for purposes of Vermont law. Accepting Plaintiff's own pleadings as true, the consumer transaction at issue occurred in New Hampshire and was litigated there.

Plaintiff's New Hampshire judgment against Down Under Masonry, Inc. is presumed to be entitled to full faith and credit in this state, but the flip-side of full faith and credit is comity. She cannot relitigate the same transaction here in an effort to pierce the corporate veil *based on the original consumer fraud*, where she either did not assert the claim or failed at it when the claim was adjudicated in New Hampshire. See *Hall v. McCormick* 154 Vt. 592, 594 (presumption of full faith and credit; relitigation unnecessary); *Sabourin v. Woish*, 117 Vt. 94 (1952) (rule against splitting); Restatement (Second) of Conflict of Laws § 100 (money judgments of sister states enforced); Restatement (Second) of Conflict of Laws § 307 (rule of merger applies "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.")

Plaintiff may attempt to enforce her New Hampshire judgment against Defendant personally, based on Defendant's alleged conduct, as an officer or shareholder, in hiding the funds of Down Under Masonry, Inc. That action, however, is on the judgment debt and not on the consumer transaction already litigated. Count I is not necessary to recognition or enforcement of the New Hampshire judgment and represents impermissible splitting and duplication. Thus, Count I fails to state a claim for which this court could grant relief under any conceivable circumstance.

As this court wrote in November, this case is to be trial ready by May 1, 2008.

Order

For the foregoing reasons,

Plaintiff's Motion to Enlarge Time for Service is **DENIED**;

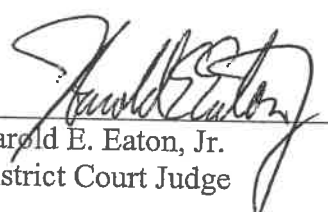
The case against Defendants Tina Stetson and New England Stone Crafters, Ltd. is **DISMISSED** as to all claims and causes of action; and,

Defendant Barclay Stetson's Motion to Dismiss Count I is **GRANTED**.

This case will be scheduled for trial after May 1, 2008. The parties are to advise the Court, in writing, of the anticipated length of their case, including cross-examination of opponents witnesses, no later than May 1, 2008.

So ORDERED.

Dated at St. Johnsbury this 13th day of March, 2008.



Harold E. Eaton, Jr.
District Court Judge