

Curtis D. Zelmer v. 21st Century Towing, Inc., Adversary No. 00-3059-rld

Curtis D. Zelmer, Case No. 300-30202-rld11

Appellate No. Dist. Ct. CV-01-1309-HA

11/2/01

Haggerty, aff'g RLD

Unpublished

The Bankruptcy Court determined in a letter opinion that the unsecured portion of the creditor's claim was barred by issue preclusion and claim preclusion in light of a pre-petition arbitration award issued in connection with the dispute between the creditor and the debtor. The District Court affirmed, holding that the creditor proceeded to arbitration on the theory that the debtor had committed a material breach rather than a partial breach, as demonstrated by the creditor's request in the arbitration for future damages in the form of lost profits and income, and that this election precluded the creditor from seeking additional damages not requested in the arbitration.

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DISTRICT OF OREGON

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Adv 11-6-01

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re:

CURTIS D. ZELMER,

Debtor-In-Possession,

Bank. No. 300-30202-rld11

CIVIL NO. 01-1309-HA

CURTIS D. ZELMER,

Plaintiff-Appellee,

OPINION AND ORDER

v.

21ST CENTURY TOWING, INC.,

Defendant-Appellant.

Adv 00-3059

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1 HAGGERTY, Judge:

2 The matter before the court is an appeal from the final decision of the United States
3 Bankruptcy Court for the District of Oregon entered on April 12, 2001. The district court
4 acts as an appeals court from decisions of the bankruptcy court. The parties agree that this
5 court may exercise jurisdiction under 28 U.S.C. § 158(a)(1). Appellant elects to have its
6 appeal heard by this court rather than the Bankruptcy Appeal Panel, *see* 28 U.S.C. § 157.
7 Jurisdiction for the original proceeding arose under 28 U.S.C. §§ 1334(b) and 157(b)(1)
8 and (2), as well as Rule 2100-1 of the Local Rules of Civil Practice.

9 The court acknowledges that both parties requested oral argument regarding this
10 appeal. The court concludes that oral argument is unnecessary, and for the reasons below
11 affirms the ruling by the United States Bankruptcy Court for the District of Oregon.

12 **BACKGROUND**

13 Appellant asserts that the United States Bankruptcy Court for the District of Oregon
14 erred in granting summary judgment to appellee and ruling that appellant's unsecured claims
15 were barred by issue and/or claim preclusion. Appellant "21st Century Towing" (referred
16 hereinafter as appellant or 21st Century) was a self-described "vehicle-recycling enterprise"
17 which entered into an agreement in 1997 with appellee Curtis Zelmer (referred hereinafter
18 as appellee or Zelmer) to lease Zelmer's property at 12104 N. Columbia Boulevard, in
19 Portland, Oregon. Problems arose subsequent to the execution of this commercial real
20 estate lease, and the parties proceeded to arbitration. The Arbitrator rendered an award in
21 favor of 21st Century in the amount of approximately \$600,000, and appellee subsequently
22 petitioned for bankruptcy. The Arbitrator's award became a secured claim, and was paid by
23 the bankruptcy trustee.

24 In addition to this secured claim, 21st Century Towing filed an unsecured claim
25 against appellee for lost profits and other damages. Bankruptcy Judge Randall Dunn
26

1 granted appellee's motion for summary judgment against this unsecured claim, and 21st
2 Century Towing appeals.

3 The district court reviews the findings of fact of the bankruptcy court under a clearly
4 erroneous standard, and conclusions of law, such as summary judgment decisions, are
5 reviewed *de novo*. *Daniels-Head & Assocs. v. William M. Mercer, Inc. (In re Daniels-*
6 *Head & Assocs.)*, 819 F.2d 914, 918 (9th Cir. 1987).

7 ANALYSIS

8 **1. DID APPELLANT CLAIM A MATERIAL BREACH OF THE LEASE 9 RATHER THAN A PARTIAL BREACH?**

10 Appellant argues that its unsecured claims are not barred by claim preclusion,
11 because the claims arise from successive breaches of a continuing contract. Appellee does
12 not dispute that appellant states the law correctly for successive breaches of a continuing
13 contract, but asserts that the United States Bankruptcy Court for the District of Oregon
14 properly determined that appellant pled a material breach and constructive eviction. As
15 such, the parties were limited to asserting their breach claims in a single action. *See*
16 Appellee's Response Brief at 8-9 and authorities cited therein; *see also* Appellant's Brief at
17 19 (citing *Elliot Megdal and Assocs. v. Daio USA*, 87 Haw. 129, 952 P.2d 886 (Haw. App.
18 1998) and noting that where a plaintiff terminated a lease, it created a single breach of
19 contract claim, and plaintiff could not then sue periodically under that lease).

20 Appellant acknowledges the "general rule" that a party may sue for all foreseeable
21 damages in the event of a material breach, or – if that party has not repudiated the contract
22 – it may elect to treat the breach as partial and bring successive suits for continued
23 breaches. Appellant's Brief at 21, quoting *Kaiser v. Northwest Shopping Center, Inc.*, 587
24 S.W.2d 454, 456-57 (Tex. Civ. App. 1979) (citations and internal quotations omitted).
25 Appellant argues that it could not have brought its present claims in an earlier action,
26 because the damages arising from the claims were not incurred until after the earlier action

1 was filed. Appellant complains that appellee failed to produce any evidence to the contrary,
2 while appellant has established through affidavit that the damages at issue arose subsequent
3 to the arbitration and were in fact unknown at the time of that arbitration.

4 This court agrees with the Bankruptcy Court in concluding that appellant proceeded
5 to arbitration on the theory that appellee committed a material breach, and that accordingly,
6 appellant is not now entitled to additional causes of action. The Bankruptcy Court referred
7 to appellant's acknowledgments in prior briefings that it owed no duty to pay rent due to
8 constructive eviction, and that appellant did in fact terminate rental payments after paying
9 \$15,500 of a total of \$106,500 of rent due under the first lease. The court found that
10 appellant claimed material breach and an "effective repudiation" of the lease by appellee,
11 and that appellant itself committed a material breach by refusing to pay rent because of
12 alleged constructive eviction. Although it may be true that appellant's unsecured claims
13 consist of alleged damages that were unknown at the time of arbitration, appellant's posture
14 fails to alter the conclusion that appellant previously claimed a material breach and
15 constructive eviction, and elected to terminate lease payments in accordance with these
16 claims. The Bankruptcy Court's cited legal authorities, as well as the authorities relied upon
17 by both parties, acknowledge consistently that under circumstances establishing a material
18 breach (particularly where a lessee materially breaches by electing to terminate rent
19 payments), the parties are left with treating the contract as terminated and suing once for
20 total breach. *See, e.g., Little Caesar Enterprises, Inc., v. R-J-L Foods, Inc.*, 796 F. Supp.
21 1026, 1032 (E.D. Mich. 1992); *see also* Letter Opinion of Judge Dunn at ER0583 and
22 authorities cited therein. Accordingly, the United States Bankruptcy Court for the District
23 of Oregon concluded correctly that under the facts presented, appellant made an
24 unequivocal election to sue for material breach and was entitled to only one action under
25 the lease. The Bankruptcy Court's ruling is affirmed.

1 **2. DID APPELLEE REPUDIATE THE LEASE, REQUIRING**
2 **APPELLANT TO BRING ALL CLAIMS IN ONE ACTION?**

3 Similarly, this court adopts the Bankruptcy Court's finding that appellant alleged
4 "effective repudiation" on the part of appellee in the arbitration proceedings, and that the
5 court proceeded to properly conclude that "21st Century had its opportunity in the
6 Arbitration to assert and recover all damages resulting from Mr. Zelmer's material breaches
7 and repudiation of Lease No. 1." *See* Letter Opinion of Judge Dunn at ER0588. In cases in
8 which "there has been a repudiation of a contract, the breach gives rise to only one cause of
9 action." *Wilson v. Western Alliance Corp.*, 78 Or. App. 197, 201, 715 P.2d 1344, 1346,
10 *rev. denied*, 301 Or. 446, 723 P.2d 325 (1986).

11 Clearly, appellant attempted at arbitration to assert claims for future damages in the
12 form of lost profits and income. While the Arbitrator denied these claims, the Arbitrator's
13 Amended and Restated Award contemplated such issues generally, since appellant received
14 an award that reflected an amount greater than the amount of rental payments owed,
15 addressed the parties' future relationship, and concluded with the statement that the award
16 was "in full settlement of all claims and counterclaims submitted to this arbitrator." *See*
17 ER0391.

18 **4. OTHER ISSUES**

19 This court also concludes that appellant's claim for the loss of an "Abandoned
20 Vehicles Contract" in August, 1998, is barred for the additional reasons that this claim
21 existed and was not raised at the times that the initial Demand for Arbitration (October,
22 1998) and the Amended Demand for Arbitration (December, 1998) were made. *See United*
23 *States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998) (applying the
24 doctrine of claim preclusion).

25 Because of the disposition of the case as described above, this court need not reach
26 the merits of appellee's argument that appellant should be barred from attempting to again

1 seek lost income and lost profits under the doctrine of issue preclusion. The Bankruptcy
2 Court's findings of fact and conclusions of law in this matter are affirmed for the reasons
3 stated above.

4 **RULING OF THE COURT**

5 For the reasons provided, appellant 21st Century's appeal is denied. This court
6 ADOPTS the decision of the Honorable Randall L. Dunn, United States Bankruptcy Judge,
7 which was filed on April 12, 2001, granting summary judgment to appellee Zelmer.

8 IT IS SO ORDERED.

9 DATED this 2 day of November, 2001.

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12 ANCER L. HAGGERTY
13 United States District Judge
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