motion to dismiss

Inn at Rogue Valley v. Seattle-First National Bank, Adv. no. 690-6032
In re The Inn at Rogue Valley Partnership, Case no. 690-60371-H11

10/25/90 CEL unpublished

At a hearing on defendant's motion to dismiss, the parties raised new issues and the court subsequently allowed them to submit supplemental memoranda. Plaintiff's argued that since the court was considering information outside the pleadings, the motion to dismiss was converted to a motion for summary judgment which was improperly before the court due to lack of notice to plaintiffs and their inability to conduct discovery sufficient to allege ultimate facts to defeat summary judgment. Judge Luckey reasoned that there was nothing to indicate up until the time of the hearing on the motion that either party was treating the motion as other than a naked motion to dismiss, and held that if either party desires to seek relief by summary judgment, on the record as it now stands, the file should reflect appropriate notice thereof, and reasonable opportunity given for development of facts to justify the adverse party's opposition to the motion. A motion to dismiss for insufficiency of statement of claim should not be granted unless it appears with certainty that plaintiff would not be entitled to relief under any statement of facts which could be proved in support of the claims. No matter how improbable it may be that the plaintiff can establish the allegations of its complaint, it is, nevertheless, entitled to make the attempt.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE THE INN AT ROGUE VALLEY PARTNERSHIP, Debtor-in-possession. THE INN AT ROGUE VALLEY PARTNERSHIP, Plaintiff, vs. SEATTLE-FIRST NATIONAL BANK, Defendant.	)	Case No. 690-60371-H11 Adversary No. 690-6032-H MEMORANDUM OPINION AND ORDER

Plaintiff filed its complaint March 1, 1990. The defendant Seattle-First National Bank filed its motion for withdrawal of reference on April 9, 1990. The motion was granted June 18, 1990 "upon the lodging of the pre-trial order by the bankruptcy judge based upon the plaintiff's demand for a jury trial and the nonbankruptcy issues involved in this proceeding."

On April 10, 1990, the defendant filed its motion to dismiss, and memorandum in support of the motion. After the district court order, the defendant noticed a number of depositions. On August 7, 1990, hearing on the motion to dismiss was noticed for September 27, 1990 via telephone conference, and the memorandum in opposition to the motion was filed. On August 22, 1990, a reply memorandum was filed by defendant.

At the hearing, on September 27, 1990, new issues were raised and citations relied upon, and the parties were allowed to submit supplemental

memoranda. No answer has been filed to the complaint nor any proposed pre-trial order tendered, and none entered.

The complaint seeks to recover damages for the alleged refusal of the bank to honor an alleged agreement to lend money, bad faith denial of contract and alleged interference with contract relating to a contemplated permanent financing lender.

It is alleged that the bank and defendant entered into the construction loan agreement on January 15, 1989.

The complaint further alleged that it became known after the motel was substantially constructed in August of 1989 that the bookkeeper of the plaintiff had embezzled approximately $60,000 and that cost overruns from additional improvements would require an additional $1,325,000 over and above the construction loan agreement's $2,675,000, and that in the first week of January, 1990, the defendant represented to the plaintiff that it would provide the undisbursed funds from the $2,675,000 loan agreement, and additional funds necessary to complete construction and pay creditors in full, that it was preparing necessary documents to consummate the revised loan transaction, and that on January 5, 1990, a representative of the permanent financing fund contacted plaintiff's agent with a revised commitment, which the defendant did not find satisfactory.

Further allegations are made concerning an alleged early January, 1990 modification agreement which plaintiff says resulted in a letter from the anticipated permanent financing fund incorporating provisions for modification agreed upon to which defendant agreed to provide written confirmation by January 17, 1990.

Copies of the construction loan agreement and the alleged letter of January 9, 1990, are attached as exhibits to the complaint.

The motion to dismiss alleges simply that the plaintiff has failed to state a claim upon which relief can be granted. In its supporting memorandum defendant urges that the alleged agreement is an oral agreement void under the

Statute of Frauds, O.R.S. 41.580, that it is too vague and uncertain to enforce, that Oregon law does not recognize "bad faith denial or [sic] contract", and that Seattle-First was a party to the permanent financing agreement and therefore could not under Oregon law be found to have wrongfully interfered with it. Defendant attached documents to its memorandum, but gave no notice that it intended conversion to a motion for summary judgment.

Plaintiff relies on Portland Retail Druggists Association, etc. v. Kaiser Foundation Health Plan, et al., 662 F.2d 641 (9th Cir. 1981), urging that plaintiff's complaint is sufficient to withstand a motion to dismiss, and that if it is to be treated as a motion for summary judgment particularly relating to a defense of statute of frauds which is an affirmative defense if material outside the pleadings is relied upon, plaintiff should have opportunity to submit affidavits, documents and to conduct discovery before a motion for summary judgment would be appropriate.

In this case, there has been no scheduling order. There is nothing to indicate either party up until the time of the hearing, was treating the motion as other than a naked motion to dismiss.

If either party desires to seek relief by summary judgment, on the record as it now stands, the file should reflect appropriate notice thereof, and reasonable opportunity given for development of facts to justify the adverse party's opposition to the motion.

A motion to dismiss for insufficiency of statement of claim should not be granted unless it appears with certainty that plaintiff would not be entitled to relief under any statement of facts which could be proved in support of the claims. Fargo Glass and Paint Co. v. Globe American Corp., 161 F.2d 811 (7th Cir. 1947); Chicago & North Western Ry. v. First Nat. Bank of Waukegan, 200 F.2d 383 (7th Cir. 1952).

No matter how improbable it may be that the plaintiff can establish the allegations of its complaint, it is, nevertheless, entitled to make the attempt. Louisiana Farmers' Protective Union, Inc. v. Great Atlantic and Pacific Tea Co.

of America, Inc., et al., 131 F.2d 419 (8th Cir. 1942).

The court compliments all counsel on thorough and persuasive briefs. The court finds merit in each of the party's memoranda, but if the court is to err under liberal rules of federal notice pleadings when addressing a motion to dismiss, it must err on the side of the opportunity of the plaintiff to make its case after adequate opportunity to develop and present the facts, either in the context of motion for summary judgment by either party, or trial.

On the present record, the motion to dismiss is **ORDERED** denied.

IT IS ORDERED defendant may have 20 days to answer or otherwise plead, or move for summary judgment, and the plaintiff may have 20 days to respond to any pleading filed by the defendant.

This order is not a disposition of this related case for which a withdrawal order has been entered for jury trial after entry of a pre-trial order by the bankruptcy court. It is therefore not referred to the District Judge by recommendation for approval.

DATED this _____ day of October, 1990.

_____
C. E. LUCKEY
Bankruptcy Judge