

AMERICAN MUTUAL LIABILITY, INSURANCE COMPANY,  
Plaintiff-Counterdefendant, BEATRICE COMPANIES, INC.,  
Defendant-Counterplaintiff and Third Party Plaintiff, v.  
TRANSPORT INSURANCE COMPANY, NATIONAL SURETY CORPORATION,  
CALIFORNIA UNION INSURANCE COMPANY, ALLIANZ UNDERWRITERS,  
INC., ARTHUR J. GALLAGHER & CO., GALLAGHER BASSETT INSURANCE  
SERVICES, INC. and LIBERTY MUTUAL INSURANCE COMPANY, Third  
party defendants.

Case No. 86 C 1874

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
ILLINOIS, EASTERN DIVISION

1994 U.S. Dist. LEXIS 1989

February 24, 1994, Docketed

JUDGES: [\*1] Williams

affirmed [\*2] on appeal.

OPINION: MEMORANDUM OPINION AND  
ORDER

American Mutual Liability Insurance Co. ("American Mutual") brought this declaratory judgment suit against Beatrice Companies, Inc. ("Beatrice") alleging that it was not obligated to defend or indemnify Beatrice for its defense costs in another lawsuit. Beatrice filed a third-party complaint against American Mutual and its various other insurers, including Liberty Mutual Insurance Co. ("Liberty Mutual"). This matter is before the court on Liberty Mutual's motion for leave to amend affirmative defenses, which the court construes as a motion to dismiss. For the reasons explained below, Liberty Mutual's motion is denied.

Background

In 1982, Beatrice was named as a defendant in *Anderson v. Cryovac, et al.*, which was then pending in the United States District Court for the District of Massachusetts. In *Anderson*, thirty-four plaintiffs alleged that Beatrice's subsidiary, John J. Riley Co. ("Riley") caused them cancer and other serious illnesses by contaminating their drinking water with toxic chemicals. On September 11, 1986, a jury returned a verdict for Beatrice. The final judgment for Beatrice was

American Mutual brought this action in 1986 seeking a declaration that it was not liable for the defense costs and related expenses incurred in *Anderson*. Beatrice then filed a third-party claim against its insurers. Pursuant to stipulation, on June 29, 1989, the court entered an "Order of Dismissal with Leave to Reinstate" while appeals and other issues were being resolved in the *Anderson* litigation. The order stated that the case was dismissed without prejudice and with leave to any party to move to reinstate on the court's calendar "not later than sixty days following final resolution n1 of the action entitled *Anderson v. Cryovac, et al.*, No. 82-1672-S." (Beatrice Objections, Ex. B).

n1 "The date of final resolution shall mean the date following the last day on which any party to the *Anderson* action can initiate as a matter of right any further proceedings following final judgment in the trial court, in the first instance or after appeal, whether by post-trial motion, notice of appeal, motion for reconsideration or rehearing, or petition for writ of certiorari." (Beatrice Objections Ex. B).

[\*3]

The First Circuit affirmed the judgment for Beatrice on January 30, 1990. The Supreme Court

denied the Anderson plaintiffs petition for a writ of certiorari on October 1, 1990. However, one of the Anderson plaintiffs instituted a new action, Robbins v. Ryan, et al., 90-2648-A, in May 1990 in the Superior Court of Massachusetts. n2 The case was dismissed on June 15, 1990. On July 9, 1990, Robbins filed a timely notice of appeal. Since Robbins was on appeal when the time for reinstatement was about to expire, Beatrice proposed a new stipulation. Pursuant to the parties' October 19, 1990 stipulation, the court entered a November 30, 1990 order providing that any motion to reinstate was to be filed no later than sixty days following final resolution of the Robbins action. (Beatrice Objections, Ex. C, D). "Final Resolution" was defined as

the date following the last day on which any party to the Robbins action can initiate as a matter of right any further proceedings following final judgment in the trial court, in the first instance or after appeal, whether by post-trial motion, notice of appeal, motion for reconsideration or rehearing, or petition for writ [\*4] of certiorari, and no proceeding, motion, appeal or petition remains pending in any court.

(Beatrice Objections, Ex. D. P 1). This order also stated that "at least every ninety days, or more often as may be appropriate, counsel for Beatrice company shall report by letter to the Court and counsel for the parties on the status of the Robbins litigation." (Beatrice Objections, Ex. D P 2).

n2 In Robbins, the plaintiff brought a suit for equitable discovery to obtain information which she claimed was critical for her writ of certiorari to the Supreme Court. Specifically, Robbins sought to obtain documents which Beatrice and Riley attorneys withheld during the Anderson action. Although the Massachusetts court noted that it could entertain equitable bills for discovery, it dismissed the case for lack of jurisdiction. See Robbins v. Ryan, No. 90-2648-A (D. Mass. June 14, 1990) (attached to Reply).

On June 8, 1992, two years n3 after Robbins filed her notice of appeal, the Massachusetts Appellate Court [\*5] Clerk issued a notice of assembly of record of appeal. Under Massachusetts Appellate Rule 10(a), Robbins was

required to pay a docketing fee within ten days, on June 18, 1992. Robbins did not do so. On February 16, 1993, Beatrice moved to reinstate this action. n4 The motion was heard and granted on March 26, 1993. No party objected to reinstatement at that time. Seven months later, on September 7, 1993, Liberty Mutual moved for leave to add an affirmative defense alleging that Beatrice's motion to reinstate was untimely. n5 On October 15, 1993, the third party defendants all joined in Liberty Mutual's motion. n6 The court construes Liberty Mutual's motion as a motion to dismiss.

n3 There is no explanation in the record for the two year delay between the notice of appeal and the notice of assembly of the record.

n4 The docket indicates that this motion was filed on March 2, 1993.

n5 This motion was stricken with leave to reinstate once the court set a briefing schedule on other motions, and was reinstated on October 4, 1993.

n6 However, since this action was filed, American Mutual has become insolvent and has not participated in recent proceedings.

[\*6]

#### Discussion

Rule 10(a)(1) of the Massachusetts Rules of Appellate Procedure provides that "within ten days after receiving from the clerk of the lower court notice of assembly of the record . . . the appellant shall pay to the clerk of the appellate court the docket fee fixed by law, and the clerk shall thereupon enter the appeal upon the docket." However, "upon motion, the lower court or a single justice of the appellate court may, for cause shown, enlarge the time for docketing the appeal or permit the appeal to be docketed out of time." n7 Mass R. App. P. 10(a)(3). Rule 10(c), which governs dismissal of appeals states in relevant part:

If any appellant in a civil case shall fail to comply with . . . Rule 10(a)(1) . . . the lower court may, on motion with notice by an appellee, dismiss the

appeal, but only upon a finding of inexcusable neglect; otherwise, the court shall enlarge the appellant's time for taking the required action. If, prior to the lower court's hearing such motion, the appellant shall have cured the noncompliance, the appellant's compliance shall be deemed timely.

Mass R. App. 10(c).

n7 Even if no motion is made, a Massachusetts appellate court has authority to refuse to consider the appeal based upon a clear violation of the rules. *Larabee v. Potvin Lumber Co.*, 390 Mass. 636, 459 N.E.2d 93, (Mass. 1983).

[\*7]

In the instant case, Liberty Mutual claims that the Robbins appeal was dismissed when Robbins failed to pay the docketing fee on June 18, 1992. Therefore, Liberty Mutual contends that Beatrice's motion to reinstate is untimely under the court's order because it had to be brought by August 21, 1992. In support, Liberty Mutual attaches the affidavit of Darren E. Sinofsky ("Sinofsky"), a summer law clerk at Liberty Mutual. Sinofsky states that on June 18, 1993, the Assistant Clerk of the Massachusetts Appeals Court informed him that "no docket fee had ever been paid and, as per Mass. R. App. P. 10, no appeal docketed." (Sinofsky Aff. P 4). Sinofsky confirmed this information on July 7, 1993. (Sinofsky Aff. P 2). Sinofsky was also advised that "as an administrative matter, the Record on Appeal, which is compiled and transferred to the Appeals Court by the clerk of the trial court, is destroyed by the Appeals Court after one year." (Sinofsky Aff. P 7).

In its motion to reinstate this case, Beatrice stated that the Robbins action had been dormant, but that an appeal was still pending. Beatrice makes a similar argument in response to Liberty Mutual's motion to dismiss. Specifically, [\*8] Beatrice contends that Robbins' failure to pay the fee is grounds for dismissal of the appeal, but did not automatically result in such dismissal. (Beatrice Objections at 7). Thus, Beatrice argues that the Robbins appeal remains pending because the appeal has not been dismissed by court order as required by Mass. R. App. P. 10(c). Moreover, Beatrice maintains that there has not been a "final resolution" since Robbins has the right to initiate further proceedings under

Rule 10(c). Consequently, Beatrice claims that its motion to reinstate is clearly timely because Robbins is still "pending." Additionally, Beatrice argues that it should not lose its rights on this "purely technical ground" because:

Liberty Mutual's defense elevates form over substance and would significantly prejudice Beatrice. This coverage litigation was deferred because, until all underlying litigation was finally concluded, the parties would not know whether this case merely concerned the carriers['] responsibility for Beatrice's defense costs or whether it might additionally concern the carriers' responsibility for a substantial judgment. Given that the deferral might be lengthy, the parties stipulated [\*9] to a dismissal with leave to reinstate, rather than simply a stay of proceedings.

(Beatrice Objections at 3). Liberty Mutual concedes that Rule 10 is not self-executing, but claims that Robbins lost the ability to proceed "as a matter of right" when she failed to pay the docketing fee. (Reply at 2-3).

As an initial matter, the court notes that this "purely technical" issue might not have arisen if Beatrice had complied with the provisions of the November 30, 1990 order requiring it to "report by letter to the Court and counsel for the parties [at least every ninety days, or more often as may be appropriate] on the status of the Robbins litigation." (Beatrice Objections, Ex. D P 2). However, the court denies Liberty Mutual's motion for the following reasons.

First, it is undisputed that an appeal is not automatically dismissed for failure to pay the docketing fee. (Beatrice Objections at 7-8, Reply at 3-4). Although the presumption is that such a case will be dismissed, under Massachusetts appellate procedure, the Robbins case could theoretically be revived if Robbins demonstrates good cause for her failure to pay the fee, and has a meritorious claim. n8 See Mass R. [\*10] App. 10(a)(1),(3) and 10(c). Also, disposing of this case on this technical basis is not appealing from an equitable standpoint. On two separate occasions the parties agreed to dismiss this case pending the outcome of this long and involved litigation. Now, Liberty Mutual argues that this case -- where \$7 million in defense costs is at stake -- should have been reinstated six months earlier than it was; by August 21, 1992 rather than February 16,

1993. However, Liberty Mutual waited at least that long to bring this matter to the court's attention, rather than raising this argument when Beatrice first moved to reinstate this action, or when the motion was actually heard. In sum, the court denies Liberty Mutual's motion on legal and equitable grounds.

n8 Liberty Mutual argues that the Robbins appeal became moot when the Supreme Court denied cert on October 1, 1990. However, the court entered the November 30, 1990 order extending the time to reinstate based upon the parties' October 19, 1990 stipulation.

Conclusion [\*11]

For the foregoing reasons, Liberty Mutual's motion for leave to amend affirmative defenses, which is construed as a motion to dismiss, is denied.

ENTER:

Ann Claire Williams, Judge

United States District Court

Dated: FEB 18 1994