

No. 1-10-1793

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

Third Division
May 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MML, INC. and MORTON M. LAPIDES,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants-Cross-Appellees,)	Cook County.
)	
v.)	
)	
CERBERUS CAPITAL MANAGEMENT, L.P. and)	
MADELEINE, LLC., <i>et al.</i> ,)	09 L 004607
)	
Defendant-Appellee-Cross-Appellants.)	
)	
)	
GORDON BROTHERS GROUP and WARREN FEDER,)	Honorable
)	Allen S. Goldberg,
Appellees-Cross-Appellants.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Steele concurred in the judgment.

ORDER

HELD: Under precedent from the United States Court of Appeals for the Ninth Circuit, the California bankruptcy court's approval of a plan for reorganization of a bankrupt corporation did not operate as *res judicata* to bar a subsequent lawsuit by minority owners of the

bankrupt corporation against the majority owners, in which the minority owners claimed the majority owners breached a contract by forcing the corporation into bankruptcy. A second bankruptcy proceeding in the Fourth Circuit involving a second corporation that lost its income due to the bankruptcy of the first corporation also did not bar the breach of contract action, because the Maryland bankruptcy court lacked jurisdiction to decide the contract claim between the shareholders of the first corporation who were not involved in the bankruptcy proceedings before that court. The 10-year limitations period for actions on a written contract applied to a claim that defendants breached an implied term of the written contract. A federal statute established that proceedings in federal district court and the federal court of appeals suspended the running of the limitations period for the state contract claim until 30 days after the completion of federal appellate proceedings. The lack of a contract provision expressly forbidding majority owners from causing the jointly owned corporation to file for bankruptcy did not preclude a lawsuit for breach of contract based on an allegation that the majority owners breached an implied covenant of good faith by causing the corporation to file for bankruptcy.

This case involves a breach of contract claim with an extensive history. The trial court dismissed the case as *res judicata*. We reverse and remand for further proceedings.

BACKGROUND

MML, Inc., a Maryland holding company, purchased Winterland Concessions Company, a California corporation, in August 1996. Gordon Brothers Group, together with Madeleine LLC, a subsidiary of Cerberus Capital Management, loaned \$23,000,000 to Winterland, with Winterland's assets securing the loan. Winterland then agreed to lease, for a period of 10 years, plants and equipment from Transcolor Corporation, a subsidiary of MML. Morton Lapidés, Sr., controlled both MML and Transcolor.

Although Winterland paid back much of the loan from Gordon and Madeleine within a few months, it needed more capital by early 1997. In April 1997, Lapidés, MML, Winterland, Gordon and Madeleine entered into a contract extending to April 1999 the due date for the remaining balance

of the loans from Gordon and Madeleine to Winterland. In exchange, MML agreed to reduce the term of the Transcolor lease to less than two years, and MML transferred to Gordon and Madeleine 80% of the equity in Winterland. The contract expressly provided that MML and Lapides could recover control of Winterland if they bought back the Winterland stock, at a price set by an independent appraiser, before April 1998. The parties agreed that New York law would govern the rights and obligations of the parties under the contract.

On August 8, 1997, Gordon and Madeleine caused Winterland to file a petition in California for reorganization in bankruptcy. The bankruptcy court confirmed a reorganization plan for Winterland without objection, and discharged Winterland from bankruptcy proceedings in 2000. In the reorganization, the bankruptcy court terminated Winterland's leases with Transcolor.

In 1998, some of Transcolor's creditors filed a petition in bankruptcy court in Maryland to declare Transcolor bankrupt. In the course of the Maryland proceedings, Transcolor sued Gordon and Madeleine (along with Cerberus because it controls Madeleine), alleging that they unlawfully interfered with Transcolor's contract with Winterland when they forced MML to agree to reduce the term of the lease from ten years to two years, and when they caused Winterland to file for bankruptcy. The bankruptcy court in Maryland dismissed Transcolor's lawsuit against Gordon, Cerberus and Madeleine, finding it barred by the *res judicata* effect of the California bankruptcy court's decision. *In re Transcolor Corp.*, 258 B.R. 149, 159 (D. Md. 2001).

In July 2007, MML and Lapides tried a new forum. MML and Lapides, along with numerous other persons named as plaintiffs, sued Gordon, Cerberus and Madeleine in federal court in Illinois, alleging that the defendants engaged in racketeering in violation of the Racketeer Influenced and

Corrupt Organizations Act (RICO) (18 U.S.C. §§1961 *et seq.* (1994)). MML and Lapidès also claimed that the defendants breached the April 1997 contract when they caused Winterland to file the bankruptcy petition. According to the complaint, Winterland's bankruptcy precluded MML and Lapidès from exercising their rights under the April 1997 contract to regain control of Winterland by buying back its stock before April 1998. In an order dated April 4, 2008, the district court dismissed the RICO counts with prejudice, and it dismissed the pendent state claims, including the count for breach of contract, without prejudice. *Cancer Foundation, Inc. v. Cerberus Capital Management, LP*, 2008 U.S. Dist. Lexis 27483 (N.D. Ill. 2008). The United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment in an opinion dated March 19, 2009. *Cancer Foundation, Inc. v. Cerberus Capital Management, LP*, 559 F.3d 671 (7th Cir. 2009).

Less than 30 days later, on April 17, 2009, the plaintiffs, including MML and Lapidès, sued Gordon, Cerberus and Madeleine, alleging that the defendants breached the April 1997 contract when they eliminated MML's and Lapidès's right to regain control of Winterland. The plaintiffs alleged that the contract implicitly included a covenant of good faith and fair dealing, which obligated the defendants not to place Winterland in bankruptcy before April 1998, so that MML and Lapidès would have one year in which to regain control of Winterland by buying the stock from the defendants. MML and Lapidès conceded that most of the named plaintiffs had no standing to sue. Only MML and Lapidès remain plaintiffs in this lawsuit.

The trial court dismissed the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619(a)(4) (West 2008)), finding that the *res judicata* effect of the California bankruptcy decision barred the complaint. The defendants also argued that the *res judicata* effect

1-10-1793

of the Maryland bankruptcy decision barred the complaint, the Illinois statute of limitations barred the complaint, and the complaint failed to state a cause of action under New York contract law. The court decided not to award defendants their costs and attorneys' fees. MML and Lapidès now appeal, and Gordon, Cerberus and Madeleine cross-appeal from the denial of fees and costs.

ANALYSIS

Forum Non Conveniens

This court asked the parties to brief the issue of whether this court should dismiss the case under the doctrine of *forum non conveniens*, so that a court in California could decide the *res judicata* effect of the California bankruptcy decision, or a Maryland court could decide the *res judicata* effect of the Maryland bankruptcy decision, or a New York court could adjudicate the claim for breach of a contract governed by New York law. See *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 172-73 (2003), and *People ex rel. Compagnie Nationale Air France v. Giliberto*, 74 Ill. 2d 90, 110-15 (1978). Gordon, Cerberus and Madeleine told this court that they would not waive the statutes of limitations for the other jurisdictions. Supreme Court Rule 187 (Ill. Sup. Ct. R. 187 (eff. Aug. 1, 1986)), directs this court not to dismiss a case for *forum non conveniens* without a waiver, by the defendant, of the statutes of limitations in the other jurisdictions. See *McClain v. Illinois Central Gulf R.R. Co.*, 121 Ill. 2d 278, 292 (1988). Therefore, we will address the other grounds raised for dismissing the case.

Winterland's California Bankruptcy

In this case, the trial court granted defendant's section 2-619 motion to dismiss the complaint. Appellate courts review the dismissal of a complaint under section 2-619 *de novo*. *Parks v.*

Kownacki, 193 Ill. 2d 164, 175 (2000).

MML and Lapidés argue that the California bankruptcy decision does not preclude them from bringing this lawsuit. The parties agree that federal law from the Ninth Circuit determines the *res judicata* effect of the California bankruptcy decision. See *Peregrine Financial Group, Inc. v. Trademaven, L.L.C.*, 391 Ill. App. 3d 309, 313 (2009)(federal law governs the *res judicata* effect of cases litigated in federal court); *Instituto Nacional de Comercializacion Agricola v. Continental Illinois National Bank & Trust Co.*, 858 F.2d 1264, 1271 (7th Cir. 1988)(Illinois choice of law rules indicate that the law of the jurisdiction where a judgment was rendered determines the *res judicata* effect of that judgment).

We find that *Davis v. Yageo Corp.*, 481 F.3d 661 (9th Cir. 2006), a federal case from the Ninth Circuit, governs our decision here. In *Davis*, the plaintiffs, as minority shareholders, and the defendants, as majority shareholders, jointly owned Long Life Noodle Co. (LLNC). LLNC filed a plan for reorganization in bankruptcy and the plaintiffs objected, arguing that the defendants did not act in good faith when they caused LLNC to file the plan. *Davis*, 481 F.3d at 668. The bankruptcy court confirmed the defendants' plan for reorganization of LLNC. The plaintiffs then filed a separate lawsuit against the defendants, claiming that the defendants breached their fiduciary duties to the plaintiffs when they caused LLNC to file its bankruptcy petition. *Davis*, 481 F.3d at 669.

The defendants argued that the *res judicata* effect of the bankruptcy decision barred the claim for breach of fiduciary duties. The United States Court of Appeals for the Ninth Circuit held:

“Res judicata does not bar plaintiffs' LLNC claim for several reasons. First, the LLNC claim is a claim for breach of fiduciary duty that does not "pertain[] to the

[reorganization] plan." *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir.1995) [Citations].

Second, plaintiffs' claim for breach of fiduciary duty *** was not decided by the bankruptcy court. While [the plaintiffs] did argue that the reorganization plan should not be confirmed because it was not filed in good faith, the breach of fiduciary duty claim with respect to the directors and the majority shareholder was not raised in, much less decided by, the bankruptcy court. The breach of fiduciary duty claim that [the plaintiff] raised in [the bankruptcy proceeding] was based on debtor LLNC's fiduciary duty to creditors and shareholders *in bankruptcy*. This is clearly a different duty than that of the [defendants] to the corporation itself and the minority shareholders prior to bankruptcy. Moreover, [the plaintiff's] objection to the reorganization plan as being in bad faith *** was not the same as a breach of fiduciary duty claim under California corporate law." *Davis*, 481 F.3d at 680-81.

The plaintiffs in *Davis* claimed that the defendants breached fiduciary duties to the minority shareholders of LLNC when they caused LLNC to file for bankruptcy. MML and Lapidés, minority shareholders of Winterland, claim that Gordon, Cerberus and Madeleine, Winterland's majority shareholders, breached a contract with MML and Lapidés when the defendants made Winterland file for bankruptcy. The claim appears to pertain to Winterland's reorganization plan to exactly the same extent that the minority shareholders' claim in *Davis* pertained to the reorganization plan for LLNC. Under the reasoning of *Davis*, then, the California bankruptcy decision does not bar the breach of contract claim here.

Moreover, the second reason given in *Davis* for finding that *res judicata* did not bar the plaintiffs' claim also applies here. The bankruptcy court here never addressed any claim that Gordon, Cerberus and Madeleine breached a contract when they caused Winterland to file for bankruptcy. Even if MML and Lapidés had objected to the bankruptcy proceedings on grounds that the defendants filed for bankruptcy in bad faith, under the reasoning of *Davis*, a decision on that issue would not foreclose MML and Lapidés from raising, in a separate lawsuit, a claim that Gordon, Cerberus and Madeleine breached a contract with MML and Lapidés by making Winterland file for bankruptcy. See *Davis*, 481 F.3d at 680-81.

Gordon, Cerberus and Madeleine ask us to distinguish *Davis* from this case on the basis of a third ground the court there found for holding that *res judicata* did not bar the claim for breach of fiduciary duty. The court in *Davis* said that the reorganization plan that the court approved expressly reserved for the benefit of the bankrupt's estate claims like those the plaintiffs there sought to bring against the defendants. *Davis*, 481 F.3d at 681-82. We do not see how the addition of this third, separate ground for allowing the lawsuit to proceed allows us to ignore the first two grounds stated for holding that *res judicata* did not bar the suit. Following *Davis*, we hold that the *res judicata* effect of the California decision concerning the bankruptcy of Winterland does not preclude MML and Lapidés from bringing this lawsuit against Gordon, Cerberus and Madeleine for breach of contract.

Transcolor's Maryland Bankruptcy

Gordon, Cerberus and Madeleine contend that the *res judicata* effect of the Transcolor bankruptcy decision in Maryland bars the complaint. The parties agree that law from the Fourth

Circuit governs the *res judicata* effect of the Maryland bankruptcy decision. See *Peregrine*, 391 Ill. App. 3d at 313; *Instituto Nacional*, 858 F.2d at 1271. A bankruptcy decision operates as *res judicata* only for claims that the bankruptcy court had jurisdiction to hear. *CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187, 198-99 (3d Cir. 1999).

Bankruptcy courts have limited jurisdiction delineated by statute. See 28 U.S.C. §157(b) (1998); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86-87 (1982). Bankruptcy courts have the power to decide core matters in bankruptcy, and they may also hear non-core matters related to a bankruptcy case. 28 U.S.C. §157(b), (c) (1998). Core matters include any “proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship.” 28 U.S.C. §157(b)(2)(O) (1998). We see no effect of the breach of contract claim on the liquidation of Transcolor’s assets. MML and Lapides owned equity in Winterland, but Transcolor did not. Recovery by MML and Lapides will make the former owners of Transcolor richer, but it will not make any more funds available for distribution to Transcolor’s creditors. A decision for or against MML and Lapides on their claim against Gordon, Cerberus and Madeleine will not affect the equity of Transcolor. If MML and Lapides had succeeded in blocking the bankruptcy proceedings for Winterland in California, they might have kept Transcolor out of bankruptcy for a while. But MML and Lapides did not block the bankruptcy proceedings, and their right to damages for breach of contract remains litigable, even though the litigation cannot have any effect on Transcolor or its creditors. We find only a severely attenuated relationship between the Transcolor bankruptcy and MML’s and Lapides’s rights to compensation for Gordon, Cerberus and Madeleine’s alleged breach of a contractual commitment not to cause

Winterland to file for bankruptcy before April 1998. See *In re Apex Express Corp.*, 190 F.3d 624, 631-33 (4th Cir. 1999) (contract claim against non-debtor did not qualify as core matter).

Gordon, Cerberus and Madeleine argue that the contract claim bears a relationship to the Transcolor bankruptcy that brings it under the bankruptcy court's jurisdiction to hear non-core matters related to the bankruptcy proceedings. See *Valley Historic Ltd. Partnership v. Bank of New York*, 486 F.3d 831, 837 (4th Cir. 2007). The court may hear non-core matters if the outcome of the proceedings on the non-core matter could affect the bankruptcy estate. *Valley Historic*, 486 F.3d at 836. " 'An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.' " *Owens-Illinois, Inc. v. Rapid American Corp.*, 124 F.3d 619, 625-26 (4th Cir.1997), quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), overruled on other grounds in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

We do not see how resolution of MML's and Lapedes's contract claim against Gordon, Cerberus and Madeleine could have affected Transcolor, even if MML and Lapedes had brought the claim at the time of Transcolor's bankruptcy proceedings. A judgment for or against MML and Lapedes would not affect Transcolor's rights in the long-since canceled contract with Winterland. A decision on the contract claim would not affect Transcolor's other rights, liabilities, options, or freedom of action, and it would not alter the administration of Transcolor's estate. Under the test applicable in the Fourth Circuit, the bankruptcy court in Maryland lacked jurisdiction to decide the contract claim at issue here. Accordingly, we find that the Maryland court's decision concerning the

bankruptcy of Transcolor does not bar MML and Lapidés from bringing this lawsuit against Gordon, Cerberus and Madeleine for breach of contract.

Statute of Limitations

The parties agree that Illinois' statutes of limitations control our determination of whether MML and Lapidés timely filed this lawsuit. See *Cox v. Kaufman*, 212 Ill. App. 3d 1056, 1062 (1991). MML and Lapidés claim that Gordon, Cerberus and Madeleine breached a provision for good faith and fair dealing implied in their written contract of April 1997. Gordon, Cerberus and Madeleine argue that the five-year limitations period for actions on unwritten contracts governs this cause of action, making the complaint untimely. See 735 ILCS 5/13-205 (West 2008). Gordon, Cerberus and Madeleine misinterpret the applicable law. The statute of limitations for actions on written contracts governs causes of action for breach of the implied terms of written contracts. See *Toth v. Mansell*, 207 Ill. App. 3d 665, 669-70 (1990) (limitations period for written contracts governed implied promise, as long as parol evidence not needed to establish essential elements of contract). Thus, the 10-year limitations period for written contracts applies here. 735 ILCS 5/13-206 (West 2008).

MML and Lapidés filed their contract claim in federal court in July 2007, alleging that Gordon, Cerberus and Madeleine breached the written contract in August 1997. Thus, MML and Lapidés filed the federal complaint, with the pendent state contract claim, within the applicable limitations period.

The federal district court dismissed the claim, without prejudice, on April 4, 2008. MML and Lapidés appealed, and the United States Court of Appeals for the Seventh Circuit affirmed the

district court's decision on March 19, 2009. MML and Lapedes filed this cause of action in Illinois state court on April 17, 2009, less than 30 days after the court of appeals affirmed the district court, but more than one year after the district court dismissed the complaint. The applicable federal statute provides that, for any pendent state claim dismissed without prejudice by a federal court, "[t]he period of limitations *** shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. §1367(d) (2006).

The parties have cited, and we have found, no Illinois cases interpreting this provision. We adopt the interpretation given in *Turner v. Kight*, 957 A.2d 984, 990-93 (Md. 2008), where the court held that the federal statute suspends the running of the state limitations period for the time that the claim remains pending in federal court. See also *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755, 759-61 (Minn. 2010); *Bonifield v. County of Nevada*, 114 Cal. Rptr. 2d 207, 211 (Cal. App. 2001); *Oleski v. Department of Public Welfare*, 822 A.2d 120, 126 (Pa. Cmwlth. 2003). The claim remains pending until "(1) a final judgment is entered by the U.S. District Court dismissing the pendant State-law claims, or (2) if an appeal is noted from that judgment, issuance of an order of the U.S. Court of Appeals dismissing the appeal or a mandate affirming the dismissal of those claims by the District Court." *Turner*, 957 A.2d at 996-97; see also *Okoro v. City of Oakland*, 48 Cal. Rptr. 3d 260, 264 (Cal. App. 2006).

The court of appeals affirmed the dismissal of the contract claim at issue here on March 19, 2009. Section 1367(d), thus, suspended the running of the 10-year limitations period from the date on which MML and Lapedes filed the claim, in July 2007, until 30 days after March 19, 2009. By filing the complaint on April 17, 2009, MML and Lapedes filed the lawsuit within the 10-year

limitations period.

Gordon, Cerberus and Madeleine point out that under prior Illinois case law, MML and Lapides needed to file their claim in Illinois within one year of the district court's dismissal of their complaint, even if the federal appeals court had not resolved their appeal within that year. See *Wade v. Byles*, 295 Ill. App. 3d 545, 546-47 (1998). But insofar as an Illinois statute may conflict with the federal statute, the federal statute prevails. *Turner*, 957 A.2d at 997; *Blinn v. Florida Dept. of Transportation*, 781 So. 2d 1103, 1109 (Fla. App. 2000). Thus, we find the complaint timely.

Failure to State a Claim

Gordon, Cerberus and Madeleine try one last argument for affirming the dismissal of the complaint. They maintain that MML and Lapides have failed to state a claim for breach of contract. For this argument, we must take as true all well-pleaded facts in the complaint, and we must not dismiss the complaint if " 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.' " *Polonetsky v Better Homes Depot, Inc.*, 760 N.E.2d 1274, 1278 (N.Y. 2001), quoting *Guggenheimer v Ginzburg*, 372 N.E.2d 17, 20 (N.Y. 1977).

A New York court set out the relevant principles in *Aventine Investment Management, Inc. v. Canadian Imperial Bank of Commerce*, 697 N.Y.S.2d 128, 130 (1999):

“Within every contract is an implied covenant of good faith and fair dealing (citation). This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement (citation). For a complaint to state a cause of action alleging breach of an implied covenant of good

faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff.”

The benefits MML and Lapidés sought from the contract included the right to recover their ownership interest in Winterland by buying back their shares in Winterland before April 1998. MML and Lapidés allege that Gordon, Cerberus and Madeleine extinguished this benefit by causing Winterland to file for bankruptcy in August 1997. Gordon, Cerberus and Madeleine argue that their acts cannot have breached the contract because the contract did not expressly forbid them from causing Winterland to file for bankruptcy, as a good faith exercise of their rights under their loan agreement with Winterland. But MML and Lapidés allege facts supporting an inference that Gordon, Cerberus and Madeleine did not act in good faith when they used their control of Winterland’s management to cause Winterland to default on its obligations under the loan contract, and then used the default they created as an excuse for forcing Winterland into bankruptcy. The lack of an express provision forbidding resort to bankruptcy does not affect the claims here. A suit to enforce an implied covenant of good faith usually involves allegations of acts “not expressly forbidden by any contractual provision, [which] would deprive the other party of the right to receive the benefits under their agreement.” *Aventine Investment*, 697 N.Y.S.2d at 130. Accordingly, we find that Gordon, Cerberus and Madeleine have not presented sufficient grounds for finding that the complaint fails to state a claim for breach of contract.

Cross-Appeal

In this case, because we find no grounds for dismissing the complaint, we see no reason to

disturb the trial court's decision not to award Gordon, Cerberus and Madeleine fees and costs for this lawsuit. Therefore, we affirm the judgment on the cross-appeal.

CONCLUSION

Under *Davis*, the *res judicata* effect of the decision concerning Winterland's bankruptcy does not provide grounds for dismissing this lawsuit in which the minority shareholders of Winterland claim that the majority owners of Winterland breached a contract when they caused Winterland to file for bankruptcy. The federal court in Maryland that presided over Transcolor's bankruptcy proceedings lacked jurisdiction to decide MML's and Lapidés's claim against Gordon, Cerberus and Madeleine for breach of contract, because any decision on the breach of contract claim would have no effect on Transcolor's rights, liabilities, options, or freedom of action, and it would not alter the administration of Transcolor's estate. Therefore, the *res judicata* effect of the Maryland bankruptcy decision does not provide grounds for dismissing this complaint. MML and Lapidés filed the breach of contract claim in federal court within the applicable limitations period, and after the affirmance of the dismissal of their claim, they filed their complaint in state court within the extended period set by federal statute. See 28 U.S.C. §1367(d) (2006). Finally, Gordon, Cerberus and Madeleine have not presented grounds for finding that the complaint fails to state a cause of action. Accordingly, we reverse the decision dismissing the complaint and we remand for further proceedings in accord with this order.

Reversed and remanded.