

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:)	Chapter 7 Case
)	Number <u>86-40143</u>
ROSE MARINE, INC.)	
)	
Debtor)	
_____))	
ROSE MARINE, INC.)	FILED
)	at 11 O'clock & 43 min. A.M.
Plaintiff)	Date: 6-24-92
)	
vs.)	Adversary Proceeding
)	Number <u>88-4038</u>
MARINE CONTRACTING CORPORATION,)	
EARL J. HADEN, JR.,)	
ROBERT H. THOMPSON AND)	
JOHN H. BUDGE)	
)	
Defendants)	

ORDER

The parties seek in the proposed pretrial order a pretrial ruling on what State law applies to plaintiff's various causes of action set forth in its pleadings and on whether the defenses of statute of limitations and statute of frauds are available to defendants, having failed to plead them, and if so, what State law governs these defenses. Plaintiff, Rose Marine, Inc., the Chapter 7 debtor in the underlying case, was formerly engaged in the marine construction business. Plaintiff maintains two offices, one in Savannah, Georgia, the other in Norfolk, Virginia. Defendants Earl J. Haden, Jr., Robert H. Thompson, and John H. Budge, all employees

of plaintiff, worked out of plaintiff's Virginia office. Defendants Haden and Thompson were officers of plaintiff and, according to the complaint, were officers of defendant Marine Contracting Corporation ("Marine Contracting") and owned a substantial share of Marine Contracting's stock. Defendant Budge was the office

manager and bookkeeper for plaintiff in its Virginia office.

Because at times plaintiff could not secure bonding for its construction jobs, an oral agreement was allegedly entered into with Marine Contracting whereby Marine Contracting, which had bonding, would obtain construction contracts and subcontract them to plaintiff. Under the alleged oral agreement, plaintiff paid Marine Contracting 1% of each job, which according to plaintiff was later amended to 2%, plus the cost of the bonding fee.

Defendant Marine Contracting, as prime contractor, entered into a marine construction contract to repair the James River Bridge Fender System at Newport News, Virginia and subcontracted the job to plaintiff. Under the alleged oral agreement referenced above, Marine Contracting was to be paid 1% of the total cost of the James River Bridge job, plus bonding costs. According to plaintiff, all equipment used to conduct the necessary repairs was either owned by plaintiff or leased to plaintiff by Donald Austin or Diamond Manufacturing Co., Inc. On September 26, 1983 several tugs of the Curtis Bay Towing Company collided with equipment used by plaintiff in conducting the James River Bridge repairs, damaging some

equipment and causing the loss overboard of other equipment.

Plaintiff alleges defendants fraudulently represented to Curtis Bay Towing Company that the equipment damaged or lost was owned by defendant Marine Contracting, rather than plaintiff, in order to collect damages from Curtis Bay Towing Company or its insurer, which damages plaintiff contends it was entitled to collect. Plaintiff further alleges that with respect to the James River Bridge job and other unspecified jobs subcontracted to plaintiff, Marine Contracting overcharged expenses and withheld money owed plaintiff thereby receiving a greater percentage of the cost of the jobs than the percentage the parties orally agreed Marine Contracting would be paid. Plaintiff further alleges defendant Marine Contracting tortiously interfered with an existing business relationship between plaintiff and the Jonathan Corporation by taking Jonathan Corporation's business from plaintiff. Plaintiff further alleges that defendant Haden, as a

corporate officer of plaintiff, breached a fiduciary duty owed plaintiff by appropriating plaintiff's business with the Jonathan Corporation for his and Marine Contracting's benefit. Plaintiff's causes of action can be categorized as follows: (1) conversion; (2) breach of contract; (3) tortious interference with a business relationship; and (4) appropriation of a corporate opportunity by a fiduciary. In their answer, defendants admit or deny each paragraph of plaintiff's complaint. Defendants raise in the pretrial order, for the first

time statute of limitations and statute of frauds defenses.

As Georgia is the forum state, its choice of law rules govern what State law applies to the allegations set forth in plaintiff's complaint. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.E.2d 1477 (1941). Concerning plaintiff's breach of contract allegations, Georgia courts apply the traditional lex loci contractus rule that

'[contracts] are to be governed as to their nature, validity and interpretation by the law of the place where they were made, except where it appears from the contract itself that it is to be performed in a State other than that in which it was made, in which case . . . the laws of that sister State will be applied. . . .'

General Telephone Co. of Southwest v. Trimm, 252 Ga. 95, 311 S.E.2d 460, 461 (1984) [quoting Tillman v. Gibson, 44 Ga. App. 440, 442-43, 161 S.E. 630 (1931)].

Under Georgia's choice of law rules, the rule of lex loci contractus governs what substantive law applies (such as the nature, construction and interpretation of a contract), but the rule of lex fori contractus, the law of the forum State, controls issues affecting the plaintiff's remedy (such as rules of evidence, burden of proof and presumptions). Menendez v. Perishable Distributors, Inc., 254 Ga. 300, 329 S.E.2d 149, 151 (1985). Whether the alleged oral agreements that Marine Contracting would receive 1% or 2% of

certain jobs subcontracted to plaintiff existed and whether they were breached by Marine Contracting's alleged retention of an excessive percentage of each job are substantive contractual issues controlled by the law of the State where the oral contracts were made or to be performed. A contract is made, for choice of law purposes, "where the last act essential to the completion of the contract was done." Trimm, supra, 311 S.E.2d at 461. Plaintiff alleges "defendants breached its [sic] contracts with Rose Marine, Inc. by not paying the total contract price to-Rose Marine, Inc. less [the] one percent or two percent fee Marine Contracting Corp. was to receive" (plaintiff's amended answers to defendants' interrogatories, para. No. 1) without providing further information in its pleadings or attached exhibits to allow me to determine where some of the alleged contracts were made or to be performed. The James River Bridge job was to be performed in Virginia and the written subcontract agreement expressly provides that it is governed by Virginia law. Any oral agreement reached in connection with the James River Bridge job is therefore governed by Virginia law. However, plaintiff also alleges defendant Marine Contracting breached oral agreements with plaintiff in connection with other jobs, without specifying where these alleged oral agreements were made or to be performed. There being insufficient evidence before me on where these alleged breached contracts were made or to be performed, I assume for purposes of responding to the parties'

request for a pretrial ruling that the alleged breaches were of contracts which, like the repairs to the James River Bridge Fender System, were to be performed in Virginia. Absent evidence at trial warranting a different result based on Georgia's choice of law standards as set forth in Trimm, supra, Virginia law will govern all of plaintiff's breach of contract claims.

Plaintiff's allegation that defendants converted money damages purportedly

due plaintiff by receiving proceeds from a settlement reached with the Curtis Bay Towing Co. sounds in tort. In Georgia, tort actions are governed by the law of the State where the alleged tort occurred. Karimi v. Crowley, 324 S.E.2d 583, 584 (Ga. App. 1984). Based on the fact that the accident giving rise to the settlement proceeds occurred in Virginia, and, from the pleadings and attached exhibits, the apparent occurrence in Virginia of the negotiations between defendant Marine Contracting and Curtis Bay Towing Co. as well as the other alleged fraudulent acts by defendants relating to the settlement, Virginia law governs plaintiff's allegation that defendants converted to their own use money damages to which plaintiff is entitled.

As to plaintiff's allegation that defendant Marine Contracting tortiously interfered with plaintiff's business relationship with the Jonathan Corporation, Marine Contracting operates its office out of Virginia and, absent evidence to the contrary, presumably conducted its business with the Jonathan

Corporation out of Virginia. From the evidence presented thus far the alleged wrongful conduct by defendant Marine Contracting with respect to the Jonathan Corporation took place in Virginia. Thus, Virginia law governs plaintiff's allegation that defendant Marine Contracting tortiously interfered with plaintiff's business relationship. Karimi, supra.

Plaintiff alleges defendant Haden, a corporate officer of plaintiff, breached a fiduciary duty to plaintiff by appropriating plaintiff's business for his and Marine Contracting's benefit. In Georgia, a cause of action for the wrongful appropriation of a business opportunity by a corporate officer or director is, under the internal affairs doctrine, governed by the law of the State of incorporation. Diedrich v. Miller & Meier & Associates, 254 Ga. 734, 334 S.E.2d 308, 310 (1985).¹

¹Diedrich involved the application of former Official Code of Georgia (O.C.G.A.) §14-2-153(a)(1)(C) (wrongful appropriation of a corporate business opportunity) (repealed), which in its amended form is now found in O.C.G.A. §14-2-831. See generally Comment, O.C.G.A. §14-2-831.

No evidence has been presented on plaintiff's state of incorporation, nor do the parties indicate in what state plaintiff incorporated. Plaintiff's cause of action against defendant Haden for an alleged appropriation of plaintiff's business opportunity by a corporate fiduciary is governed by the law of the state of incorporation as established by the evidence at trial.

Plaintiff contends the defenses of statute of frauds and

statute of limitations are not available to the defendants because these defenses were not raised in the pleadings. Federal Rule of Civil Procedure (FRCP) 8(c), made applicable to adversary proceedings by Bankruptcy Rule 7008(a), provides:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by a fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

Although generally a party's failure to plead an affirmative defense in compliance with FRCP 8(c) constitutes a waiver of that defense, Hassan v. United States Postal Service, 842 F.2d 260, 263 (11th Cir. 1988), Paetz v. United States, 795 F.2d 1533, 1536 (11th Cir. 1986), American Nat. Bank v. FDIC, 710 F.2d 1528, 1537 (11th Cir. 1983), "[w]hen a plaintiff has notice that an affirmative defense will be raised at trial, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice." Hassan, *supra*, at 263. See also Jones v. Miles, 656 F.2d 103, 107 n. 7 (5th Cir. Unit B. 1981)² (failure to plead an affirmative defense "is simply noncompliance with a technicality and does not constitute a waiver where there is no claim of surprise"). As defendants included the

²Decisions of Unit B of the former 5th Circuit are binding precedent in the Eleventh Circuit. Bonner v. City of Pritchard Ala., 661 F.2d 1206 (11th Cir 1981).

affirmative defenses of statute of limitations and statute of fraud in the proposed pretrial order, there is no unfair surprise to plaintiff in allowing defendants to present evidence at trial in support of these defenses. Accord Expertise, Inc. v. Aetna Finance Co., 810 F.2d 968, 973 (10th Cir. 1987); Allied Chemical Corp. v. Mackay, 695 F.2d 854, 855-56 (5th Cir. 1983); Jenkins v. Carruth, 583 F.Supp. 613, 615 (E.D. Tenn. 1982), aff'd, 734 F.2d 14 (6th Cir. 1984) (table); cf. Hassan, supra, at 263-64 (no unfair surprise to plaintiff in permitting defendant to assert at trial an affirmative defense not pled because defendant previously questioned plaintiff in interrogatories and by deposition concerning facts that bore on the affirmative defense thereby giving plaintiff sufficient notice that defendant intended to raise the defense at trial). Therefore, defendants did not waive their statute of limitations and statute of frauds defenses. It is not necessary for defendants to amend their pleadings because these defenses are asserted in the pretrial order. FRCP 16(e), made applicable here by Bankruptcy Rule 1016; Expertise, Inc., supra, at 973.

Having determined the defenses of statute of frauds and statute of limitations are available to defendants, I must determine what State law governs each defense. The defenses of statute of limitations and statute of frauds are matters affecting plaintiff's remedy. Fimian v. Guy F. Atkinson Co., 209 Ga. 113, 70 S.E.2d 762, 763 (1952); Taylor v. Murray, 231 Ga. 819, 204 S.E.2d 747, 748-49

(1974). Under Georgia's choice of law rules, matters affecting the remedy are governed by the applicable law of the forum State even though the law of another State governs the substantive issues pertaining to the plaintiff's cause of action. Gaffee v. Williams, 194 Ga. 673, 22 S.E.2d 512, 512-13 (1942); Taylor, supra, 204 S.E.2d at 748-49.³ Georgia's statute of frauds is O.C.G.A. 13-5-30. The relevant

³An exception to this rule exists if the plaintiff's cause of action is based on a foreign statute that creates a cause of

limitations periods in Georgia are as follows: four years for oral contracts, O.C.G.A. 9-3-25, Leathers v. Timex Corp., 330 S.E.2d 102, 104 (Ga. App. 1985); four years -for conversion of personalty, O.C.G.A. 9-3-32, see Talley-Corbett Box Co. v. Royals, 216 S.E.2d 358, 359 (Ga. App. 1975); four years for tortious interference with a business relationship, O.C.G.A. 9-3-31, see Long v. A.L. Williams & Assoc., Inc., 323 S.E. 2d 868, 870 (Ga. App.

1984) and if plaintiff incorporated in Georgia, four years for breach of a fiduciary duty by a corporate officer or director in appropriating a corporate opportunity, O.C.G.A. §14-2-831(b) (see note 4). Each limitations period may be tolled under O.C.G.A. §9-396⁴ if fraud committed by defendants deterred plaintiff from bringing the action.

The parties also request in the pretrial order a pretrial ruling on "2. Underpayment as contract or fraud . . . 4. Pleas of final release and final

action not available at common law and prescribes as an element of the cause of action a limitations period which is shorter than the limitations period otherwise applicable under the law of the forum State. In such cases, the limitations period of the foreign statute controls. Taylor, supra, at 748-49; see e.g., Indon Industries, Inc. v. Charles S. Martin Distributing Co., Inc., 234 Ga. 845, 218 S.E.2d 562 (1975). However, plaintiff's contract claims and its tort claims for conversion and interference with a business relationship are common law causes of action and therefore, under Taylor, the limitations periods for these causes of action are governed by Georgia law. Assuming plaintiff incorporated in Georgia, plaintiff's cause of action against defendant Haden for appropriation of a corporate opportunity by a fiduciary is governed by Georgia law, O.C.G.A. 14-2-831, and the statutorily prescribed limitations period applies. O.C.G.A. 14-2-831(b). If plaintiff incorporated in any other state, the limitations period for plaintiff's cause of action against defendant Haden will depend on whether that state, by statute, prescribes a limitations period as an element of the cause of action.

⁴O.C.G.A. §9-3-96 provides: "If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud."

payment . . . [and] 6. contested exhibits." (Pretrial order, pp. 19-20). As indicated above, plaintiff's cause of action against defendant Marine Contracting for its alleged retention of a percentage of certain jobs subcontracted to plaintiff in excess of the percentage the parties orally agreed Marine Contracting would be paid is a contract action. I do not respond to the request for a pretrial ruling on defendants' plea of final release and payment as defendants' assertions in this regard are too skeletal for me to determine a precise issue for which the parties desire a pretrial ruling. (See Pretrial order p. 16). By order dated October 11, 1991 the contested exhibits were resolved.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 24th day of June, 1992.