(Cite as: 1990 WL 106715 (Bankr.D.Vt.))

In re Joseph G. THERIAULT, Debtor.

Leonard L. KOGOS, Plaintiff,

v.

Joseph G. THERIAULT, Defendant.

Bankruptcy No. 90-00012.

Adv. No. 90-00029A.

United States Bankruptcy Court. D. Vermont.

June 8, 1990.

J. Gray, Hershenson, Carter, Scott & McGee, Norwich, Vt., for respondent, L.L. Kogos (Kogos).

J. Meyers, White River Junction, Vt., for movant J.G. Theriault (Theriault).

MEMORANDUM DECISION ON ON MOTION TO DISMISS UNDER RULE 7017 AND ORDER

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** Theriault moves [FN1] for dismissal of Adversary Proceeding No. 90- 00029A, a § 523(a)(6) complaint, on the grounds that an insurance company (name unknown to us) and not Kogos is the real party in interest, and accordingly, under F.R.Civ.P. 17 as made applicable by Rules of Practice and Procedure Rule 7017, the complaint should be dismissed. We agree, but not without providing Kogos with an opportunity to add the insurance company as a party or to better explain their non-importance away.

> FN1. We have jurisdiction to determine this matter under 28 USC § 1334(b) and the General Reference to this Court under Part V of the Local District Court Rules for the District of Vermont. This matter is core under 28 USC § 157(b)(2)(I). Our Memorandum of Decision constitutes conclusions of law and findings of fact under F.R. Civ.P. 52 as made applicable by Rules of Practice and Procedure in Bankruptcy Rule

7052.

With exceptions not applicable here, Rules of Practice and Procedure in Bankruptcy Rule 7017 makes F.R.Civ.P. 17 applicable in adversary proceedings. Rule 17 provides in pertinent part:

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

In the matter before us Theriault moves to dismiss under F.R.Civ.P. 17 because Kogos' counsel at a pre-trial conference indicated the real party in interest is an insurance company who paid Kogos' § 523(a)(6) claim. Kogos responds that the general common law allows an insurance company to pursue a subrogation claim through the insured. Specifically, Kogos points to V.R.Civ.P. 17(a) which provides in part that "an insurer who has paid all or part of a loss may sue in the name of the assured (to whose) rights it is subrogated." Kogos' memorandum, page 3.

If an insurer is a real party in interest under applicable substantive law, a Federal Court will not apply State procedural rules that permit or require the insurer to bring the action in its own name. Industrial Development Board of City of Prattville v. Brown & Roct, Inc., 99 F.R.D. 58 (M.D.Ala.1983). The cause of action underlying this adversary proceeding receives its genesis from Federal bankruptcy law. Hence, Kogos' reliance on State procedure is unfounded.

Kogos' characterization of the real party in interest rule as generally allowing an insurance company to pursue a subrogation claim is not our understanding of the law. The seminal case in this area, Gas. Ser. Co. v. Hunt, 183 F.2d 417 (10th Cir.1950) holds that in the Federal Courts an insurer who pays the insured in full for a loss becomes subrogated to all of the rights of the insured against the wrongdoer and must maintain an action against the wrongdoer in its own name. It also held in dicta that if there is a partial loss or a partial subrogation both parties, the insurer and the insured, are real parties in interest. Compare, Travelers Ins. Co. v. Riggs, 671 F.2d 810 (4th Cir.1982) which squarely holds the dicta in Gas. Ser. Co.

***2** The problem with the motion before us is that Kogos responded to Theriault's motion with a perfunctory response. It does not tell us the name of the insurance company and whether or not they are a fully or partially subrogated.

If we grant Theriault's motion, Kogos could be barred from refiling the § 523(a)(6) complaint if it is determined the real party in interest is an insurance company. Fortunately, Rule 17(a) provides us with some assistance because its last sentence allows a correction of the parties after a statute of limitations has run, despite a valid objection from the party. Hess v. Eddy, 689 F.2d 977 (11th Cir.1982), cert. denied, 77 L.Ed. 1374 (1983).

Thus, we will conditionally grant the motion to dismiss. Kogos is to provide Theriault, by June 25, 1990, with the name of the insurer and state whether they are fully subrogated or partially subrogated. Kogos is also to provide Theriault with information about any deductible under the policy and a copy of the insurance policy. If Kogos does not provide the required information the motion to dismiss will be granted. SO ORDERED.

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