

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

**IN RE: KELVIN MANBODH ASBESTOS
LITIGATION SERIES**

ASBESTOS DOCKET

**Master Docket No.
324/1997**

Master File No. 1847

This Opinion specifically pertains to the following matters:

Lawrence & Maria Leo,

Plaintiffs,

vs.

HESS OIL VIRGIN ISLANDS, et. al.,

Defendants.

ASBESTOS DOCKET

CIVIL NO. 301/1999

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

NOT FOR PUBLICATION

Ramon & Eva Rosa,

Plaintiffs,

vs.

HESS OIL VIRGIN ISLANDS, et. al.,

Defendants.

ASBESTOS DOCKET

CIVIL NO. 323/1999

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

NOT FOR PUBLICATION

Jose & Maria Carrion,

Plaintiffs,

vs.

HESS OIL VIRGIN ISLANDS, et. al.,

Defendants.

ASBESTOS DOCKET

CIVIL NO. 324/1999

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

NOT FOR PUBLICATION

MEMORANDUM OPINION

(September 30, 2002)

THIS MATTER comes before the court on Defendant Borinquen Insulation Co., Inc.'s ("Borinquen") Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, or in the alternative, to Dismiss for Insufficient Service of Process pursuant to Federal Rule of Civil Procedure 12(b)(5). Also before the Court is Plaintiff's Motion to Strike Affidavit of Puerto Rico Attorney Francisco E. Colon-Ramirez.

For reasons discussed below, this Court will rule pursuant to Federal Rule of Civil Procedure 12(b)(5) and grant Defendant's Motion to Dismiss.

I. FACTS

Borinquen was a corporation incorporated under the laws of Puerto Rico. During its existence, Borinquen sold insulation materials that contained asbestos. On April 16, 1996, Borinquen dissolved pursuant to the laws of Puerto Rico.

By letter to Plaintiff, dated August 13, 1997, Borinquen's counsel, Attorney John Benham, authorized Puerto Rico Attorney, Salvador Antonetti-Zequeira ("Antonetti-Zequeira"), to accept "complaints and execute a waiver of service of process." Plaintiffs' counsel filed Leo (Civil No. 301/1999) on May 14, 1999; Rosa (Civil No. 323/1999) on May 26, 1999; and Carrion (Civil No. 324/1999) on May 26, 1999.

In July 1999, Plaintiffs' counsel learned of an administrative oversight, which resulted in lack of proper service. On July 23, 1999, Plaintiffs mailed a request to Attorney Antonetti-Zequeira to execute a waiver of service of process in the above-captioned cases.

Borinquen subsequently notified Plaintiffs in writing that Attorney Antonetti-Zequeira was no longer authorized to accept complaints or waive service of process on behalf of Borinquen.

Plaintiffs then successfully petitioned this Court for an extension of time to properly serve Borinquen. Thereafter, Plaintiffs continued to attempt to serve Borinquen.¹

On December 16, 1999, Borinquen filed a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, or, in the alternative, to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5). Plaintiffs filed a response to Borinquen's motion and Borinquen subsequently filed a reply to Plaintiffs' response.²

II. DISCUSSION

The issue at hand is whether Borinquen had the requisite capacity to be sued at the time Plaintiffs filed their individual complaints. For the following reasons, this Court finds that Borinquen did not have the capacity to be sued at the time the complaints were filed and will, therefore, grant Borinquen's Motion to Dismiss.

A. Federal Rule of Civil Procedure 12(b)(5), Standard.

Federal Rule of Civil Procedure 12 (b)(5) states, "[e]very defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, if one is required, except that the following

¹ On September 1, 1999, Plaintiffs mailed a letter to the Puerto Rico Department of State. This letter requested the name of the current agent for service of process for Borinquen. The letter also requested, in the absence of a registered or statutory agent, information regarding the manner in which to serve a dissolved corporation under Puerto Rico law. In response, Graciela Falgás Rodríguez, Acting Director of the Corporate and Trademark Registries of the Department of State of Puerto Rico, mailed to Plaintiff a certification that Borinquen dissolved on April 16, 1996. The response did not contain further information on the proper process for serving a dissolved corporation.

Plaintiffs sent a Summons and Complaint to Lee R. Gentil, a former president, director and shareholder of Borinquen. In addition, Plaintiffs served copies of Summonses and Complaints to Borinquen's liability insurance carriers, ACE INA Holding, CIGNA Headquarters, Reliance Group Holdings, Reliance National, Reliance Insurance Co. and The Home Insurance Company. Plaintiffs mailed a Summons and Complaint to the Department of State of Puerto Rico.

There is some question as to the receipt of the Summons and Complaint by the Department of State of Puerto Rico. Plaintiffs and Borinquen also dispute whether Plaintiffs actually served Frank McDermott, the former vice-president of Borinquen. These issues, however, have no effect on the analysis in this Memorandum Opinion.

² Borinquen included in this reply the affidavit of Attorney Colon-Ramirez. The affidavit gives testimony regarding the various situations in which the Puerto Rico Department of State is authorized to accept service of process on behalf of a corporation. Plaintiffs filed a motion to strike the affidavit of Attorney Colon-Ramirez, and Borinquen filed a response to Plaintiffs' motion to strike.

defenses may at the option of the pleader be made by motion . . . (5) insufficiency of service of process." Puerto Rico has a similar statute.³

Service of process on a corporation may be accomplished by delivery of process to any officer, to a managing or general agent, or to a registered or statutory agent. Fed. R. Civ. P. 4(h)(1). The Puerto Rico statute states the same.⁴

Borinquen contends that service may not be made on an officer of a corporation after dissolution, as the officer of a dissolved corporation is no longer an officer. Plaintiffs contend that Borinquen effectively waived a service of process defense by its counsel's involvement in the proceedings without first raising an insufficiency of service of process defense in an answer or by formal motion.

The dispositive issue, however, is whether Borinquen was a corporation with the requisite capacity to be sued at the time Plaintiffs filed their lawsuits.

B. Under Puerto Rico Law, Borinquen Lacked the Capacity to be Sued.

Federal Rule of Civil Procedure 17(b) states, "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Thus Puerto Rico law governs this issue.⁵

Puerto Rico statutory law expressly prolongs the life of a corporation three years after its dissolution for litigation purposes only. *See* P.R. Laws Ann. tit. 14, § 9.08 (1995).⁶ However, the

³ The equivalent Puerto Rico statute states:

Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third-party complaint, shall be asserted in the responsive pleading thereto, if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (4) insufficiency of service of process. P.R. Laws Ann. tit. 32 § 10.2

⁴ Service shall be made as follows . . . (e) Upon a corporation, company, partnership, association or any other artificial person, by delivering a copy of the summons and of the complaint to an officer, managing or general agent, or to any other agent authorized by appointment or designated by law to receive service of process.

⁵ In order for a corporation to exist beyond the date of its dissolution for any purpose, statutory authority is required. *See Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 125 (1937).

statute specifically prolongs a dissolved corporation's life only for litigation brought by or against the corporation initiated before the three-year period expires.⁷ *See id.*

In this case, the Puerto Rico Department of State certified Borinquen's dissolution as April 16, 1996. Applying Section 9.08 of the Puerto Rico statute, Borinquen existed as a corporation for litigation purposes until April 16, 1999. As stated above, Plaintiffs did not file complaints against Borinquen until May 1999. At the time Plaintiffs initiated their lawsuits, therefore, Borinquen no longer held the requisite capacity to be sued.

C. Borinquen Did Not Extend its Corporate Life.

Plaintiffs argue that the language of Section 9.08 which states, "or for any such period which the [Court] may in its discretion, direct . . ." provides for certain exceptions that apply in the present case. They argue that, because Borinquen authorized an agent to execute waivers of service of process beyond April 16, 1999, Borinquen voluntarily extended its own corporate life.

Puerto Rico courts have firmly established that "the interpretations that the courts of the State of Delaware and of other jurisdictions make of the corresponding sections of the General Corporations Law of the State of Delaware will have an illustrative and persuasive value" on the

⁶ P.R. Laws Ann. tit. 14, § 9.08 (1995) states:

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall continue to exist as a corporate entity for a period of three (3) years from the date for extinction or dissolution, or for any such longer period which the Court of First Instance (Superior Part) may in its discretion, direct for purposes of advancing any suits initiated by the corporation and continuing the defense of the suits pending against it, whether civil, criminal or administrative, as well as for purposes of liquidation and terminating the business of the corporation, of complying with its obligations and distributing the remaining assets to the stockholders. The legal entity shall not continue for the purpose of continuing the business for which the corporation was organized.

With respect to any action, suit or proceeding filed or initiated by or against the corporation before its extinction, or within the period of three (3) years following its extinction or dissolution, the corporation shall continue as a corporate body after the three-year term, and until all judgments, orders or decrees with respect to the aforementioned actions, suits or proceedings are fully executed, without the need for any special provision to that effect by the Court of the First Instance (Superior Part).

⁷ Fed. R. Civ. P. 3 states that a civil action is initiated, "by filing a complaint with the court."

interpretation of Puerto Rico General Corporations Law, when Puerto Rico courts have not yet interpreted a statute.⁸ *D.A. Co. v. Alturas de Florida Dev. Corp.*, 132 D.P.R. 905 (P.R. 1993). The Puerto Rico courts have not yet addressed the issue at hand, therefore, this Court will look to the Delaware courts' interpretation.

Plaintiffs cite *In re Citadel Industries Inc.* for the proposition that Borinquen voluntarily extended its corporate life. *In re Citadel*, 423 A.2d 500 (Del. Ch. 1980). Plaintiffs argue that because the Delaware court likens the corporate extension statute to a statute of limitations, the Puerto Rico corporate extension statute in the case at hand may be waived or equitably tolled by the courts.

In *In re Citadel*, Citadel Industries Inc. filed a certificate of dissolution with the Delaware Secretary of State on November 18, 1976. *See id.* at 501. After an accidental grain elevator explosion, a lawsuit was filed against General Electric on September 19, 1979. *See id.* After an extensive investigation, General Electric was notified on December 5, 1979, that Citadel was the manufacturer of certain locomotives alleged to have caused

⁸ The language in P.R. Laws Ann. Tit. 14, § 9.08 is very similar to that in Delaware's corporate extension statute. Delaware's corporate extension statute reads:

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery. Del. Code Ann. tit. 8 § 278 (1967).

the explosion. "General Electric then retained Delaware counsel to investigate the corporate status of Citadel." *Id.* At the time General Electric determined Citadel's relationship to the lawsuit and its date of dissolution, the three-year statutory wind-up period had expired.

In *Citadel*, General Electric sought to have Citadel's corporate life extended beyond the three-year statutory period because they "proceeded as diligently as it could in investigating the situation and in eventually ascertaining that it was Citadel to whom it needed to look . . . for possible contribution and indemnification for any liability found against General Electric." *Id.* at 503. The *Citadel* Court rejected that argument.

Here, Plaintiffs should have known about Borinquen's dissolution date as such date is a matter of public record, and Borinquen stated that it was dissolved in every answer given in the *Kelvin Manbodh Asbestos Litigation series*. (Borinquen's Reply at 3 note 1). Borinquen's dissolution was or should have been known to the plaintiffs before the expiration of the three-year statutory period. These facts hardly support a more compelling argument for equitable tolling.

The Delaware Court also read Section 278 of the Delaware General Corporation Laws in conjunction with Section 279 and held that it would only be necessary to extend the statutory wind-up period in cases in which a party applies for the extension prior to the expiration of such period.⁹

⁹ Section 279 of the Delaware General Corporation Laws states:

When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the directors of the corporation to be trustees, or appoint 1 or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to

The interpretation given by the Delaware Court to the relevant Delaware statutory sections becomes persuasive due to the similarity to Puerto Rico General Corporations Law §§ 9.08 and 9.09. As the Delaware Court stated, the only logical way to read Sections 278 and 279 together require a party to request an extension of the statutory wind-up period before the expiration of such period. In the instant case, Plaintiffs did not request to extend Borinquen's statutory wind-up period until several months after that period had expired. Borinquen, therefore, could not voluntarily extend its corporate life with the letter dated August 27, 1999.

III. CONCLUSION

Borinquen Insulation Company, Inc. was a corporation incorporated under the laws of Puerto Rico. The Puerto Rico Department of State certified Borinquen's dissolution on April 16, 1996.

Puerto Rico General Corporations Law Section 9.08 extends a corporation's litigation life for three years after dissolution. Accordingly, Borinquen's litigation life was extended to April 16, 1999.

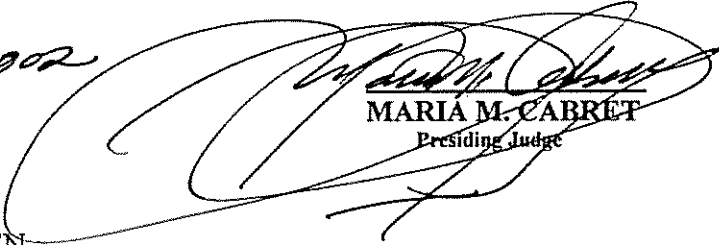
appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid. Del. Code Ann. tit. 8 § 279 (1953).

The above section is similar to Puerto Rico General Corporations Law § 9.09, which reads:

When any corporation is dissolved pursuant to the provisions of this Act, the Court of First Instance (Superior Part) may, at any time on application of any creditor or any stockholder or director of the corporation, or on petition of any person who in the judgment of the court shows good cause therefor, appoint one or more of the directors of the corporation as trustee or appoint one or more persons as receiver on behalf of and for the benefit of the corporation, so that such receivers or trustees take charge of the corporation's property and collect the credits and recover the assets of the corporation, with power to sue and defend on behalf of the corporation, file all suits as may be necessary for the aforesaid purposes, and appoint an agent or agents under their directions and carry out all acts needed to liquidate and wind up the pending affairs of the corporation as if it still existed. The powers of the receivers and the trustees may be extended by the Court of First Instance (Superior Part) as it deems necessary for the aforementioned purposes. P.R. Laws Ann. tit. 14, § 9.09 (1995).

Having granted Defendant's Motion to Dismiss, this Court need not address other motions before it on this matter.

September 30, 2002


MARIA M. CABRET
Presiding Judge

ATTEST:
DENISE D. ABRAMSEN
Clerk of the Court

By: 
Clerk

Dated: *9/30/02*