

Surprising pronouncement on forfeiture of affirmative defenses

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The Supreme Judicial Court recently held that a party who raises a lack of personal jurisdiction defense in its initial pleading nonetheless can forfeit that defense by failing to pursue it in a timely manner. *Am. Int'l Ins. Co. v. Robert Seuffer GMBH & Co. KG*, 468 Mass. 109, 119 (2014).

The decision works a substantial change in Massachusetts law governing preservation of a personal jurisdiction defense by expanding the circumstances under which a party can “forfeit” that defense.

The reasoning of the decision also raises the possibility that defense counsel may risk waiver of other commonly asserted defenses, if those defenses are potentially dispositive and not brought forward in a timely manner.

Superior Court decision

The facts of the case resemble something out of a law school casebook. See *Am. Int'l Ins. Co. v. Ziabicki Import Co.*, No. 09-04888-A, 2012 WL 3039228, at *1-3 (Mass. Super. July 5, 2012).

David Croll hung a valuable painting in his residence, which was damaged when the picture-hanging nails securing the painting to the wall snapped.

As Croll's subrogee, American International Insurance Co. brought suit in Middlesex Superior Court against Ziabicki Import Co., the distributor of the allegedly defective picture-hanging nails, and Robert Seuffer GMBH & Co. KG, the designer and manufacturer of the nails, for negligence and breach of an implied warranty.

Seuffer responded to AIIC's complaint and as-

serted lack of personal jurisdiction as an affirmative defense in its answer. Seuffer's answer specifically stated that it was making a “special appearance” to contest jurisdiction.

Seuffer is a German company, organized under German law, with its principal place of business in Calw-Hirsau, Germany. Seuffer manufactured the allegedly defective picture-hangers in Germany and then sold them to Ziabicki in Racine, Wisconsin.

After Seuffer sold the picture-hangers to Ziabicki,

On a cautionary note, the reasoning of the opinion could be extended to other affirmative defenses as well, including the other “waivable” defenses listed in Mass. R. Civ. P. 12(h)(1), and possibly also any potentially dispositive defense, the early resolution of which could promote judicial economy and fairness.

Seuffer did not have any control or influence over Ziabicki's distribution of the product. Seuffer does not have any place of business, employees or assets in Massachusetts, nor does it advertise or market its products in Massachusetts. Seuffer has never “sold, shipped, or introduced any product directly into Massachusetts.”

After answering the complaint on March 22, 2010, Seuffer conducted discovery for a period of approximately 18 months. During that time, Seuffer served interrogatories and document requests, responded to AIIC's interrogatories, deposed the AIIC claims adjuster and the restorer who repaired the painting as well as two other parties, inspected the picture-hanging nails, and inspected Croll's residence.

In some of its discovery responses, but not all, Seuffer reiterated its jurisdictional defense. Seuffer also filed a cross-claim against Ziabicki, the retailer, for indemnification, and joined in motions to extend the tracking order deadline.

On Sept. 21, 2011, Seuffer filed a motion for summary judgment, asserting lack of personal jurisdiction as the primary basis for dismissal. Seuffer also argued in the alternative for summary judgment on the merits, asserting that the plaintiff had no evidence of a defect in the nails.

In a relatively brief opinion, Superior Court Judge Douglas H. Wilkins denied Seuffer's motion, finding that Seuffer waived its personal jurisdiction defense “by delay in bringing that defense forward, coupled with participation in discovery and motions regarding the merits.”

Interestingly, the judge noted that Seuffer had an “airtight claim that this Court lacks personal jurisdiction,” and that “[h]ad Seuffer filed the Motion at the outset of the case, dismissal would surely have followed.”

Furthermore, the judge acknowledged that Seuffer fully complied with “the letter” of Mass. R. Civ. P. 12, which governs the assertion and preservation of affirmative defenses.

By litigating on the merits, however, Seuffer invoked the “benefits and protections” of the Massachusetts legal system, thereby waiving Seuffer's personal jurisdiction defense.

SJC decision

Following the decision, Seuffer filed a petition for interlocutory review in the Appeals Court. *Am. Int'l Ins. Co. v. Robert Seuffer GMBH & Co. KG*, 468 Mass. 109, 109 (2014). A single justice granted Seuffer leave to appeal, prompting AIIC to petition for direct appellate review at the SJC, which was granted.

The SJC upheld the trial court decision, concluding that a party who raises a personal jurisdiction defense in compliance with Rule 12 nonetheless can forfeit that defense by failing to pursue it in a timely manner.

The SJC instructed lower courts to engage in a “fact sensitive” inquiry into the party's conduct during the course of the litigation to determine whether the party had forfeited its personal jurisdiction defense.

As further guidance, the SJC provided a list of relevant factors for a trial court to consider during its inquiry:

1. “[T]he amount of time that has elapsed, as well as the changed procedural posture of the case, in the period between the party's initial and subsequent assertion of the defense;
2. [T]he extent to which the party engaged in discovery on the merits; and
3. [W]hether the party engaged in substantive

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pretrial motion practice and otherwise actively participated in the litigation.”

Finally, the SJC held that a party can ensure the preservation of its personal jurisdiction defense by filing a Mass. R. Civ. P. 12(b)(2) motion to dismiss “within a reasonable time, prior to substantially participating in discovery and litigating the merits of the case.”

The SJC cited to a number of rationales as support for its decision. First, the court reasoned that early resolution of personal jurisdiction disputes promotes “judicial economy and efficiency.” Where a party can “seriously contest the court’s jurisdiction,” the court should be provided with an opportunity to determine if personal jurisdiction over the party exists early in the litigation in order to avoid time and expense.

Second, the SJC found that bringing personal jurisdiction disputes forward early in the litigation promotes fairness. Otherwise, a party would be able to “keep the defense of lack of personal jurisdiction in its back pocket, even when engaging in conduct signaling that it is submitting to the court’s jurisdiction.”

Third, the SJC cited to federal case law interpreting Fed. R. Civ. P. 12 as allowing for forfeiture of a personal jurisdiction defense, and held that Mass. R. Civ. P. 12 should be interpreted consistent with the federal rule, “absent compelling reasons to the contrary.”

Finally, the SJC noted that, “unlike certain other affirmative defenses enumerated in rule 12(b), [lack of personal jurisdiction] is a potentially dispositive procedural defect,” thereby making it “particularly desirable to resolve [that issue] prior to engaging in substantive litigation.”

On May 28, Seuffer filed a petition for rehearing.

Case analysis

At the end of its opinion, the SJC held that its forfeiture ruling would apply retroactively because the “holding ... affirms, rather than contradicts, extant Massachusetts case law concerning the forfeiture of a defense of a lack of personal jurisdiction.”

In our view, the cases cited in the opinion do not fully support that holding. The cases also illustrate the difficulty trial courts may have in determining whether a personal jurisdiction defense has been brought forward in a “reasonable time.”

In *Vangel v. Martin*, 45 Mass. App. Ct. 76 (1998), a case cited in *Seuffer*, the Appeals Court held that a party that failed to assert a personal jurisdiction defense in any of its responsive pleadings or motions, and then engaged in three years of motion practice and discovery before first raising the defense in response to a motion for default judgment, waived its right to assert the defense.

Two years later, the Appeals Court returned to the same issue and held that a party forfeited its personal jurisdiction defense, despite asserting it in a responsive pleading, when it failed to pursue that defense until three years after the court had entered a default judgment. *Sarin v. Ochsner*, 48 Mass. App. Ct. 421, 422-23 (2000).

Six years later, in *Lamarche v. Lussier*, 65 Mass. App. Ct. 887 (2006), the Appeals Court seemed to take a step in the other direction. In that case, the defendant appealed from a series of abuse prevention orders entered against him.

The defendant initially had moved to dismiss the complaint on several grounds, including personal jurisdiction, but the motion was denied. The defendant thereafter proceeded to trial without again asserting the defense.

The Appeals Court held that the defense had not been waived because the defendant had given the trial court “sufficient notice of his objection to its jurisdiction.” In support of the holding, the court cited to *Walling v. Beers*, 120 Mass. 548 (1876), in which a defendant raised a personal jurisdiction defense only through a special appearance and in his answer.

The SJC held that those actions were sufficient to bring the defense to the attention of the court, so that the defendant, “by proceeding to trial afterwards,” did not forfeit the defense.

The *Seuffer* court also relied heavily on the *Raposo* case, which was an insufficiency of process case, not a personal jurisdiction suit. *Raposo v. Evans*, 71 Mass. App. Ct. 379 (2008).

The Appeals Court held in *Raposo* that a party who asserted an improper service of process defense in his answer, but failed to meaningfully pursue that defense for almost five years, and then only after participating in the final pre-trial conference and after entry of default against him, had waived his right to assert the defense.

The court held that “[a] defendant who challenges service of process in his answer must move to dismiss within a reasonable time, prior to substantially participating in discovery and litigating the merits of the case.”

Notably, however, as guidance for what would constitute a “reasonable time,” the *Raposo* court cited to a Michigan federal District Court decision, *Wilson v. Kuwahara Co.*, 717 F. Supp. 525 (W.D. Mich. 1989).

In *Wilson*, which was a products liability case involving a bicycle wheel, the court held that a foreign manufacturer’s participation in discovery and other pre-trial activities did not amount to a waiver of its properly asserted jurisdictional defense, where the defendant participated in discovery on the merits for 14 months, initiated several depositions, and appeared at a court status conference.

The court held that that “moderate amount of pretrial activity” did not justify a finding that the Japanese defendant had waived “an important due process right,” particularly where the defendant was in literal compliance with the federal equivalent of Rule 12(h).

In sum, the pre-*Seuffer* case law suggested that a party could forfeit its personal jurisdiction defense by: (1) failing to raise the defense in responsive pleadings at the outset of the litigation; or (2) asserting the personal jurisdiction defense in its responsive pleading but failing to pursue the defense until after the court had entered judgment.

In *Seuffer*, the foreign defendant asserted the personal jurisdiction defense in its first responsive pleading, and then reasserted that defense in its first appearance before the trial court as a basis for its motion for summary judgment, only 18 months after the case was filed.

In these circumstances, one easily can imagine that the trial court’s decision, and the SJC’s affirmation of that decision, came as an unwelcome surprise to Seuffer and its lawyers.

The new landscape

The SJC’s decision in *Seuffer* expanded the circumstances in which a litigant might be deemed to have forfeited a personal jurisdiction defense.

Moreover, on a cautionary note, the reasoning of the opinion could be extended to other affirmative defenses as well, including the other “waivable” defenses listed in Mass. R. Civ. P. 12(h)(1), and possibly also any potentially dispositive defense, the early resolution of which could promote judicial economy and fairness.

In upholding the Superior Court’s decision, the SJC stated that “[t]he Appeals Court implicitly has ... suggest[ed] that a party may, by virtue of its conduct, forfeit *all waivable affirmative defenses* previously asserted in a defensive pleading, including the defense of lack of personal jurisdiction.” (emphasis added).

That language suggests that a defendant can forfeit all waivable affirmative defenses under Mass. R. Civ. P. 12(h)(1) — including improper venue, misnomer of a party, insufficiency of process, pendency of a prior action, or improper amount of damages — despite asserting them in its responsive pleading. See Mass. R. Civ. P. 12(h)(1).

Further, the *Seuffer* opinion follows on and extends the *Raposo* decision and suggests that Massachusetts courts are moving toward an expanded definition of forfeiture based on considerations of fairness and judicial economy.

The cautious litigator, therefore, should consider pursuing any meritorious affirmative defense, particularly those listed in Rule 12(h)(1) and those that potentially could be dispositive of the entire case, within a “reasonable time.” **MLW**

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