

Trap for the unwary litigator: forfeiture of affirmative defense

The following post was taken from “The Litigators’ Blog,” which is hosted on the website of the Boston law firm Krokidas & Bluestein, www.kb-law.com.

In a case decided on May 14 by the Supreme Judicial Court, *American International Insurance Company v. Robert Seuffer GmbH & Co. KG.*, the court held that even though the defendant complied with the requirements of the Massachusetts Rules of Civil Procedure for raising the affirmative defense of lack of jurisdiction, that party forfeited such defense by its conduct in the litigation:

“[W]e conclude that, where a party raises the defense of lack of personal jurisdiction in a responsive pleading, the party’s subsequent conduct may in some circumstances result in a forfeiture of that defense.”

In *Seuffer*, the plaintiff sought damages when two “Floreat” picture hangers manufactured by Seuffer failed, causing the canvas of a valuable painting to tear. After pleading the affirmative defense of lack of personal jurisdiction in its answer, Seuffer engaged in discovery on the merits, serving interrogatories and document requests, responding to the plaintiff’s interrogatories, taking four depositions, requesting to inspect personal property, and making a motion to compel inspection of a residence.

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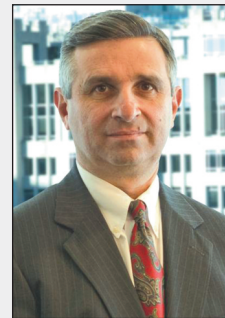
BLOG OF THE WEEK

By Vincent Pisegna
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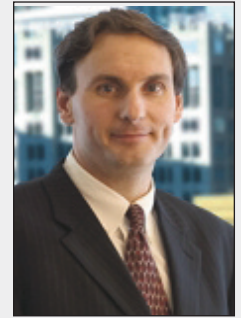
Approximately 20 months after filing its answer, Seuffer filed a motion for summary judgment raising, among other arguments, its defense of a lack of personal jurisdiction over Seuffer. The court denied Seuffer’s motion, and Seuffer filed a G.L.c. 231, §118 petition after which the SJC granted the plaintiff’s petition for direct appellate review.

Citing a phalanx of Massachusetts and federal court authority for the proposition that a party may, by its conduct, forfeit waivable affirmative defenses previously asserted in a defensive pleading, the SJC held that fairness and judicial economy and efficiency prevented Seuffer from sitting on its rights and upheld the denial of the summary judgment ruling.

In explaining its ruling, the court stated that the “fundamental purpose” of the Massachusetts Rules of Civil Procedure requires a party to assert the defense of lack of personal jurisdiction within a reasonable time prior to substantially participating in discovery and litigating the merits of a case.



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The court cited the following factors to be considered in ascertaining what constitutes a “reasonable time”: the amount of time that has elapsed from the assertion of the defense, any changed procedural posture in the case, whether the party has engaged in substantial pre-trial motion practice, and whether the party has otherwise actively participated in the litigation.

In a coda to the case, at footnote 11, the court observed that if Seuffer had prevailed on its motion for summary judgment for lack of personal jurisdiction, the statute of limitations applicable to the plaintiff’s claims would likely have run in the jurisdiction in which there was personal jurisdiction, the state of Wisconsin.

The clear and simple lesson from *Seuffer* is to make a motion to dismiss promptly if you have grounds to do so for lack of personal jurisdiction, since any material delay, whether for strategic or other reasons, may lead to the denial of such motion on forfeiture grounds.

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