NORTH BRITISH & MERCANTILE INS. CO. v. LATHROP et al.

LATHROP v. NORTH BRITISH & MERCANTILE INS. CO.

(Circuit Court, E. D. Virginia. September 15, 1894.)

1. EQUITY—INJUNCTION—CROSS BILL—PRESUMPTION.
   Where an insurance company procures a temporary injunction in the United States court, which restrains a policy holder from suing on the policy until after the time limited thereby for such suit, and defendant, by cross bill, asks to recover the amount of the loss under the policy, the court will presume, in determining whether such affirmative relief can be granted in equity, that, if it denies such relief, a state court, in which an action at law on the policy would have to be brought, would enforce the limitation, notwithstanding the injunction, and defeat recovery.
2. SAME—JURISDICTION.
   Where an insurance company brings suit to enjoin an action on a policy, and procures a temporary restraining order, and, after the issues are settled and proofs taken, defendant files a cross bill, asking to recover the amount of the loss under the policy, on the ground that the time limited by the policy for bringing an action thereon at law has expired, such affirmative relief will not be denied defendant, on the ground that his demand is a legal one, of which equity has no jurisdiction.
3. SAME—JURY TRIAL—WAIVER.
   In such case the insurer waives the right to a jury trial by voluntary submission to the jurisdiction of a court of equity.

This was a bill by the North British & Mercantile Insurance Company against Kate M. Lathrop, trading, etc., and others, to enjoin defendants from bringing an action on an award of appraisers of loss sustained by fire, under a fire insurance policy issued by complainant, etc. Defendant Lathrop filed a cross bill to enforce payment of the award, to which complainant demurred. Demurrer overruled.

The original bill here was a suit by an insurer of fire risks against sundry parties insured, of whom one only had an actual interest in this result. The policy contained a provision that it should be entirely void in case of fraud on the part of the insured. A fire occurred; and, in pursuance of a provision of the policy, an appraisement was made, and an award rendered by two of three appraisers, fixing the loss at a certain amount. To this award the insurer objected, and filed its bill on the equity side of this court, charging fraud in the appraisement, and praying the court to enjoin the insured from bringing suit at law for the loss ascertained by the award, and from applying for or procuring the sale of any bonds belonging to the insurer on deposit with the treasurer of Virginia, as security for satisfying awards made against it for losses by fire. The bill also prayed for disclosure and discovery. One of the judges of this court granted an order temporarily restraining the insured from in any manner enforcing, or attempting to enforce, the award that had been made in their favor,—that is to say, from bringing suit at law,—and also from procuring the sale of bonds held by the state treasurer in satisfaction of the award. The bill was brought in October, 1892. In the November following, the answer was filed, denying all the fraud charged, in general and in particular. The suit went on in due course. Pleadings were matured, proofs all taken and concluded, and the case made ready for a final hearing; when, on the 4th April, 1894, the insured filed a cross bill in this suit, by leave of court, praying affirmative relief and payment of the amount awarded by the appraisers. It is alleged in the cross bill, among other things, that the insured had been prevented by the temporary restraining order of the court from suing at law upon the award beyond the limitation of time for so suing stipulated in the policy,

and also by the fact that this court, having acquired jurisdiction of the question of the validity of the policy which is the basis of this suit, has exclusive jurisdiction of that question. The cross bill further alleges that if this court should merely dismiss the original bill, without decreeing the payment of the amount of the award, the expense and delay of an action at law to recover the money due would be thrown upon the insured; and that in such suit the insured would be resisted by a plea of limitation, founded on a provision of the policy, forbidding suit after one year from the time of the fire. The cross bill avers that it is the province of a court of equity, having charge of a controversy, to do full justice between the parties to it; and that it would be contrary to equity, and injurious and oppressive to the insured, for the insured to be required, at this stage of the proceedings, to institute a separate suit at law to recover what is due. The insurer demurred to the cross bill, relying—First, upon the ground that the claim of defendant is of a purely pecuniary nature, sounding in damages, for an alleged breach of contract only, and therefore, under the constitution and laws of the United States, cognizable and triable only in a court of common law, which this court has no jurisdiction to hear and determine; and, secondly, upon the ground that the claim of the insured under the award is subject to a limitation in the policy, which limitation is binding upon courts of equity, as well as of law.

Chas. S. Stringfellow, for complainant.
C. V. Meredith, for defendant Mrs. Lathrop

HUGHES, District Judge (after stating the facts). As to the question whether the limitation clause of the policy would defeat the insured if required to sue at law, it would certainly be competent for any other court but this, in which suit at law might be brought, to rule in favor of enforcing the limitation. Such court would be bound by no other consideration in favor of the insured than the comity due between courts; but no court can yield its convictions as to the force of a contract to any considerations of comity. I do not feel that this court has a right to presume that another court, in which suit at law might be brought by the insured, and the plea of limitation relied upon by the defense, would necessarily hold that the insurer was estopped from pleading the limitation. On the contrary, I think this court ought to presume the worst, to wit, that the limitation would be enforced. In contemplation of such a ruling, it would be contrary to equity for this court, after enjoining the insured from suing for a time beyond the period of limitation, to send him to a court of law to enforce his rights.

The authorities are very conflicting on the question whether a court of equity, having entertained a suit such as the one under consideration, through all its stages, until it is matured for hearing, and having found it necessary, in order to do full justice between the parties, to entertain a cross bill filed by the defendant, praying affirmative relief, is debarred from proceeding under the cross bill because it asserts a cause of action originally cognizable only in a court of law. These conflicting decisions seem to have arisen, to a greater or less extent, out of the peculiar and varying circumstances of the particular cases tried.

I do not think that there are any cases in the books in which the circumstances justifying a court of equity—after a protracted litigation, which has arrived at a stage for a decree, and full and com-