

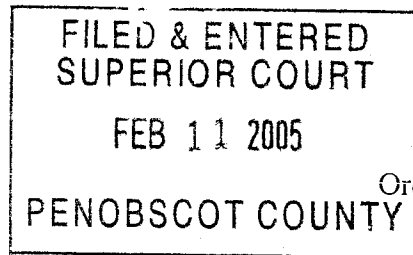
STATE OF MAINE
PENOBSCOT, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-04-218

Rosalie Countryman,
Plaintiff

v.

Kmart,
Defendant



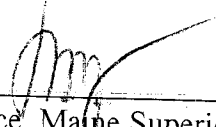
Order (Motion to Dismiss)

The defendant has filed a motion to dismiss the complaint, arguing that the claim is barred by the terms of an order issued in a bankruptcy proceeding affecting the defendant. A motion to dismiss ordinarily tests only the sufficiency of a complaint. *See McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994). Bankruptcy is an affirmative defense of avoidance, *see* M.R.Civ.P. 8(c), on which the defendant bears the burden of proof. The defendant and, in response, the plaintiff have filed extrinsic material that goes beyond the record that defines the analytical scope of a motion to dismiss. Whether the motion at bar is viewed as a motion to dismiss or a motion for summary judgment, *see* M.R.Civ.P. 12(b) (a motion to dismiss may be converted into one for summary judgment), it must be denied. First, if the motion is a motion to dismiss, the pleadings do not establish that the plaintiff is precluded from recovery on her claim. Second, if it is a motion for summary judgment, and even if the record created by the parties is a proper one to consider the factual assertions they make, that record reveals a genuine issue of material fact on the question of whether the plaintiff, through counsel, received notice of any filing requirements.

The entry shall be:

The defendant's motion to dismiss is denied.

Dated: February 11, 2005


Justice, Maine Superior Court
Jeffrey L. Hjelm

ROSALIE COUNTRYMAN - PLAINTIFF

SUPERIOR COURT

PENOBSCOT, ss.

Docket No BANSC-CV-2004-00218

Attorney for: ROSALIE COUNTRYMAN
BRETT D BABER - RETAINED 10/27/2004
LAW OFFICE OF BRETT D. BABER PA
304 HANCOCK ST, SUITE 2E
BANGOR ME 04401

DOCKET RECORD

vs

KMART - DEFENDANT

688 HOGAN ROAD

BANGOR ME 04401

Attorney for: KMART

SHAUN LISTER - RETAINED 12/09/2004

RELLA & LISTER PA

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PO BOX 2700

BANGOR ME 04402-2700

Filing Document: COMPLAINT

Minor Case Type: PROPERTY NEGLIGENCE

Filing Date: 10/27/2004

Docket Events:

10/28/2004 FILING DOCUMENT - COMPLAINT FILED ON 10/27/2004

10/28/2004 Party(s): ROSALIE COUNTRYMAN
ATTORNEY - RETAINED ENTERED ON 10/27/2004
Plaintiff's Attorney: BRETT D BABER

10/29/2004 CERTIFY/NOTIFICATION - CASE FILE NOTICE SENT ON 10/29/2004
TO ATTORNEY FOR PLAINTIFF.

11/04/2004 Party(s): KMART
SUMMONS/SERVICE - CIVIL SUMMONS SERVED ON 10/29/2004
AS TO DEFT. BY PAMELA BELL.

11/04/2004 Party(s): KMART
SUMMONS/SERVICE - CIVIL SUMMONS FILED ON 11/04/2004

11/29/2004 Party(s): KMART
SUMMONS/SERVICE - ACK OF RECEIPT OF SUMM/COMP SERVED ON 11/19/2004
AS TO DEFENDANT KMART BY SHAUN LISTER, ESQ.

11/29/2004 Party(s): KMART
SUMMONS/SERVICE - ACK OF RECEIPT OF SUMM/COMP FILED ON 11/24/2004
BY PLAINTIFF.

12/09/2004 Party(s): KMART
MOTION - MOTION TO DISMISS FILED ON 12/09/2004
DEFENDANT'S MOTION TO DISMISS WITH EXHIBIT A-D AND PROPOSED ORDER.

12/09/2004 Party(s): KMART
OTHER FILING - REQUEST FOR HEARING FILED ON 12/09/2004
BY DEFT. ON MOTION TO DISMISS, NT, .25.