

FILED: October 29, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

RIVERVIEW CONDOMINIUM ASSOCIATION, an Oregon non-profit corporation,
Plaintiff,

v.

CYPRESS VENTURES, INC., an Oregon domestic business corporation; et al,
Defendants.

BROOKFIELD DEVELOPMENT, INC.,
Third-Party Plaintiff-Appellant,

v.

PETER ZAIKIN, dba Anytime Construction; MIKE ANFILOFIEFF, dba Final Finish
Carpentry; and MODERN TECH CONSTRUCTION, INC., an Oregon corporation,
Third-Party Defendants-Respondents,

and

N.W. CUTTING EDGE CONST., INC., an Oregon corporation and RAIN-MASTER
ROOFING, INC., an Oregon corporation,
Third-Party Defendants.

Multnomah County Circuit Court
100710713

A149542

Charles E. Corrigan, Judge pro tempore.

Argued and submitted on March 06, 2014.

Bruce R. Gilbert argued the cause for appellant. With him on the briefs were Stephen E. Archer and Smith Freed & Eberhard P.C.

Jonathan W. Henderson argued the cause for respondents Peter Zaikin and Modern Tech Construction, Inc. With him on the brief was Davis Rothwell Earle & Xóchihua, P.C.

James A. Wickwire argued the cause for respondent Mike Anfilofieff. With him on the brief was Harris, Wyatt & Amala, LLC.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Lagesen, Judge.

DUNCAN, P. J.

Motion to dismiss denied. Judgment reversed and remanded as to third-party claims against Peter Zaikin dba Anytime Construction, Mike Anfilofieff dba Final Finish Carpentry, and Modern Tech Construction, Inc.; otherwise affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

- [] No costs allowed.
[X] Costs allowed, payable by Respondents.
[] Costs allowed, to abide the outcome on remand, payable by
-

1 DUNCAN, P. J.

2 This appeal relates to the same construction litigation as our decision in

3 *Riverview Condominium Association v. Cypress Ventures, Inc.* (A150586), ___ Or App

4 ___, ___ P3d ___ (Oct 29, 2014). Whereas *Riverview Condominium Association*

5 involved claims by the condominium association against, among others, Brookfield

6 Development, Inc. (Brookfield), which was the general contractor that built the

7 condominiums, this appeal concerns Brookfield's third-party claims for contribution and

8 indemnity against its subcontractors.¹ As we explained in *Riverview Condominium*

9 *Association*, the trial court ruled that the condominium association's construction-defect

10 claims against Brookfield were barred by the statute of repose. ___ Or App at ___ (slip

11 op at 10). At that point, the subcontractors moved for summary judgment against

12 Brookfield's third-party claims, arguing that the dismissal of the underlying claims

13 against Brookfield eliminated the predicate for any third-party liability. The trial court

14 agreed and granted the motion, entering a limited judgment in favor of the

15 subcontractors. Brookfield then initiated this appeal, seeking to preserve its third-party

16 claims in the event that the judgment in Brookfield's favor on the underlying claims were

17 to be reversed on appeal.

18 In *Riverview Condominium Association*, that contingency came to pass:

19 We reversed the judgment in Brookfield's favor and remanded the condominium

¹ The subcontractors remaining as respondents are Peter Zaikin dba Anytime Construction, Mike Anfilofieff dba Final Finish Carpentry, and Modern Tech Construction, Inc.

1 association's construction-defect claims for further proceedings. ____ Or App at ____ (slip
2 op at 46). Hence, the predicate for the trial court's ruling--*i.e.*, dismissal of the
3 underlying claims--is gone, and the appropriate remedy is to reverse and remand the
4 judgment on the third-party claims as well.

5 Two of the subcontractors, however, raise a jurisdictional challenge that, in
6 their view, precludes that remedy.² On appeal, those subcontractors argue for the first
7 time that Brookfield's third-party claims are not ripe, because common-law indemnity
8 claims and statutory contribution claims do not accrue until the party seeking indemnity
9 or contribution has actually made a payment to a third party. *See Rains v. Stayton*
10 *Builders Mart, Inc.*, 264 Or App 636, 670, ____ P3d ____ (2014) ("That understanding of
11 the discharge element--that actual payment is required before an indemnity plaintiff has a
12 right to indemnity--has not since been called into question by any Oregon cases and is
13 consistent with the treatment of the issue in the *Restatement (Third) of Torts * * **.");
14 ORS 31.800(2) ("The right of contribution exists only in favor of a tortfeasor who has
15 paid more than a proportional share of the common liability, and the total recovery of the
16 tortfeasor is limited to the amount paid by the tortfeasor in excess of the proportional
17 share. No tortfeasor is compelled to make contribution beyond the proportional share of
18 the tortfeasor of the entire liability."). It follows, the subcontractors argue, that
19 contribution and indemnity claims are not ripe until the underlying liability has been

² Respondents Modern Tech Construction, Inc. and Peter Zaikin filed a motion to dismiss for lack of jurisdiction, and the Appellate Commissioner deferred the resolution of that motion to the merits panel.

1 determined and the judgment has been paid by the third-party plaintiff, and Brookfield's
2 third-party claims are therefore not yet justiciable. *See McIntire v. Forbes*, 322 Or 426,
3 434, 909 P2d 846 (1996) ("For a claim to be justiciable, '[t]he controversy must involve
4 present facts as opposed to a dispute which is based on future events of a hypothetical
5 issue.' *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982)."); *Yancy v.*
6 *Shatzer*, 337 Or 345, 349, 97 P3d 1161 (2004) (explaining that ripeness is
7 "[e]ncompassed within the broad question of justiciability").

8 The subcontractors acknowledge that, for more than three decades, ORCP
9 22 has allowed a third-party complaint to be filed against a party "who is or may be liable
10 to the third party plaintiff for all or part of the plaintiff's claim against the third party
11 plaintiff." *See Kahn v. Weldin*, 60 Or App 365, 371, 653 P2d 1268 (1982), *rev den*, 294
12 Or 682 (1983) (explaining that the purpose of the "may be liable" language in Rule 22 "is
13 to promote the expeditious and economical adjudication in a single action of the entire
14 subject matter arising from a set of facts, including claims contingent on the
15 determination of other issues in the case"); *see also Marton v. Ater Construction Co.,*
16 *LLC*, 256 Or App 554, 561, 302 P3d 1198 (2013) ("ORCP 22 C(1) does not alter the
17 substance of a contribution claim under ORS 31.800 or a common-law claim for
18 indemnity. ORCP 22 is a *procedural* rule that affects the timing--not the elements--of
19 third-party claims." (Emphasis in original.)). That rule, the subcontractors argue, "cannot
20 permit Oregon courts to decide unripe cases. To the extent ORCP 22 C does permit
21 Oregon courts to decide unripe, contingent third party claims, it is unconstitutional as

1 ultra vires."

2 We are not persuaded by the subcontractors' ripeness arguments, which
3 would unreasonably restrict the ability of courts to decide what are genuine and present
4 controversies between potentially liable parties. "[R]ipeness depends on whether the
5 controversy involves present facts as opposed to hypothetical future events." *Menasha*
6 *Forest Products Corp. v. Curry County Title*, 234 Or App 115, 120, 227 P3d 770 (2010),
7 *rev'd in part on other grounds*, 350 Or 81, 249 P3d 1265 (2011). However, as we have
8 previously noted, "'[p]resent facts' and 'hypothetical future events,' * * * do not announce
9 themselves as such," and "[r]ipeness is often a matter of degree." *Id.* at 120-21. The fact
10 that a controversy might involve some unsettled questions or contingencies does not, by
11 itself, render the case "unripe" or mean that the controversy as a whole is "contingent"
12 and therefore not justiciable. *See, e.g., McIntire*, 322 Or at 434 (concluding that,
13 although operation of the legislation challenged in that case was "contingent" on funding
14 that "may or may not be committed[,]" "[t]hat uncertainty * * * does not prevent ripeness
15 for decision").

16 In our view, the third-party claims at issue in this case are based on present,
17 as opposed to hypothetical, facts. The parties have a present dispute about their
18 respective roles and responsibilities relating to the construction of the Riverview
19 Condominium, and the only true contingency--discharge of the underlying liability--will
20 flow directly from the resolution of issues within the case itself. We are not persuaded
21 that such a minimal degree of "contingency"--given that the law presumes that Brookfield

1 will satisfy any obligation to the condominium association and provides enforcement
2 mechanisms if it does not³--is sufficient to render this controversy nonjusticiable, given
3 the parties' present and competing interests in determining their respective fault based on
4 completed events. Nor are we persuaded that ORCP 22, by authorizing an accelerated
5 timeline for deciding these types of controversies, runs afoul of constitutional ripeness
6 principles. Accordingly, we reject the subcontractors' jurisdictional challenge, as well as
7 their related challenge to the constitutionality of ORCP 22, and we reverse and remand
8 the judgment dismissing Brookfield's third-party claims for further proceedings.⁴

9 Motion to dismiss denied. Judgment reversed and remanded as to third-
10 party claims against Peter Zaikin dba Anytime Construction, Mike Anfilofieff dba Final
11 Finish Carpentry, and Modern Tech Construction, Inc.; otherwise affirmed.

³ See, e.g., ORS 18.150 (concerning judgment liens); ORCP 83 (provisional process); ORCP 84 (attachment); OEC 311(1)(f) (creating an evidentiary presumption that "[a]n obligation delivered to the debtor has been paid").

⁴ Brookfield also brought a negligence claim against the subcontractors. That claim was dismissed for other reasons and is not at issue on appeal.