2001

Power-Train, Inc. and Jack H. Wynn v. Paul M. Stuver : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

POWER-TRAIN, INC., and JACK H. WYNN,

Plaintiffs and Appellants,

vs.

PAUL M. STUVER,

Defendant and Respondent.

Case No. 14302

B R I E F O F A P P E L L A N T S

Appeal from Order of Third District Court
for Salt Lake County
Honorable Bryant H. Croft, District Judge

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B R I E F O F A P P E L L A N T S

STATEMENT OF THE NATURE OF THE CASE

This is an interlocutory appeal from an order granting Respondent's Motion to Dismiss the above-entitled action.

DISPOSITION OF CASE BY LOWER COURT

An order granting the Respondent's Motion to Dismiss was entered on the 17th day of September, 1975.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the order of the trial court dismissing the above-entitled action vacated and the cause remanded for trial on the merits.

STATEMENT OF FACTS

On November 1, 1974, Paul M. Stuver, Defendant-Respondent herein, brought an action as plaintiff in the Superior Court

of the State of California for the County of Humboldt, Docket No. 56571, against Jack H. Wynn, Power-Train, Inc., Plaintiffs-Appellants herein, and Does I through X inclusive. The sole and exclusive relief sought by Mr. Stuver as plaintiff in the California action was the rescission of two assignment agreements. The first agreement (Exhibit "A" in the California action, Record 96), assigns from Mr. Stuver to Mr. Wynn Letters Patent No. 3,090,363 in the United States Patent Office, pertaining to a so-called "Mini-Sam" fluid drive motor. The second agreement (Exhibit "B" in the California action, Record 103), assigns from Mr. Stuver to Mr. Wynn all rights, including letters patent, to a unique high volume, moderate pressure, radial piston hydraulic pump and braking system which will compliment the Power-Train ("Mini-Sam") motor..." Both agreements contain provisions that they are to be "construed in accordance with and governed by the laws of the State of Utah." (Record 21, 28).

Mr. Stuver's complaint in the California action alleges as grounds for rescission breach by Mr. Wynn, Power-Train, and Does I through X of various provisions of the two assignment agreements above-described, including, among others, covenants by said defendants to pay certain cash amounts to Stuver, certain expenses of Stuver, certain royalties and certain stock rights in other corporations, and to employ Stuver to assist in the production of the inventions to which he had assigned his rights.

Mr. Wynn and Power-Train, Inc., filed an answer as defendants to the California action on December 10, 1974. It denied generally the allegations of Mr. Stuver's complaint. In addition, it set up as affirmative defenses Mr. Stuver's failure to make a legally sufficient offer of restitution, failure of constructive conditions of cooperation under the assignment agreements, misrepresentations by Stuver with respect to the legal integrity, performance and cost characteristics of the inventions assigned, and a broadly worded affirmative defense of "willful and wanton" conduct by Mr. Stuver resulting in harm to the defendants. The Appellants' answer in the California action contained no counterclaim.

On June 23, 1975, Appellants commenced this action against the Respondent. They based their prayer for damages on fifteen separate counts of tortious conduct, ranging from the Respondent's misrepresentations with respect to the inventions assigned, their manufacturing costs, etc., to tortious interference with the Appellants' contract relations, interference with their prospective advantage, appropriation of trade secrets, industrial sabotage and champerty.

Thereafter, the Respondent filed his Motion to Dismiss on the ground that the action pending in California involved the same parties and the same issues and, therefore, the priority principal applied to the present action and required its dismissal.

The trial court adopted the argument of the Respondent

and dismissed this action on the grounds that all the allegations in Appellants' Complaint were properly compulsory counterclaims under California law, and as a matter of judicial comity to the California court, the Appellants' Complaint was dismissed. (Record 83.)

ARGUMENT

POINT I

IF THE CALIFORNIA ACTION WERE FOUND TO INVOLVE THE IDENTICAL PARTIES, ISSUES AND RELIEF AS THE PRESENT ACTION, SUCH FINDING WOULD NOT CONSTITUTE GROUNDS FOR DISMISSING THE PRESENT ACTION.

The trial court has misapplied the familiar "priority principal" which states the general rule of law that the pendency of a prior action in a court of competent jurisdiction within the same state, between identical parties, involving the identical cause of action and seeking identical relief, wherein all of the rights of the parties thereto may be fully and finally determined, may be asserted as a grounds for dismissal. 1 Am. Jur. Abatement and Revival, Sec. 14.

But

> The pendency of a prior suit in one state cannot be pleaded in abatement or in bar to a subsequent suit in another state even though both suits are between the same parties and upon the same cause of action.... [Although a] judgment rendered in one is, of course, when pleaded, a bar to further prosecution of the other action. (1 Am.Jur. Abatement and Revival, Sec. 39.)

Chicago R.I. & P.R.Co. v. Schendel, 270 U.S. 611 (1927); Dodge v. Superior Court, 139 Cal.178, 33 P.2d 695 (1934); Upton

v. Heiselt Construction Co., 3 Utah2d 170, 280 P.2d 971 (1955); 53 A.L.R. 1265; Restatement (Second) of Conflicts, Sec. 86. There is no substantive distinction between "abatement" and "dismissal" of an action. 1 Am. Jur.2d Abatement and Revival, Sec. 1.

The trial court based its dismissal of the present action on the precise ground that there was an action pending in another state, involving the same parties and the same issues, which the authorities have universally held to be impermissible grounds for dismissal. This Court must, therefore, vacate the order of the trial court dismissing the present action.

POINT II

A STAY OF THE PRESENT ACTION PENDING THE CONCLUSION OF THE CALIFORNIA ACTION IS CLEARLY INAPPROPRIATE.

The issue of whether or not a stay of the present action pending the conclusion of the California action is not directly presented by this appeal. The Respondent has not moved for such relief and the trial court not awarded it. But, in the event that this Court should consider it necessary to first determine whether or not a stay of the present action is appropriate before remanding this action for trial on the merits, the Appellants will demonstrate that such relief is clearly inappropriate.

A court of one state may, in its discretion, stay a proceeding pending it before it on the ground that a case involving the same parties and issues is pending in another

state. Simmons v. Superior Court, 96 Cal·2d 119, 214 P.2d 844 (1950); 19 A.L.R.2d 301. Such a stay is not available to the moving party as a matter of right. Coffey v. Coffey, 71 S.W.2d 141 (Mo. 1934).

The general rule empowering a court to stay a local action pending the outcome of a foreign action and its rationale are summarized in 19 A.L.R.2d 301, Sec. 2 at page 306:

> While judicial comity owing to the courts of other states in which the former litigation was pending is sometimes advanced as a reason for the exercise of the power to stay the local proceedings, it is apparent that it is not the principal or sole reason, since if it were, the power would be exercised (as it is not) unconditionally and under all circumstances.
>
> The real or principal reason for the exercise of the power, when it has been exercised, appears to be the protection of the defendant from vexatious and harassing litigation, where there is no legitimate advantage which the plaintiff may gain by bringing his suit in more than one jurisdiction....

Confirming that this is the rationale for the rule empowering a court to stay a domestic proceeding pending the outcome of a foreign proceeding is State v. Knehans, 31 S.W.2d 226 (Mo· 1930), wherein it was stated that:

> The general rule has come to be that the defense of a prior suit pending applies only when the plaintiff in both suits is the same and both are commenced by himself and not to cross-suits by the plaintiff in one who is the defendant in the other.

It is plain, then, that the principal reason for empowering courts to stay a local action pending the outcome of the same action in a foreign jurisdiction is to control the potential harrassment to which a defendant may be subjected by a plaintiff

who proliferates suits against him in various jurisdictions in bad faith. It plainly follows that the rationale for the rule applies with less force to the situation where the plaintiff in the domestic action is the defendant in the foreign action. An additional subordinate rationale for empowering courts to stay local actions pending the outcome of foreign actions is to promote judicial economy by discouraging redundant suits.

When to authorize a stay of a local action is a policy question, and its proper application is not susceptible to generalized rules. Application of that policy depends almost entirely upon the facts of the individual case. Muir v. Robinson, 205 Ind. 293, 186 N.E. 289 (1933). Courts have, however, devised some generally accepted tests to determine when a subsequent local suit has no legitimate basis as a separate action and is, therefore, considered vexatious. For the priority principal to apply, it is deemed necessary that the two actions be between identical parties, Kirkpatrick v. Eastern Milling and Export Co., 135 F. 144 (D.C. N.J. 1904), that they involve identical issues, Slade v. Dickinson, 82 F.Supp. 416 (D.C. Mich. 1949); Pesquera Del Pacifico S. De P.L. v. Superior Court, 89 Cal.2d 738, 201 P.2d 553 (1949); Chappel v. Chappel, 186 Misc. 968, 60 N.Y.S.2d 447 (1945); Sullivan v. Sullivan, 71 N.Y.S.2d 120 (1947); and request the same relief, Disbrow Mfg. Co. v. Creamery Package Mfg. Co., 115 Minn. 434, 132 N.W.

915 (1911), such that a decision in one action will render all issues in the other res judicata.

The foregoing test of identity of parties, issues and relief is the one employed when applying the principal of res judicata generally. Essentially the same test, however, is used for determining whether an abatement or stay is appropriate under the priority principal and for determining whether a counterclaim is compulsory or permissive. Where the prerequisites of identity of parties, issues and relief are satisfied, the trial court is deemed empowered to stay a local action on the grounds of a prior pending foreign suit. Chadwick v. Gill, 16 Del. 127, 141 A. 618 (1927); 19 A.L.R.2d 301, 307-08.

The question that must be answered in determining whether a stay of the present action is appropriate is, therefore, whether all of the allegations of the Appellants' complaint in the present action are properly defined as compulsory counterclaims in the California action.

The California Rules of Civil Procedure, Sec. 426.60 state:

> (a) Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action.

Section 426.10(c) clarifies what is meant by "any related cause

of action." It states:

> "Related cause of action" means a cause of action which arises out of the same transaction, occurrence or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint.

In deciding whether all of the allegations of Appellants' Complaint filed in the present action would be compulsory or permissive counterclaims in the California action, the key phrase that must be defined is "arises out of the same transaction, occurrence or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." Under authoritative definitions of the phrase "same transaction or occurrence" as it is used in the California and similiar compulsory counterclaim statutes, it cannot be maintained that all of the allegations contained in the Appellants' Complaint in the present action would constitute compulsory counterclaims in the California action.

Knapp v. Knapp, 15 Cal.2d 237, 100 P.2d 759 (1943) illustrates how the "same transaction" test is to be applied. There the plaintiff brought an action seeking to share in the proceeds from the sale of land in which he and the defendant each owned an undivided one-half interest, the defendant holding the plaintiff's share for him as trustee.

The plaintiff had left the state where the land was located for an extended period. The defendant eventually sent

him a promissory note in the amount of $2,000.00 bearing the following inscription: "In full settlement for (plaintiff's) interest in the Cucamunga, California orange grove which was owned by payor and payee." The plaintiff alleged that the note was part of a scheme by the defendant to abscond entirely with the proceeds of the sale of the parcel which actually amounted to $10,000.00.

The defendant argued that a prior pending suit brought by the plaintiff to recover on the note constituted a suit on the same cause of action and, therefore, the failure of the plaintiff to assert his claim for fraud at that time should bar his subsequent suit for fraud.

The court held the cause of action on the note itself to be separate from the cause of action for fraud and that, therefore, the plaintiff's prior action to recover on the note would not operate to bar his action for fraud though it was closely connected with the note.

Big Cola v. World Bottling Co., 134 F.2d 718 (6th Cir. 1943) contains an instructive definition of the phrase "same transaction or occurrence" as employed in a compulsory counterclaim statute then in force. There the plaintiff granted the defendant a contractual right to manufacture a soft drink concentrate according to the plaintiff's secret formula, as well as the exclusive right to use a registered name in the sale of the

concentrate. Defendant thereafter expended money and effort in promotional work and advertising in many states. The plaintiff asked for a determination that the contract was void. The defendant's answer asserted the validity of the contract, but asserted no counterclaim.

The defendant to the former action subsequently brought an independent action against the plaintiff in the former action seeking damages on the ground of implied contract. The defendant (plaintiff in the former action) moved for abatement of the subsequent action on the ground that it involved the same cause of action which was the basis of the prior suit, that plaintiff's claims were properly compulsory counterclaims in the prior suit and could not now serve as the basis of an independent action.

The court held that the plaintiff's cause of action on implied contract did not "arise out of the transaction or occurrence that is the subject-matter of the opposing party's claim," that it was, therefore, a permissive counterclaim which the plaintiff was not obliged to plead in the former suit and was now free to assert as the basis of an independent action.

Kerby v. State, 62 Ariz. 294, 157 P.2d 698 (1945) contains another instructive application of the "same transaction or occurrence" test as employed in interpreting a compulsory

counterclaim statute. There the secretary of state had previously brought an action in mandamus against the state auditor requiring the auditor to pay his accrued salary then being withheld by the auditor on the ground of illegal payments made by the secretary of state. Subsequently, the auditor brought an action against the secretary of state to recover the expenditures illegally made. The secretary argued that the auditor's claim arose from the same transaction or occurrence which was the subject matter of the prior suit in mandamus, that it was, therefore, a compulsory counterclaim in the prior suit and could not now serve as the basis of an independent action.

The court held that Arizona's counterclaim statute did not apply to bar the auditor's claim since it did not arise from the same transaction or occurrence which was the subject matter of the secretary's action in mandamus.

Another instructive application of the "same transaction or occurrence" test for determining whether a counterclaim is compulsory or permissive is found in Capetillo v. Burress and Rogers, 202 S.W.2d 953 (Tex. 1947). Capetillo was an action brought by plaintiff for damages for wrongful sequestration of his truck by the defendants. Defendants had previously brought an action against the plaintiff to foreclose a chattel mortgage on his truck, causing the truck to be repossessed and held for charges. The defendants moved to abate the plaintiff's

action for wrongful sequestration on the grounds that it arose out of the same transaction which was the subject matter of the prior suit for foreclosure, and was, therefore, properly a compulsory counterclaim in the prior action. The court rejected the defendants' argument, holding that the plaintiff's wrongful sequestration action was a question of abuse of court process and, as such, did not arise out of the transaction upon which the foreclosure suit was based. It therefore held that the Texas compulsory counterclaim statute was not a bar to the plaintiff's wrongful sequestration action.

Williams v. Robinson, 1 F.R.D. 211 (D.D.C. 1940) also illustrates the proper application of the "same transaction or occurrence" test to the issue of whether a counterclaim is properly defined as compulsory or permissive. There the wife of the defendant had previously brought an action against him for divorce. In the previous action the defendant had cross-complained for absolute divorce from his wife on grounds of adultery, naming the plaintiff in the principal case as co-respondent. The answer filed by the plaintiff in the principal case to the husband's cross-complaint in the prior action was limited to a general denial of the allegation of adultery.

Thereafter, the plaintiff in the principal case brought an action against the defendant husband for libel and slander. The defendant moved to dismiss the plaintiff's complaint on the grounds that the defendant had failed to assert it as a

counterclaim in the prior action for divorce as required by Rule 13(a) of the Federal Rules of Civil Procedure, and was now precluded from basing a separate action thereon.

The court rejected the defendant's argument, holding that the slander and libel of which the plaintiff complained was not part and parcel of the transaction or occurrence that was the subject matter of the defendant husband's cross-complaint in the previous action for divorce and consequently the plaintiff's libel and slander action must be considered a permissive rather than a compulsory counterclaim.

Knapp, Big Cola, Capetillo, and Williams, forcefully illustrate that a cause of action will not be deemed to have arisen from the "same transaction or occurrence" which was the subject matter of an opposing party's cause of action merely because a relationship can be shown between the respective "transactions." They illustrate that a close analysis of the respective "transactions" is required in order to determine whether those transactions raise common questions of law sufficient to justify a requirement that those questions be determined in a single proceeding.

Specifically with respect to contract actions, the authorities have established that certain causes of action in contract are to be defined as separate from others though the subject matter of both may be the same contract. Many

authorities hold, for example, that actions to enforce rights under a contract are properly defined as causes of action separate from actions to reform, rescind or cancel the same contract. For example in National Fire Insurance Company v. Hughes, 81 N.E. 563 (1907), an insurer brought an action to reform a fire insurance policy on the grounds of mutual mistake in the description of the insured structures. There was an appeal pending from a prior suit by the insured seeking recovery under the policy. The insured argued that his prior pending suit on the policy was based on the same cause of action as the principal suit by the insurer for reformation and, therefore, should bar the subsequent suit by the insurer.

The court held that the cause of action in reformation was distinct from the cause of action at law to recover on the policy, though both causes of action related to the same contract. Accord, Knapp v. Knapp, 15 Cal.2d 237, 100 P.2d 759 (1943); State v. Knehans, 31 S.W.2d 226 (Mo. 1930); Strike v. Floor, 97 Utah 265, 92 P.2d 867 (1939); Western & Southern Life Ins. Co. v. Brenna, 275 Mich. 19, 265 N.W. 512 (1936).

In summary, the authorities state that a defendant's claims against a plaintiff, before they may be defined as compulsory counterclaims, must not only be related to the transaction or occurrence upon which the plaintiff's claims against the defendant are based, but must also be closely analyzed to determine

if they raise common questions of law that would justify requiring all of the defendant's claims to be adjudicated in the proceeding brought by the plaintiff. This is particularly true in actions confined to the question of rescission, cancellation or reformation of contracts.

The contract case cited in the Memorandum of the Respondent in Support of his Motion to Dismiss does not undermine these conclusions. In Brunswick Drug Co. v. Springer, 130 P.2d 758 (Cal. 1942), cited by the Respondent (Record 85), the complaint therein simultaneously asserted causes of action for rescission and damages under the contract upon which the action was based. Under those circumstances, there is little question that the defendant's own claims for damages under the same contract were held to be compulsory counterclaims.

Furthermore, the cases cited in said Memorandum of the Respondent wherein local actions were stayed on the ground of prior pending foreign actions involving the same parties and the same issues for reasons of judicial "comity" must be considered to represent a minority view. As previously noted, if comity were truely the rationale upon which the priority principal is based, the authority of a court to stay a local action pending the conclusion of an action in a foreign state would be a mandatory duty rather than a discretionary power, which the authorities unanimously state it is not. (See authorities cited page 6, supra.)

The question of whether a stay of the present action would be appropriate, then, can only be determined by a close examination of the pleadings in the respective actions. Notice should first be taken of the factors distinguishing the California action from the present action. There is not a strict identity of parties, the California action naming Does I through X as defendants while there are no such parties named in the present action. Two assignment agreements constitute the subject matter of the California action, while the subject matter of the present action is the tortious acts of the Respondent, some related to the agreements upon which the California action is based and some unrelated. The relief sought in the California action is limited to rescission and restitution, while the relief sought in the present action is limited to damages and an accounting.

The fact that the prerequisites of identity of parties and of relief sought are lacking in the present action tends to reinforce Appellants' contention that the claims asserted in their Complaint herein would be permissive rather than compulsory counterclaims in the California action, but the absence of those prerequisites is not dispositive. The respective pleadings must be further analyzed to determine whether all of the Appellants' alleged causes of action arose from the "same transaction or occurrence which is the subject matter of the (Respondent's)

Complaint" in the California action. It must be concluded that they do not.

The action brought by Respondent as plaintiff in the California Superior Court seeks rescission of the assignment agreements, (Exhibits "A" and "B" in the California action, Record 96, 103), and restitution, but seeks no other relief. The issues raised by Respondent's Complaint, as previously described in Appellants' Statement of Facts, are the performance or non-performance of the respective parties of those assignment agreements as that relates to the Respondent's right to rescind. The affirmative defenses contained in the Appellants' answer raised the issues of misrepresentation by the Respondent pertaining to the inventions assigned, his intentional obstruction of Appellants' business operations and other "willful and wanton" conduct as such conduct may relate to failure of constructive conditions of cooperation under the agreements. Appellants in their Answer made no counterclaim. In summary, the "subject-matter" of the California action is the two assignment agreements described herein. The "transactions or occurrences" arising therefrom are the performance or non-performance of those agreements as they relate to Mr. Stuver's right to the equitable remedy of rescission.

In contrast, the action brought by Appellants as Plaintiffs in the Utah District Court is an action in tort, seeking damages and an accounting for fifteen (15) separate counts of tortious

conduct by the Respondent. They include misrepresentations by Respondent as to the integrity of the patent assigned (Count I and II of Appellants' Complaint), the performance characteristics of the inventions assigned (Count XIII) and their manufacturing costs (Count V). Such conduct may be considered "transactions or occurrences" related to the two assignment agreements which constitute the "subject-matter" of the California action and may, therefore, be considered to "arise therefrom."

But Appellants' Complaint also includes allegations of champerty (Count XIV), tortious interference with Appellants' contract relations with its customers (Count XIV), with its prospective advantage with future customers (Count VIII) and an accounting for profits realized from trade secrets appropriated by the Respondent (Count XV). Such conduct can be considered to have only the most strained and incidental relationship to the two assignment agreements which constitute the "subject-matter" of the California action, and the conclusion that they "arise therefrom" and therefore constitute compulsory counterclaims under the California statutes is simply untenable.

For example, the Appellants' claim that the Respondent has tortiously interfered with its prospective advantage, and his claim that the Respondent has conducted industrial sabotage has little bearing on the question of the performance or non-performance of the respective parties of the assignment agreements as that relates to Respondent's right to rescind. They

do not constitute a defense to the Respondent's claim for rescission and would not be affected by a determination that the Respondent has such right. Therefore, these allegations in Appellants' Complaint must considered permissive rather than compulsory counterclaims had they been filed in the California action for rescission. Least of all can the question of champerty by the Respondent be thought to relate to the Respondent's right to rescind or the lack thereof. It presents an entirely distinct question of abuse of court process and would therefore constitute a permissive rather than a compulsory counterclaim in the California action. Capetillo v. Buress and Rogers, 202 S.W.2d 953 (Tex. 1947); Williams v. Robinson, 1 F.R.D. 211 (D.D.C. 1940).

It is clear that Appellants' Complaint includes several allegations that can, at most, be considered permissive counterclaims had they been asserted in the California action. As permissive counterclaims, the right of Appellants to bring a separate action thereon is uncontestable. This Court should, therefore, not only vacate the Order of the trial court, dismissing the present action, but should remand this cause for trial on the merits.

CONCLUSION

The Order of the trial court dismissing the present action contravenes the universally accepted rule that the

pendency of a prior suit in the one state cannot be pleaded in abatement or in bar to a subsequent suit in another state, even where both suits are brought between identical parties, upon identical causes of action and seek identical relief. The Order of the trial court must, therefore, be vacated.

A stay of the present action pending the outcome of the California action is clearly inappropriate inasmuch as the Appellants' Complaint includes several causes of action that would, at best, have been permissive counterclaims if asserted in the California action. This Court should, therefore, remand this cause for trial on the merits.

Respectfully submitted,

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