

1952

Slim Olson, Inc. v. Keith Winegar dba Intermountain Oil Distributors : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Slim Olson, Inc. v. Keith Winegar*, No. 7801 (Utah Supreme Court, 1952).
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In the Supreme Court of the State of Utah

SLIM OLSON, INC., a corporation,
Plaintiff and Respondent,

— vs. —

KEITH WINEGAR, doing business
as INTERMOUNTAIN OIL DIS-
TRIBUTORS,
Defendant and Appellant.

No. 7801

BRIEF OF APPELLANT

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clerk, Supreme Court, Utah

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In the Supreme Court of the State of Utah

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Plaintiff and Respondent,

— vs. —

KEITH WINEGAR, doing business
as INTERMOUNTAIN OIL DIS-
TRIBUTORS,
Defendant and Appellant.

No. 7801

BRIEF OF APPELLANT

STATEMENT OF FACTS

On June 6, 1951, plaintiff filed suit to recover \$3,778.43 with legal interest, also attorney fees, on an account for goods sold and services rendered to defendant between January 1 and May 18, 1951. On March 24, 1951, prior to the filing of this action, defendant brought action against plaintiff for damages for destruction of a Diesel

engine as a result of negligent installation of a sump bag, (No. 4293 in the same court, which case is now before this Honorable Court on appeal, No. 7780). In said other case which is now No. 7780 in this Court, plaintiff herein as defendant in that action, filed an answer on April 9, 1951, but no counterclaim.

In the answer filed by defendant in the above entitled cause, the defendant admitted all except \$17.12 of the account asserted by plaintiff as justly due and owing. Defendant denied liability for counsel fees. As a further defense, defendant alleged that civil case No. 4293 was an action arising out of the services performed for this defendant by plaintiff; and that plaintiff herein was barred from asserting any claim as to matters in controversy in said other case by virtue of the provisions of Rule 13, Utah Rules of Civil Procedure, by failure to assert such claims by way of counterclaim.

Exhibit "A" offered in evidence by plaintiff in this case, consists of a number of sales slips and delivery tickets, which includes one dated January 24, 1951, for the following items:

Lubrication	\$ 3.00
Gear grease 4 pints	1.00
Lubefiner	5.00
Sump bag90
Sump gasket50
Labor on filters50
Tax16
 Total	 \$11.06

Thus, one of the items of the alleged account in this action, was a claim dated January 24, 1951, for servicing of a Diesel engine and the installation of a sump bag. Said item of account is definitely related to the cause of action asserted by defendant in the negligence action in which defendant herein sued for destruction of his Diesel engine. Said negligence action is now on appeal in this Court as case No. 7780.

The trial court overruled in toto the objection of this defendant, that this action was barred as to matters which should have been asserted by way of counterclaim in the negligence action. The court affirmatively held that action was not barred, and in effect gave judgment against defendant for the service and installation performed January 24, 1951, which was the subject of controversy in the other action. Judgment was allowed without proof of correct service or satisfactory installation.

The matters in controversy on this appeal are principally questions of law.

POINTS ON WHICH DEFENDANT RELIES FOR REVERSAL OF THE JUDGMENT

1. The trial court erred in awarding counsel fees.
2. The court erred in allowing recovery with respect to items in the account which should have been asserted as a counterclaim in another action.

ARGUMENT

Point No. 1:

THE TRIAL COURT ERRED IN AWARDING COUNSEL FEES.

The plaintiff sued on an open account for goods sold and for services rendered. The award of counsel fees was based on a statement printed on the lower power of the sales slips (Exhibit "A"):

"Received from SLIM OLSON, INC., the above described merchandise. The undersigned agrees to pay all costs, including reasonable attorney's fees, if this account is referred to an attorney for collection."

An examination of the sales slips or delivery tickets (Exhibit "A"), discloses that a number of them were signed by persons other than defendant. The signatures were placed *above* the foregoing statement. The defendant denied by answer that any of these people were authorized to agree to pay counsel fees. There was no evidence of any authorization.

As far as the individual tickets were concerned, even if the signatures had been made below the statement, there could not be implied any promise to pay except by the individual who signed. The statement is that "the undersigned agrees to pay." They were not signed in the name of defendant, except in several instances, and as far as the record is concerned, those particular tickets might well have been covered by the advances or payments made by defendant.

If such a clause inserted at the bottom of a sales ticket or delivery slip can be construed as a covenant by the principal to pay counsel fees, then every truck driver whose authority and employment is limited to receiving and delivering goods, can exercise the same authority as an executive vice-president or general manager of the company making the purchase, without the consent of the company. The authority to pick up goods or freight which is given to a truck driver, should not be construed to authorize the employee to execute an agreement for payment of counsel fees, which would be binding upon the principal although not done in the name of the principal.

None of the tickets are signed below the questioned statement as "Keith Winegar," or "Intermountain Oil Distributors, By x....." If the defendant can be held liable for counsel fees, then even if the goods were picked up by messenger or other independent contractor, the purchaser of the goods could be held liable for attorney fees.

We have found no authority which would support the judgment for counsel fees in a case of this kind, independent of statute. We contend that the award of counsel fees was entirely in error.

Point No. 2:

THE TRIAL COURT ERRED IN ALLOWING RECOVERY WITH RESPECT TO ITEMS IN THE ACCOUNT WHICH SHOULD HAVE BEEN ASSERTED AS A COUNTERCLAIM IN ANOTHER ACTION.

By Finding of Fact No. 6 the trial court found that:

“this account and the cause of action did not arise out of the transaction alleged in that certain action entitled ‘Keith Winegar, doing business as Intermountain Oil Distributors v. Slim Olson, Inc., a corporation, Defendant,’ being Civil No. 4293, but the court finds that said cause and this cause were consolidated for trial, * * * And the court finds that the plaintiff is not barred under the provisions of Rule 13 of the Utah Rules of Civil Procedure or at all from proceeding in this cause.”

There can be no dispute about the fact that included in this action was a claim for \$11.06 for lubrication, installation of sump bag, etc., on January 24, 1951. Said Civil Case No. 4293 (now pending in this Court as No. 7780) was brought by defendant herein against the plaintiff herein on March 24, 1951, to recover damages for the negligent installation of a sump bag as a result of which installation the Diesel engine was starved of oil and the engine was completely destroyed. On April 9, 1951, plaintiff herein as the defendant in said action, filed an answer to the complaint. It denied liability, but did not file any counterclaim for recovery of the costs of installation or the materials and oils and greases involved in connection therewith. Our contention is that with respect to all matters which could be classified as “compulsory counterclaims,” action was barred here by failure to set up such items by way of counterclaim.

Rule 13(a) of the Utah Rules of Civil Procedure reads as follows:

“(a) COMPULSORY COUNTERCLAIM.

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the *transaction or occurrence that is the subject matter of the opposing party's claim* and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be stated if at the time the action was commenced the claim was the subject of another pending action.” (Italics added.)

Federal Rule 13(a) is identical with our Utah Rule 13(a). It is to be noted that the rule states:

“A pleading shall state as a counterclaim *any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.*” (Italics added.)

In support of defendant's contention in this matter it is necessary to interpret the meaning of the phrase “transaction or occurrence that is the subject matter of the opposing party's claim.”

As stated in Moore's Federal Practice, Vol. 3, P. 30:

“An all-embracing definition cannot be given, nor is one desirable. The same flexibility and same empirical treatment is necessary in connection with ‘transaction or occurrence’ that has been advocated and discussed in connection with ‘cause of action.’ ”

Moore then quotes from the case of *Moore v. New*

York Cotton Exchange (1926), 270 U. S. 593; 46 S. Ct. 367; 70 L. Ed. 750, as follows:

“‘Transaction’ is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here basis its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. *Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely indetical, or that the counterclaim embraces additional allegations; as, for example, that appellant is unlawfully getting the quotations, does not matter.* To hold otherwise would be to rob this branch of the rule (the compulsory counterclaim provisions of Equity Rule 30) of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant’s counterclaim.”

The case of *Pennsylvania Railroad Co. v. Musante-Phillips, Inc.*, (1941) 42 Fed. Sup. 340, also supports the contention of appellant. In this case the plaintiffs sue to recover freight and other charges upon a carload of lettuce from Oxnard, California, by various diversions to Philadelphia, Pennsylvania, where the consignee rejected. The defendant filed a counterclaim alleging that the carload of lettuce was diverted so negligently by vari-

ous connecting carriers that the lettuce arrived in a damaged condition. The Court held that Rule 13(a) was mandatory, and if the defendant had not pleaded its counterclaim it would have been precluded by raising the same matter in an independent action.

Eastern Transportation Co. v. United States, et al. (1947) 159 Fed. Sup. (2d) 349. This was an action against the United States for earned freight. Counterclaims for damage, demurrage and expenses alleged to unworthiness of the vessel were held to be compulsory counterclaims which must be pleaded under Rule 13(a).

In *Advance Thresher Co. v. Klein* 133, N. W. 51, action was brought on a series of notes given for the purchase price of a threshing rig. The notes were given to secure the purchase price which was set out in a contract of sale. The defendant counterclaimed for medical expenses and loss of services occasioned defendant by injuries to his minor son while assisting the plaintiff's agent in repairing the rig, which repair was being made pursuant to the contract between plaintiff and defendant. The Court, in interpreting the meaning of the word "transaction," quotes the case of *Story v. Story*, 100 Cal. 30, 34 Pac. 671, as follows:

"In the case of *Story v. Story & Isham Commercial Co.*, 100 Cal. 30, 34 Pac. 671, the court held that the 'transaction' comprehended within the meaning of this section of the Code is not limited to the facts set forth in the complaint, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding

between them which formed the basis of the agreement, and if plaintiff omits or fails to set forth in his complaint the entire transaction out of which the claim arose defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court. The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist on a judgment on that fact alone, if the fact is so connected with others that it forms only a portion of the transaction." See also 34 Cyc. 686 and 687.

The Court then goes on and discusses the threshing rig case:

"In the case at bar, the notes set out in the complaint constitute but a component part or portion of the entire transaction of the sale of the threshing machinery by plaintiff to defendant. The contract of sale with all its mutual agreements and provisions, the acts of all the parties and their agents performed under and by virtue thereof in carrying out and performing the mutual provisions thereof, the repair of the engine, the assistance to be furnished in such repair on the part of defendant, are all parts of one and the same transaction, just as much as the giving or the payment or nonpayment of the notes sued upon. The question then arises, Was the alleged negligent injury to the defendant's son so connected with the transaction or subject-matter of the action as to constitute a proper counterclaim?" The court held that it was.

These cases make a very realistic and broad interpretation of the word "transaction." The Moore case

cited above is authority under Federal Rule 13(a), since Rule 13(a) is broader in scope than Equity Rule 30 under which the Moore case was decided. Equity Rule 30 required a counterclaim "arising out of the *transaction* which is the subject-matter of the suit." Rule 13(a) requires a counterclaim arising "out of the *transaction* or *occurrence* that is the subject-matter of the suit."

In 3 Moore's Federal Practice, p. 33, appears the statement:

"Courts should give the phrase 'transaction or occurrence that is the subject matter' of the suit a broad realistic interpretation in the interest of avoiding multiplicity of suits. Subject to the exceptions, any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim; only claims that are unrelated to or are related, but within the exceptions, need not be pleaded. * * *"

The note to Rule 13(a) states that "Secs 104-9-1 (2) and 104-9-3, are covered by this rule. Section 104-9-3, U. C. A. 1943, provided:

"If the defendant omits to set up a counterclaim in the cases mentioned in the first subdivision of the next preceding section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

The rules do not expressly state the language of the foregoing former statutory provision, but by implication they bar action on matters which would be compulsory counterclaims, by subdivision (e) of Rule 13:

“When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.”

There is a fundamental reason why a defendant should be compelled to assert as a counterclaim any matters which arise out of the transaction which is the subject-matter of the claim of plaintiff. The instant case help to illustrate the necessity for such a rule to prevent a miscarriage of justice. *If a defendant who is sued for negligently performing a service in such a manner that it resulted in damage to plaintiff, denies that he rendered such service in his attempt to defeat the negligence action, he should not be permitted in a subsequent action to recover for the very service which he denied that he ever rendered.*

In the instant case, plaintiff who was the defendant in the negligence action, by answer filed April 9, 1951, admitted that the truck was serviced on January 24, 1951, but denied that the corporation did or was in any manner responsible for the things of which Keith Winegar complained. No counterclaim was set up for recovery of the amount claimed for service to the truck which was the basis of the negligence claim of Keith Winegar. Nor was any counterclaim set up for any services rendered to the plaintiff in that action (defendant in the instant case). However, on June 6, 1951, Slim Olson, Inc., filed an independent action to recover on open account, which included the transaction of January 24, 1951, with respect to the very Diesel engine in controversy.

If plaintiff had counterclaimed in the negligence action for the claim of January 24, 1951, for service and installation on the Diesel engine, as we contend plaintiff was required to do under the compulsory counterclaim rule, plaintiff would have been compelled to prove that it performed the service in a good workmanlike manner. By filing an independent action and including therein the claim which related to the controversy with respect to January 24, 1951, along with other claims, plaintiff sought to be compensated in this action for service on the Diesel engine on the theory that it was done properly. *There was no evidence that the service and installation was properly done.*

Even if the question of attorney fees were not involved in this action, defendant here would have been compelled to appeal in this case, by reason of the inclusion in this case, the controversial claim which is the subject of the negligence action; for even if defendant here as the plaintiff in the negligence action prevails in this Court, upon the re-trial of said cause, the plaintiff here as defendant in that action would doubtless attempt to plead the judgment in this case as a bar to recovery. Plaintiff would doubtless claim that recovery was had in this case for installation, and that by implication, judgment in this case covering the service and installation was for proper installation and negatived negligent installation.

Defendant has been compelled to take two appeals, due in part to the failure of the trial court to exclude from this case, matters which were part of the "tran-

saction or occurrence" which constituted the subject matter of the negligence action. Plaintiff should not be permitted to say that although covered by the compulsory counterclaim rule, it should be excepted therefrom because it chose to combine its claim which should have been asserted as a counterclaim, with other claims which were independent of the controversy over the Diesel engine. The evil of allowing any such an exception is that it allows a party to have more than "his day in court," and subjects the injured party to two appeals involving the identical controversy.

The streamlining of our Rules of Civil Procedure will operate to short-circuit justice, if the term "Compulsory Counterclaim" can be construed to mean "Optional Counterclaim." If such construction of Rule 13 were permitted, it would permit a defendant to deny liability in an action for services negligently performed, and then allow recovery in a subsequent action for the very service with respect to which he denied liability, and perhaps previously denied that he ever rendered.

When the evidence disclosed that the account for January 24, 1951, was included in this action, the court should have treated that matter as barred by failure to set up such claim as a counterclaim in the negligence case. Counsel for defendant here argued at the trial that items in the account were barred in addition to the ones of January 24, 1951. Even if defendant were wrong in claiming additional items or even all of the items were barred, that error could not obviate the prejudicial error of the trial court in holding that none of the items

were barred. The items relating to the servicing of the Diesel engine on January 24, 1951, were definitely claims which arose "out of the transaction or occurrence that is the subject matter of the opposing party's claim" in the negligence action.

The court declared that both cases were consolidated for trial. The consolidation was without notice; but disregarding such fact, consolidation of two cases for trial did not operate to make the complaint in the instant case or any portion thereof, a counterclaim in the negligence action. Furthermore, the two cases were not merged, but remained separate and independent cases. With respect to claims which are barred by reason of failure to assert them as compulsory counterclaims, there could be nothing to consolidate for purposes of trial.

CONCLUSION

The trial court committed reversible error by awarding counsel fees in an action on open account, particularly in view of the lack of authority of the truck drivers to make any agreements for defendant to pay counsel fees.

The trial court also committed prejudicial error in holding that this action is not barred under Rule 13. Such ruling was reversible error with respect to the items pertaining to the servicing of the Diesel engine on January 24, 1951. There was no proof that plaintiff had

performed that service and installation in a competent and prudent manner. Regardless of how small the amount involved might be, inclusion in the judgment of said amount is prejudicial, particularly if plaintiff as defendant in the negligence action can plead recovery in this action as a bar to the claim of negligence in the event of re-trial in the negligence case.

Respectfully submitted,

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