

1952

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

Utah Supreme Court

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IN THE
SUPREME COURT

OF THE
State of Utah

FILED

MAY 1 - 1952

SLIM OLSON, INC., a corporation,

Plaintiff and Respondent.

vs.

KEITH WINEGAR, doing business
as INTERMOUNTAIN OIL
DISTRIBUTORS,

Defendant and Appellant.

No. 7801

HUGGINS & HUGGINS
Attorneys for Plaintiff
and Respondent.

RESPONDENT'S BRIEF

TABLE OF CONTENTS

| | Page |
|--|------|
| STATEMENT OF FACTS | 1 |
| STATEMENT OF POINTS | 4 |
| POINT NO. I: | |
| The Trial Court did not err in awarding counsel fees | 4 |
| POINT NO. II: | |
| The Trial Court did not err in allowing recovery with respect to items in the account which appellant alleges should have been asserted as a counterclaim in another action | 4 |
| ARGUMENT | 4 |
| Point No. I | 4 |
| Point No. II | 4 |
| CONCLUSION | 17 |

TABLE OF CASES CITED

| | |
|--|----|
| Advance Thresher Co. v. Klein, 133 N. W. 151 | 16 |
| Big Cola Corp. v. World Bottling Co., Ltd., 7 F.R. Serv. 13 b. 3 Case 1, 134 F (2d) 718 (C.C.A. 6th, 1943) | 13 |
| D' Auxy. v. D Pre, 47 App. Div. 51; 62 N.Y.S. 244 | 12 |
| Donnelly Garment Co. v. International Ladies Garment Workers Union, 6 F.R. Serv. 13a. 11, Case 2; 47 F. Supp. 67, (D. C. W. D. Mo. 1942) | 10 |
| Douglas v. Wisconsin Alumni Research Foundation, 11 F.R. Serv. 13a. 11, Case 1; 81 F. Supp. 167, (D. C. N. D. Ill. 1948) | 15 |
| Eastern Transportation Co. v. United States et. al., (1947) 159 Fed. Supp. (2d) 349 | 16 |
| Gallahar v. George H. Pheman Co., 7 F.R. Serv. 13F. 12, 50 Fed. Supp. 655 (D. C. S. D. G. A. 1943) | 8 |
| Keith Winegar d. b. a. Intermountain Oil Distributors v. Slim Olson, Inc., a corporation. No. 4293 | 2 |
| Kiester Laboratories Inc. v. Lee, 14 F.R. Serv. 13a. 11, Case 1; 10 F.R.D. 351 (D. C. N. D. 1950) | 10 |
| Louisville Trust Co. v. Glenn, 9 F.R. Serv. 13f. 12, Case 1; 66 F. Supp. 872 (D. C. W. D. Ky., 1946) | 10 |
| Martin v. Thorckmartin, 15 Pa. 632 | 13 |
| Moore v. New York Cotton Exchange, 1925, 270 U.S. 593; 46 S. Ct. 367; 371; 70 L. Ed. 750; 45 A.L.R. 1370 | 14 |
| Noel Estate Inc. v. Dixon & Denny et. al., 212 La. 313; 31 Southern (2d) 810, (1947) | 11 |
| Pennsylvania Railroad Co. v. Musante-Phillips, Inc. (1941) 42 Fed. Supp. 340 | 15 |
| Redlop Trucking Corp. v. Seaboard Freight Lines Inc., 4 F.R. Serv. 13a. 11, Case 2; 35 F. Supp. 740 (D. C. S. D. N. Y., 1940) | 9 |
| William v. Robinson, 3 F.R. Serv. 13a. 11, Case 1; 1 F.R.D. 211 (D. C. D. C. 1940) | 9 |

STATUTES CITED

Utah Rules of Civil Procedure:

| | |
|------------------|----------|
| Rule 11 | 2 |
| Rule 13(a) | 7, 8, 17 |
| Rule 13(b) | 13 |

TEXTS CITED

Am. Juris:

| | |
|----------------------------------|---|
| 2 Am. Juris p. 70 and 86 | 5 |
| 12 Am. Juris p. 552 and 61 | 5 |

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
DISTRIBUTORS,

Defendant and Appellant.

No. 7801

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The records will show that on June 6, 1951, plaintiff and respondent filed suit to recover the sum of \$3778.43 principal with legal interest, attorney's fees in the sum of \$250.00 and costs. On July 31, 1951, defendant and

appellant filed a purported motion to dismiss, which motion in fact had no legal meaning or significance, in as much as it was not signed by a person duly authorized to practice law in the state of Utah. It is obvious that this motion is a nullity, and is of no consequence. Rule 11, Utah Rule of Civil Procedure.

“Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney who is duly licensed to practice in the state of Utah * * * *”

On the 14th day of August, the trial court properly denied the purported motion to dismiss, and it should be noted that defendant failed to appear in court to press his motion. At this time, the court ordered this instant case consolidated with the case of Keith Winegar, d.b.a. Intermountain Oil Distributors v. Slim Olson, Inc., a corporation, Case No. 4293. T. p 31.

On the 28th day of August, 1951, defendant filed his answer in which he admitted that the sum due and owing plaintiff is \$3761.31, with legal interest from the 10th day of July, 1951, and allegedly tendered this sum to the court, which in actuality was never tendered in fact — again showing the defendant realized that his purported motion was not well taken.

On October 3, 1951, and immediately after the conclusion of the trial of the former case, to-wit: Keith Winegar v. Slim Olson, Inc., No. 4293, and in accordance with the order of consolidation (transcript P. 31) this case was regularly called for trial; plaintiff and defendant were both present in court and represented by the respective counsel at which time counsel for Keith Winegar objected

to going forward on the grounds that he did not know of the order of consolidation and that, in any event, he desired the instant case to be heard before a judge other than Judge Hendricks. Whereupon the court ordered a pre-trial to be had. At that time, it was there stipulated that the only issue was the question of attorney's fees (transcript P. 32). Nothing was said concerning defendant's contention that this claim should have been pleaded as a counterclaim. At the conclusion of the pre-trial the court set the instant case for trial on October 9, 1951.

On October 9, 1951, the trial was had, and the only issue, under the pre-trial order was that of attorney's fees. There was no question about the fact that the sum was owed, but the question of attorney's fees was argued, and the court allowed defendant one week to brief the question of whether or not this was a compulsory counterclaim, and plaintiff an additional week to answer defendant's brief. After the court had considered both parties briefs, he entered judgment for plaintiff as against defendant, from which this appeal is taken.

Prior to the filing of this action and on March 24, 1951, defendant had filed an action against plaintiff for damages caused by an alleged negligent installation of a filter bag on his diesel engine. On April 9, 1951, plaintiff in this case filed his answer. It is in this suit—a tort action concerning a specific instance and sole transaction—that defendant claims plaintiff should have filed the instant action on an open account for goods sold and delivered, as a counterclaim. Let it be noted that over \$3,000.00 of plaintiff's account arose after the alleged negligence of plaintiff's agent, and further, between \$500.00 and \$600.00 was incurred after plaintiff's answer

in the tort action had been filed. There is no evidence that any of the items except the one January 24th, 1951, had any connection with or involved the diesel truck which was the subject of the first case.

POINTS RELIED UPON

POINT No. I

The trial court did not err in awarding counsel fees.

POINT No. II

The trial court did not err in allowing recovery with respect to items in the account which appellant alleges should have been asserted as a counterclaim in another action.

ARGUMENT

POINT No. I

THE TRIAL COURT DID NOT ERR IN AWARDING COUNSEL FEES.

Exhibit "A" will show that all of the sales slips in question contain the following statement on the lower part of the slip, to-wit:

"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."

Each of the slips bears the signature of either appellant or one of his agents.

The law of principal and agency in this sort of case is so fundamental that it is obvious that there is no merit in appellants Point No. 1. It is clearly the law, that the

actual location of the signature on a contract does not affect its validity.

In 12 Am. Juris. p 552, Sec. 61, it states this fundamental law as follows:

"A party is bound by a written contract even though his signature does not appear at its end. (Italics ours) If his name, written by himself, appears in any part of the agreement, it may be taken as his signature, if it were written for the purpose of giving authenticity to the instrument, and thus operating as a signature. Therefore, words written on the back of a contract blank as a portion of the instrument to be signed by the parties become part of the obligation, although the signatures are not below them but are on the preceding page."

The law thus stated is so elemental that nothing more need be said.

The sales slips not signed by Keith Winegar, were signed by his drivers and agents, and it was their duty to service Winegars cars and trucks. Being in the scope of their employment, it follows that their signatures on the sales slips bound the principal Winegar with the terms of the contract.

In 2 Am. Juris. p 70, Sec. 86, the following general law is stated:

"* * * * An agent expressly authorized to do a particular act or acts, or conduct a particular transaction has implied authority to do acts which are incidental to, usually accompany, or are reasonably necessary to the accomplishment of performance of

the principal act or transaction delegated.”

The drivers had the authority to buy gas, supplies and services on credit, and in order so to do, they had the authority under general agency principals to sign sales slips and bind their principal to the terms of the contract. In any event, this procedure had been carried on for a long period of time, and Winegar had never questioned the provision on the sales slip, and had never given notice that the drivers had no right to bind him on such provision. Under the law and under the facts, he is now estopped from asserting such a ground upon appeal.

POINT No. II

The trial court did not err in allowing recovery with respect to items in the account which appellant allege should have been asserted as a counterclaim in another action.

It is our contention that, with the possible exception of the sales slip made up at the time of the alleged negligence of plaintiff's agent, there can be absolutely no part of plaintiff's claim construed as arising out of the "transaction or occurrence" out of which defendants cause of action for damages arose.

Defendant's claim arose out of an alleged negligent act of plaintiff's agent in a particular servicing of his diesel truck. It is a tort action. It is in no way connected with previous or subsequent sales of supplies and services. Each sale was a separate act. There was no contract or agreement between the parties that defendant would buy his supplies and services at plaintiff's place of business, nor was there a contract or agreement that plaintiff would sell to defendant, or would service his

cars and trucks. Defendant merely came in when he desired, serviced his vehicles, and signed credit slips for each transaction. Under this fact situation, it is baffling how defendant reaches the conclusion that the two cases arose out of the same transaction. The most that might be said on his matter is that plaintiff's claim *might* be a permissive counterclaim, certainly not a compulsory one.

After admission by the defendant throughout the case, that the account was due and owing, defendant now is trying to defeat a valid claim for goods, supplies, and services sold and delivered through an imaginary technicality. Even if appellants could, by some stretch of the imagination, place plaintiff's claim into the category of a compulsory counterclaim, let it be noted that this case and defendant's previous case for damages were consolidated after defendant had apparently abandoned his plea that this is a proper case for a compulsory counterclaim. Further, let it be noted that *it was the defendant who refused to have this case heard at the conclusion of his own case*. Had he gone forward, the result would have been the same as if the second case had been pleaded as a counterclaim. Appellant, by his own acts, defeated the manner of procedure which would have, in effect, made this action one of counterclaim.

Now coming to the rule involved, which reads in part as follows:

“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* * * * * ” Rule

13 (a) Utah Rules of Civil Procedure.

The transaction or occurrence referred to in the rule applied to the Winegar case was the alleged servicing of his tractor on January 24th, 1951. That is the only transaction alleged by Winegar in the complaint from which his action in damages stemmed. It may be that the service charge of \$11.06 on that day was the service alleged to have been negligently made in the first action, and might be considered as having arisen out of the transaction or occurrence but certainly not more than that. The purpose of the rule should be considered. The philosophy of the rule is to discourage separate actions which make for multiplicity of suits and wherever possible to permit and sometimes require combining in one litigation all the cross claims of the parties, particularly where they arise out of the same transaction. *Gallahar v. George H. Rheman Co.*, 7 F. R. Serv., 13 F. 12, 50 Fed. Supp., 655, (D.C.S.D.G.A. 1943.)

“The decided cases indicate that the word “transaction” denotes something done, a completed action an affair as a whole. In *Croft Refrigeration Mark Co. v. Quinne Picie Brewing Co.*, 63 Conn., 551, 29 A. 76, 25 L.R.A. 856, the word “transaction” is defined to mean something which has been acted out to the end. In *Cheatham v. Bobbett*, 118 N. C. 343, 24 S. E., 13, it is said the word “transaction” in N. C. code, in reference to joinder of actions is used in the sense of the conduct of finishing up an affair which constitutes as a whole the subject of an action.”

All of the cases cited by Winegar are cases where actions have been filed after the original action was com-

pleted, resulting in continuing litigation and multiplicity of suits. The present actions were consolidated and opportunity offered to try the two simultaneously, obviating and complying with the very purpose of the rule.

In *Williams v. Robinson*, 3 Fed. Rule Service, Case 1, 1 F.R.D. 211 (D.C.D.C. 1940), it was said:

“The terms “transaction and occurrence” as used in Rule 13 (a) include the facts and circumstances out of which a claim may arise and whether its claims arise out of the same transaction or occurrence *depends in part on whether the same evidence will support or refute both.*” Where defendant in an action for maintenance filed a counterclaim for divorce, naming a co-respondent and the co-respondent answered, denying the charges, and later filed a separate action for libel and slander against the defendant, it was held that the claim for libel and slander did not arise out of the transaction or occurrence upon which defendant’s counterclaim against the correspondent was based.” (Italics ours.)

It will be clearly seen that the proof necessary in both cases was entirely different.

Courts attempt to administer justice and equity and give wide discretion to the trial court in proceeding in this kind of cases. For instance in *Redlop Trucking Corp. v. Seaboard Freight Lines, Inc.*, 35 F. Supp. 740, (D.C.S.D.N.Y., 1940), 4 F. R. Serv., 13 a 11, Case 2:

“A defendant in a federal court filed suit in a state court on a claim which would constitute a compulsory counterclaim in the former action,”

held the state court action should not be staid. It was

said in *Louisville Trust Company v. Glenn*, 66 Fed. Supp. 872, a Kentucky case decided in 1946 in an action by the government to recover unpaid taxes for the taxable years 1941 and 1942 a counterclaim seeking to set off amounts improperly collected for the tax year 1943 is not a compulsory but a permissive counterclaim.

In an action against certain labor unions and individual defendants under the Sherman Act defendants brought a proceeding under the Norris-LaGuardia Act, 29 U.S.C., Sec. 107, for damages alleged to have been caused by wrongful issuance of injunctions against them, plaintiffs attempted to set up a counterclaim based upon alleged wrongful acts of defendants substantially the same as those which formed the basis of the proceeding under the Sherman Act, held (1) that such a counterclaim may not be entertained in a summary proceeding, and (2) that the counterclaim did not arise out of the same transaction or occurrence as the defendant's claim and, therefore, could not be maintained. *Donnelly Garment Co. v. International Ladies Garment Workers Union*, 47 Fed. Supp. 67.

In *Kuster Laboratories, Inc. v. Lee*, 14 F. R. Serv. 13a.11, Case 1, 10 F. R. D. 351 (D.C.N.D. 1950), the court in dismissing a counterclaim made the following pertinent finding:

“A compulsory counterclaim must arise ‘out of the transaction or occurrence that is the *subject matter* of the opposing party’s claim.’ Rule 13 (a) Federal Rules of Civil Procedure. * * * * It is patent that the claim and counterclaim do not arise out of the same transaction or same occurrence. *Each must*

be established by distinct proofs.” (Italics ours).

Referring now to the test “whether the same evidence would support or refute both” the Winegar and the Olson cases, how could any negligence pleaded in the Winegar case prove or refute the claim of Slim Olson for goods, wares and services sold by him over a period of five months to Winegar? Conversely how could the evidence in the Slim Olson case to prove money owing for goods and wares and services sold to Winegar prove or defeat Winegar’s claim for negligence in one only of approximately 500 separate purchases?

From the foregoing and numerous other cases which could be cited, it becomes apparently certain that the claim contained in the Slim Olson case cannot be considered a compulsory counterclaim. As a matter of fact, under the authorities we believe that it could not even become a permissive counterclaim.

In the case of Noel Estate, Inc. v. Dixon and Denny, et al., 212 La. 313, 31 Southern (2) 810, decided by the Louisiana Supreme Court May 26, 1947, it was held in a case where a firm of attorneys representing a client over a period of time earned several fees for litigation handled for the client and finally having collected a judgment for their client, sought to apply the judgment on the fees which had been earned in all the cases and where the client filed suit against the attorneys to recover the amount of the judgment collected by them and the attorneys attempted to counterclaim their earned fee against the claim of their client, the court held:

“Attorneys may not in a client’s action against them to recover the proceeds of a judgment re-

covered by the attorneys for the client, maintain a plea of set off and compensation based upon unliquidated claims for fees for various services rendered and suits filed during a period of years.”

The court further said:

“The fees and charges claimed in defendant’s reconventional demand (counterclaim) other than those for services in the Highway Commission litigation (where the judgment was collected) are not connected with or incidental to the subject of the main action herein. This is clearly shown by defendant’s answer, one allegation of which is ‘that on or about during the year 1934 the Noel Estate, Inc. employed your defendants as attorneys to handle their legal business and agreed to pay them for assisting in their office work and giving advice the sum of \$50.00 per month, and any other fees for work done were to be separately adjusted and paid.’ * * * * *In a separate suit, however, defendants may seek to recover such fees and charges and in this connection all of their rights should and will be reserved.*”

In *D’Auxy v. DPre*, 47 App. Div. 51, 62 N. Y. S., 244, it appeared that the plaintiff had employed the defendant to collect a claim which he later assigned to the defendant and subsequently instituted suit to have the assignment set aside as being induced by fraud and for an accounting. The defendant filed a counterclaim, seeking to set off his claim for fees for services rendered the plaintiff *from time to time*.^L An order overruling plaintiff’s demurrer to the counterclaim was reversed on appeal, the court holding that since the claim was not on the contract, the defendant’s counterclaim *not arising out of or con-*

nected with the plaintiff's transaction was an independent cause of action and could not be set off.

In *Big Cola Corp. v. World Bottling Co., Ltd.* 7 F. R. Serv. 13b .3 Case 1; 134 F. (2d) 718 (C C A 6th 1943) the court in discussing the difference between a permissive and a compulsory counterclaim said:

“The difference between the compulsory requirement of stating counterclaims under Rule 13 (a) and permissive provision of stating such claims under Rule 13 (b), depends on whether such claims arise ‘out of the transaction or occurrence that is the subject matter of an opposing parties claim.’ *Where a counterclaim is an essentially independent action it is a permissive counterclaim; and even where pleaded in answer to an opposing parties claim, the trial court is given discretion to order separate trials of claim and counterclaim.*” (Italics ours).

In *Martin v. Throckmartin*, 15 Pa. 632, it was held well settled that an attorney who has collected money for his client cannot set off against his client's claim for that money a claim due him for services as counsel for any proceeding other than that out of which the money came.

These latter cases, which are similar to the instant case where Winegar seeks to compel Olson to counterclaim independent claims for goods, wares and services sold to Winegar other than at the time Olson serviced the truck which became the basis of Winegar's action, hold that such cases are not even permissive counterclaims and hence could certainly not be compulsory.

It will be noted under Section (b) of Rule 13 the rule

broadens the scope of 13 (a) by adding

“A pleading *may* (Italics ours) state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”

In any event the two cases were consolidated, which gave Winegar every right and benefit he could have obtained under the rule, even if Olson’s claim had formed the basis of a compulsory counterclaim, which it did not, and so an analysis of the two claims and the procedure followed leaves Winegar shorn clean of any right, legal or equitable, to attempt to defeat the Slim Olson case on a technicality of procedure, and it must be kept in mind that the rules of procedure are not jurisdictional but are procedural only and are not intended to defeat legitimate claims.

An analysis of the defendant’s authorities cited in his brief demonstrates the difference between the cases cited by him and the case at bar. For instance, in the *Moore v. New York Cotton Exchange* case it will be noted that the entire transactions covered arose out of and by virtue of a contract where the plaintiff sued to have the contract between the New York Stock Exchange and Western Union declared to be in violation of the Sherman Anti-Trust Act, and the defendants set up the defense that they had refused to install the ticker service, which was the basis of the contract, but that the plaintiff had nevertheless used their service without right and asked for an injunction. The court’s attention is properly called to the statement of the Supreme Court in its decision, wherein it said:

“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.”

Wherein could it be said that purchases of motor fuel, oil, etc. on entirely separate days for use in entirely separate units have any logical relationship to the alleged negligence of Slim Olsons on January 24?

In *Douglas v. Wisconsin Alumni Research Foundation*, 11 F. R. Serv. 13a .11, Case 1; 81 F. Supp. 167 (D.C.N.D. Ill., 1948), the court quoted the *Moore* case cited by the appellant, as follows:

“The case of *Moore v. New York Cotton Exchange* 1925, 270 U. S. 593, 46 S. Ct. 367, 371, 70 L. Ed. 750, 45 A. L. R. 1370, sets forth the basic rules for determining whether or not a compulsory counterclaim exists:

‘Two classes of counterclaims thus are provided for: (a) One ‘arising out of the transaction which is the subject matter of the suit’ which must be pleaded; and (b) *another ‘which might be the subject of an independent suit in equity’ and which may be brought forward at the option of the defendant.*” (Italics our).

The instant case clearly falls into the (b) or second type of claim set out in this decision.

Again, the *Pennsylvania Railroad Co. v. Musanti—Phillips, Inc.*, where suit was brought by plaintiff for freight, a counterclaim was filed covering a series of diversions of a negligent nature, *all of which contributed to a final result*—deterioration of a perishable product.

The Eastern Transportation Company case again is an action for freight upon a single shipment where the government counterclaimed damages on that particular shipment for demurrage and other expenses, which was perfectly proper.

In the Advance Thresher Company v. Klein case suit was brought on a series of notes covering the purchase price of a threshing machine. All of the notes were related to and a part of the purchase price. It should be noticed that the contract of purchase and sale provided for the making of repairs, and the suit resulted from damages which occurred in making the repairs “pursuant to the contract between plaintiff and defendant.”

The Storey case cited therein holds that

“The transaction comprehended within the meaning of the section of the code is not limited to the facts set forth in the complaint but includes the entire series of facts and mutual conduct of the parties in the business or proceeding between them, *which formed the basis of the agreement.*” (Italics ours).

The agreement in the Winegar case was that Slim Olsons, Inc. would undertake the servicing of the particular unit in question on January 24, and would use due diligence and care in doing so, and the plaintiff, Winegar, would pay the reasonable costs thereof. That is the entire transaction. The fallacy of Winegar’s position is clearly pointed out in the second quote from the Storey case on page 12 of his brief.

CONCLUSION

The trial court did not err in awarding counsel fees in this action. Under well-known and well-established contract and agency law, appellant was bound by the terms of the contract, as represented by the sales slips signed by himself and by his agents acting in his behalf.

The trial court did not commit prejudicial error in holding that this action is not barred under Rule 13 (a) of Utah Rules of Civil Procedure. It is obvious under the law, and under this particular fact situation, that the open account was not, and could not be found to comprise a part of the same transaction or occurrence that appellants claim for damages arose from. Appellant claimed damages in his original cause of action, from alleged negligent work done to his truck by respondent's agent on one particular day. He does not and cannot connect his alleged damage to any of the other transactions. The fact that appellant purchased supplies and services prior to the act he complained of, and subsequent to said act, has no bearing on his original action. The facts necessary to prove appellant's case are entirely different from the ones necessary to prove respondent's case. At the very most, it might be said that this action might have constituted a permissive counterclaim. It is impossible to find any abuse of discretion by the trial court, and its ruling and decision should be affirmed.

Respectfully submitted,

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Respondent.