COVENANT NOT TO SUE HELD DEFENSE RATHER THAN COUNTERCLAIM

Johnson v. Sargent
109 Ohio App. 16, 163 N.E.2d 401 (1960)

At the scene of an automobile accident in Nebraska, the parties to this action entered into an oral contract,[1] each agreeing not to report his damages to his insurance company and to pay for the repairs to his own automobile. Despite this contract, plaintiff later obtained a default judgment in Nebraska for the damages to his automobile. The noted decision arose out of plaintiff's suit in Ohio on the Nebraska judgment, in which defendant filed a cross-petition for damages arising from plaintiff's breach of the oral contract. Plaintiff's motion to strike the cross-petition was treated as a demurrer and sustained.[2] The Court of Appeals affirmed, holding that the oral contract was "strictly defensive" matter which the defendant had waived by failing to assert it in the Nebraska action.[3]

In finding that the contract offered by defendant was strictly a matter of defense, the court relied heavily on the opinion in *Rothman v. Engel.*[4] In that case, plaintiff had recovered a judgment for breach of contract; defendant brought a subsequent action to have the judgment set aside on grounds that the contract had been induced by fraudulent misrepresentation. The court concluded that fraud was strictly a matter of defense and as such could not be asserted in a separate action.[5] In applying this language to the instant case, the court seems to have overlooked the implication that fraud is not properly asserted as a counterclaim.[6]

The instant case also ignores the Ohio Supreme Court decision in *Witte v. Lockwood,*[7] cited in the *Rothman* case as holding that the general rule that defenses not pleaded are waived is not applicable where the matter constituting the defense is sufficient to constitute a counterclaim.[8]

The instant opinion is confined in its construction of the Ohio counter-

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[1] In Ohio this contract would probably be equivalent to mutual covenants not to sue which is an agreement not to enforce a cause of action which has already arisen. Meyers v. Jenkins, 63 Ohio St. 101, 120, 57 N.E. 1089, 1093 (1900).

[2] This is not an uncommon practice in Ohio as illustrated in Hayman v. Pennsylvania R.R., 77 Ohio App. 135, 139, 62 N.E.2d 724, 727 (1945).

[3] Johnson v. Sargent, 109 Ohio App. 16, 163 N.E.2d 401 (1960).

[4] Rothman v. Engel, 97 Ohio St. 77, 119 N.E. 250 (1917).

[5] *Ibid.* at 79, at 80 ". . . Our code requires the defendant to set forth all of his strictly legal defenses to a suit brought against him, or be forever barred from urging one of them in a second suit between the same parties touching the same subject matter."

[6] *Supra,* note 4, at 81 ". . . It furnished no basis for a counterclaim of such character as could be reserved for future action. It was purely and strictly defensive."

[7] Witte v. Lockwood, 39 Ohio St. 141 (1883).

[8] *Ibid.* The syllabus reads, "The general rule is that a defendant is bound to set up every defense, legal or equitable or both, which he may have to the action, and waives those not pleaded; but where the facts claimed to afford a defense are sufficient to constitute a counter-claim, there is an exception to such general rule."

claim statute[9] to the portion which permits counterclaims "ascertained by the decision of the court." The court disallowed defendant's claim under this section by construing it to refer not to *plaintiff's* cause of action which had been ascertained by the Nebraska court, but only to such cause of action as defendant might assert by virtue of a judgment previously awarded to *him.*[10]

One must assume that the court was asked to determine the validity of defendant's counterclaim only under this limited section, without reference to the other provisions for counterclaims afforded by the Ohio statute. Defendant's claim seems more appropriate when considered in light of the section allowing a counterclaim arising out of "a cause of action set forth in the petition as the foundation of the petition or the foundation of the plaintiff's claim, or connected with the subject of the action or arising out of contract. . . ."[11] The assertion of the contract on which defendant's action for breach is based and its connection with the subject matter of plaintiff's action (a judgment awarded in the action which occasioned the breach), would seem clearly to constitute a valid counterclaim under even the strictest construction of this statutory language,[12] and entitle defendant to a decision on the merits of his claim.

Neither Ohio nor Nebraska have compulsory counterclaim statutes,[13] and the only penalty for not filing a counterclaim in the initial suit is the inability to recover costs in a subsequent action.[14] An independent cause of action existing in the defendant for plaintiff's breach of contract, which arose when plaintiff violated his promise not to sue by bringing the Nebraska action,[15] should be allowed as a counterclaim under the Ohio law in the Ohio court when plaintiff sues on the very judgment which provides the measure of defendant's damages.[16]

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[9] Ohio Rev. Code § 2309.16 (1957). "A counterclaim is a cause of action existing in favor of one or more defendants against one or more plaintiffs or . . . defendants, or both, . . . arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action or arising out of contract or ascertained by the decision of the court."

[10] *Supra* note 3, at 19.

[11] *Supra* note 9.

[12] Braden v. Neubrander, 89 Ohio App. 295, 101 N.E.2d 789 (1951), illustrates that the Ohio courts have in fact been very liberal in allowing counterclaims based on breach of contract.

[13] Horne v. Woolever, 170 Ohio St. 178, 163 N.E.2d 378 (1959), held that a claim not brought in an original action in federal court, under the federal compulsory counterclaim statute, was *res judicata* in the Ohio courts, *supra* p. 251.

[14] Lyons v. Garnette, 88 Ohio App. 543, 98 N.E.2d 346 (1950); Ohio Rev. Code § 2323.40 (1953); Neb. Rev. Stat. ch. 25, § 814 (1943).

[15] National City Bank v. Erskine & Sons, Inc., 158 Ohio St. 450, 110 N.E.2d 598 (1953).

[16] Portsmouth Clay Products Co. v. Russell, 10 Ohio L. Abs. 464 (Ct. App. 1931); Prosser, Torts § 46 (2d ed. 1955). Under a covenant not to sue, "the plaintiff does not surrender his cause of action, but merely agrees that he will not enforce it, and becomes liable for an equivalent amount of damages if he does."