COMLEY-NEFF LUMBER CO. v. ROSS

190 Kan. 734 (1963) | Cited 1 times | Supreme Court of Kansas | January 26, 1963

The opinion of the court was delivered by

This was an action whereby plaintiff lumber company soughtforeclosure of a mechanic's lien. Named as defendants

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were the property owner, the general contractor, and variousother lien claimants. The appeal is from an order striking andeliminating from the action the cross-petition of the propertyowner against a codefendant whereby the property owner soughtdamages for slander of title.

The question presented will appear as the facts are developed.

Although multiple defendants appear in the title of the case,only two of them actually are parties to this appeal. They areMargaret Ruth Ross (appellant), the property owner (hereafterreferred to as Margaret), and her codefendant lien claimant,Bragg Temp-Control, Inc., a Corporation, (appellee, hereafterreferred to as Bragg).

In order, however, to show the entire picture in its properperspective it is necessary to summarize allegations of pleadingsof parties not directly involved in the appeal. The correctnessof the statement of facts contained in Margaret's (appellant's)brief is unchallenged, and we summarize from it.

On December 31, 1960, Margaret entered into a contract with thedefendant, Bontz Construction Company, Inc. (hereafter referredto as Bontz), by the terms of which Bontz agreed to build adwelling house for Margaret for $30,950, in the city of Wichita.Construction of the house was commenced and Bontz entered intosubcontracts with various materialmen, including Bragg, whichprovided for the purchase of labor, material and supplies to beused in the construction of the new house. By the terms of theconstruction contract Bontz had agreed, upon completion thereof,to deliver the new house to Margaret free and clear of allencumbrances. Construction was completed on or about June 1,1961, at which time Bontz requested that Margaret make the$10,000 final payment due from her to Bontz under the contract.Margaret refused to make the final payment until furnished withproof that all subcontractors and materialmen had been paid infull for labor and materials furnished by them. On June 5, 1961,Bontz presented a written document to Margaret's husband, DonRoss, and who was acting as her agent. This instrument had beensigned and executed by plaintiff lumber company, by Bragg, andalso by other materialmen and subcontractors, and contained acertification to Margaret

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that all labor and material bills to date had been paid in full.The document in question reads:"BONTZCONSTRUCTIONCOMPANY BUILDERS OF QUALITY SINCE 19222608 E. DOUGLASWICHITA 7, KANSAS

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"Mr. Don Ross: "We, the undersigned, certify that all labor and material bills to date, have been paid in full for the new house located at 302 Bonnie Brae, Wichita, Kansas. "Bragg Heating and Cooling s/ K.H. Skinner _____ "Comley Neff Lumber Co. s/ Morris N. Neff, Jr. _____ "Hill Electric Co. s/ Jim Lindsay _____ "McBride Electric Co. s/ R.A. McBride, president _____ "Virgil Clough Painting s/ Virgil Clough _____ "Miller Barker Co. s/ Wilbur Miller by D.L. _____ "Allen's Inc. s/ H.D. Ritchie _____ "Breese Hardware by s/ Olive Kennedy, Bkpr. _____ "National Association of Home Builders "PHONE MU 2-4071"

(No contention is made that "Bragg Heating and Cooling," in theforegoing instrument, is not one and the same as "BraggTemp-Control, Inc., a Corporation," the appellee here, andheretofore and hereinafter referred to as Bragg.)

In reliance upon the foregoing certification, Margaret madepayment to Bontz of $8,550 of the final payment due under hercontract with Bontz.

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Notwithstanding its certification that it had been paid for alllabor and materials used in the construction of the house,plaintiff lumber company, on June 30, 1961, filed its verifiedmechanic's lien statement for the sum of $7,948.03, and on July19, 1961, commenced this action alleging that it had not beenpaid for labor and materials furnished by it, and soughtforeclosure of its purported lien. Joined as defendants in theaction were Margaret, Bragg, and various other lien claimants.

Despite its certification to Margaret that it had been paid forall labor and materials used in construction of the house, Bragg,on July 18, 1961, filed its verified mechanic's lien statement,and on August 31, 1961, filed its answer and cross-petitionseeking foreclosure of its purported mechanic's lien againstMargaret's property.

In its answer and cross-petition Bragg alleged that on or aboutJanuary 24, 1961, it had entered into an oral contract withMargaret's husband, Don, who was acting for himself and asMargaret's agent,

which provided for the installation of aheating and air conditioning unit in the house; that the value ofthe materials and labor furnished by Bragg was $2,852.94, whichMargaret and her husband agreed to pay, and which remained dueand unpaid. Bragg further alleged in its cross-petition againstMargaret that on or about June 2, 1961, Bontz delivered its checkto Bragg in the amount of $2,852.94, for which Bragg issued asigned receipt, but that the check was dishonored, and that theamount thus due Bragg remained wholly unpaid. Bragg furtheralleged that it had no contract with Bontz, and that the"certification" above set out, and which was signed by Bragg, wasprocured by fraud.

To Bragg's answer and cross-petition for foreclosure of itslien, Margaret, on October 19, 1967, filed her answer and joinedtherewith a cross-petition against Bragg for damages for allegedslander of title. In the meantime several other lien claimantdefendants who had signed the certification in question alsofiled mechanic's liens and sought, by way of cross-petition, toforeclose the same against Margaret. In response to thesecross-petitions against her Margaret also filed her answer andcross-petition alleging slander of title to her property.

Bragg's motion to strike from Margaret's cross-petition thoseallegations seeking damages for slander of title to her propertybecause of the alleged wrongful assertion by Bragg of itsmechanic's lien, was sustained, the effect of such ruling beingto eliminate from

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the action Margaret's cause of action against Bragg for slanderof title.

It is from that ruling that Margaret has appealed.

The question thus presented is whether, under the facts, theassertion by Margaret, in her cross-petition against Bragg, ofher cause of action for slander of title to her property,constituted a misjoinder of causes of action.

In support of the trial court's ruling appellee Bragg contendsthat appellant Margaret, by filing a cross-petition for damagesagainst it, Bragg, became a plaintiff in effect, and that as hercross-petition affected only one co-defendant, Bragg, it failedto meet the requirement of mutuality and hence was improperlyjoined in the main action. Bragg further contends that Margaret'scounterclaim did not arise out of the transaction set forth inBragg's cross-petition and therefore it failed to meet the testof the counterclaim statute, and further that Margaret'scross-petition was improperly joined because the damages allegedby her did not exist at the time suit was commenced. And,finally, it is contended that Margaret's cross-petition wasimproperly joined because it created "practical problems" whichcannot be disposed of conveniently in the main case. In supportof these contentions a number of cases are cited, but which, inour opinion, are readily distinguishable upon their facts fromthe present case.

We think the question presented here is much less complicatedthan it might appear to be upon first impression.

G.S. 1949, 60-601, reads: "The plaintiff may unite several causes of action in the same petition, whether they be such as have been heretofore denominated legal or equitable, or both. But the causes of action so united must affect all the parties to the action, except in actions to enforce mortgages or other liens." (Emphasis supplied.)

G.S. 1949, 60-1406, relating to the enforcement of mechanic'sliens, in pertinent part reads:

"In such actions all persons whose liens are filed as herein provided, and other encumbrances, shall be made parties, and issues shall be made and trials had as in other cases. . . ."

G.S. 1949, 60-710, relating to the contents of an answer, inpertinent part reads:

". . . The defendant may set forth in his answer as many grounds of defense, counterclaim, setoff and for relief as he may have, whether they be such as have been heretofore denominated legal or equitable, or both."

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G.S. 1949, 60-711, relating to counterclaims, reads: "The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and 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. The right to relief concerning the subject of the action mentioned in the same section must be a right to relief necessarily or properly involved in the action for a complete determination thereof, or settlement of the question involved therein." (Emphasis supplied.)

The entire situation presented is clear. In reliance upon thewritten instrument of June 1, 1961, (set out above) wherebyplaintiff lumber company, Bragg, and other materialmen, certifiedthat all labor and material bills to date had been paid, Margaretmade a substantial final payment to Bontz, the generalcontractor. It later developed that the check of Bontz to Braggwas no good and Bontz was adjudged a bankrupt. Notwithstandingits certification that it had been paid for all labor andmaterials used in the construction of the house, plaintiff lumbercompany filed its mechanic's lien statement and commenced thisaction seeking foreclosure of its lien. Despite its certificationto the same effect, Bragg later filed its lien statement andfiled its answer and cross-petition seeking foreclosure of itslien against the property in question. In filing itscross-petition to foreclose its lien, Bragg, in effect, became aplaintiff as to Margaret. She, under the provisions of thecounter-claim statute (60-711, above), had the right, by way ofcross-petition, to assert her counterclaim for damages forslander of title to her property. To say that her counterclaimdid not arise out of the transaction set

forth in thecross-petition of Bragg is to close one's eyes to the obvious.All matters involved were part and parcel of the sametransaction.

In Salina Coca-Cola Bottling Corp. v. Rogers, 171 Kan. 688,237 P.2d 218, it was held: "As used in the counterclaim statute the subject of plaintiff's action is broader than the mere thing sought to be recovered. The real subject is plaintiff's principal primary right to the relief sought, with which defendant's counterclaim must be connected. "The counterclaim, if connected as indicated in the preceding paragraph or if it qualifies under either of the other two conditions mentioned in the statute, may be grounded in tort notwithstanding plaintiff's action is based on contract.

"The purpose and intent of the counterclaim statute is to permit a full determination or settlement in a single action of all controversies properly within the purview of the statute in order that a multiplicity of suits may be avoided.

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"By virtue of G.S. 1949, 60-102 the provisions of the code of civil procedure and all proceedings thereunder must be liberally construed with a view to promote their object and assist the parties in obtaining justice. This command includes proceedings under the counterclaim statute." (Syllabi 6, 7, 8 and 9.)

Each of the various arguments and contentions made by bothparties to this appeal has been noted and considered but furtherdiscussion of the question would serve no useful purpose. Underthe facts presented by the pleadings the order of the trial courtstriking those allegations of Margaret's cross-petition seekingdamages against Bragg for slander of title to her propertybecause of the alleged wrongful assertion by Bragg of itsmechanic's lien, was erroneous.

The judgment is therefore reversed.