

85-LW-3151 (10th)

Jon C. Pensyl and Mary Pensyl, Plaintiffs-Appellants

v.

Lucas Pappas et al., Defendants-Appellees. [Casto Property Management Company, Third-Party Defendant-Appellee].

No. 85AP-269 (REGULAR CALENDAR).
10th District Court of Appeals of Ohio, Franklin County.
Decided on October 3, 1985.

APPEAL from the Franklin County Court of Common Pleas.

BRADLEY & FARRIS CO., L.P.A., MR. PHILIP R. BRADLEY, and MR. JEFFREY R. GOLDSMITH, for appellants.

MESSRS. SMITH & HALE, MR. JEFFREY L. BROWN, and MR. BEN W. HALE, JR.; MESSRS. FROST, FREYTAG & HUNTER, and MR. DANIEL R. FREYTAG, for appellees Lucas Pappas et al.

MR. ARTHUR G. WESNER, for Third-Party Defendant Casto Property Management Co.

OPINION

McCORMAC, J.

Jon C. and Mary Pensyl, plaintiffs-appellants, entered into a land contract agreement with Lucas Pappas, defendant-appellee, in regard to certain real estate. Pensyls then entered into a management contract with Casto Property Management, Inc. ("Casto"), third-party defendant-appellee. Subsequently, Pensyls sued Pappas for misrepresentation in regard to the sale of the property. Pappas counterclaimed, seeking damages for alleged breaches of the land contract agreement by Pensyls. Pensyls then filed a third-party complaint against Casto, which included four claims. The first claim was for indemnification of any damages recovered by Pappas on his counterclaim. The second claim was for contribution of any damages due Pappas for breach of the land contract agreement. The third and fourth claims alleged damages caused Pensyls directly by Casto's failure to perform its duties under the land management contract. Casto failed to file a timely answer to the third-party complaint and ultimately an interlocutory order was entered deciding liability on the third-party complaint in favor of Pensyls and setting the third-party complaint for a damage hearing after disposition of the claims between Pensyls and Pappas.

Judgment was ultimately entered dismissing the claims and counterclaims between Pensyls and Pappas without prejudice, apparently as a result of a settlement between the parties.

In the meantime, Casto had sought relief from the interlocutory judgment of liability and had tendered an answer and a counterclaim seeking damages for Pensyls' failure to make payments due under the land management contract.

The trial court then entered judgment in favor of Casto on the third-party complaint, apparently on the basis that the dismissal of the claims between Pensyls and Pappas disposed of all claims by Pensyls against Casto. The trial court also overruled Casto's motion to vacate and ordered stricken the tendered answer and counterclaim to the third-party complaint.

Pensyls have appealed, alleging the following assignments of error:

"I. The trial court erred in ordering a judgment entry dismissing the third party defendant-appellee be placed upon the record after a default judgment had been entered against the third party defendant-appellee as to liability but before damages had been determined.

"II. The trial court erred in mooting the third party complaint without permitting third party plaintiffs-

appellants to have their opportunity to show their damages on their affirmative claims for relief after they had obtained a default judgment against third party defendant-appellees on liability.

"III. The trial court abused its discretion in not having appellants issue of damages resolved."

The assignments of error are combined for discussion as they are interrelated.

Pensyls' third-party complaint against Casto contained four claims. The first two claims were for indemnification or contribution for any amounts that Pensyls were held to be liable to Pappas as a result of breaches of the land contract agreement on the alleged basis that Casto was managing the property and responsible for complying with the land contract. These claims were properly dismissed after the counterclaim of Pappas for these breaches was dismissed. However, the third and fourth claims in the third-party complaint were for damages caused by alleged breaches by Casto of the property management agreement which were stated to have caused monetary damage to Pensyls. These claims were not for indemnification or contribution and were ones that could be asserted independently of any action between Pensyls and Pappas. Under Civ. R. 14(A), the plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the claim. The third-party complaint is not restricted to damages for all or part of the claim against him that is the basis for the third-party complaint. Thus, the third and fourth claims were properly included in the third-party complaint. In response to the third-party complaint, the third-party defendant may assert any claim against the plaintiff arising out of the same transaction or occurrence.

The claims between Pensyls and Pappas were dismissed by agreement. However, the dismissal did not affect the part of the third-party claim which remained pending for independent adjudication. See Civ. R. 41(A) and (C). Thus, the trial court erred in dismissing claims three and four of the third-party complaint.

The order of the trial court finding liability by default on the third-party complaint and reserving the determination of damages was an interlocutory order subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all of the parties. Civ. R. 54(B). Hence, the trial court has discretion to set aside that determination if it is in the interest of justice and to allow the third-party defendant to serve an answer containing defenses to the third-party complaint and to assert a counterclaim arising out of the same transaction or occurrence.

Upon remand, the third and fourth claims of the third-party complaint are ordered reinstated as not properly having been dismissed as a result of the dismissal of the claims between Pensyls and Pappas. Casto's motion to set aside the interlocutory order of liability on these claims should be considered by the trial court. Within the discretion of the trial court upon good cause shown, the trial court may permit Casto to serve the tendered answer and counterclaim to the third-party complaint. Discretion should ordinarily be exercised in favor of a hearing on the merits rather than judgment by default.

Plaintiff's assignments of error are sustained to the extent that the judgment of the trial court dismissing the third and fourth claims of the third-party complaint is reversed. The judgment of the trial court overruling the third-party defendant's motion to vacate the interlocutory order of liability is also reversed, as is the trial court's order that the tendered answer and counterclaim of the third-party defendant be stricken from the record. Upon remand, these matters should be given further consideration by the trial court in accordance with this opinion.

Judgment reversed and case remanded.

MOYER and COOK, JJ., concur.

COOK, J., of the Eleventh Appellate District, sitting by assignment in the Tenth Appellate District.