RENDERED: October 23, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-000895-MR

KEN WILLIAMSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 96-CI-001718

STEVE A. WHITWORTH — APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, EMBERTON and JOHNSON, Judges.

JOHNSON, JUDGE: Ken Williamson (Williamson) has appealed from the final judgment of the Jefferson Circuit Court entered on January 24, 1997, which summarily dismissed Williamson's claims against the appellee, Steve Whitworth (Whitworth). Finding no error, we affirm.

The facts necessary for an understanding of the legal issues in this appeal are somewhat convoluted. In 1992,

Whitworth sold a 1958 Volkswagen automobile to Williamson's brother, Charles B. Williamson (Charles), for $500. At that time, Williamson was in the military and Charles purchased the vehicle on Williamson's behalf. Williamson paid Charles a deposit of $100 for the car, but eventually was not interested in buying the car. On March 16, 1994, Whitworth agreed to buy the vehicle back from Charles. Prior to the resale, Whitworth claimed that he inspected the vehicle and it was in a condition similar to the condition when he originally sold it to Charles. Whitworth claimed, however, that when he took possession of the car two months later several items were missing.

On June 13, 1994, Whitworth, in a sworn criminal complaint, averred that sometime after his purchase of the vehicle, Williamson took items from the car including a hood ornament, the right fender, and keys. He also stated that he had performed work for Williamson for which Williamson owed him $75. He alleged that Williamson refused to give him the parts to the car or pay him the amount owed for services rendered because Williamson's brother, Charles, refused to return the $100 Williamson had paid Charles for the car. On July 29, 1994, mediation having been unsuccessful, a warrant was issued for Williamson's arrest. Williamson was charged with the offense of theft by unlawful taking under $300 and was required to spend a night in the Jefferson County Jail. On March 21, 1995, the criminal prosecution was dismissed.

On that same day, Whitworth filed a complaint in the Jefferson District Court, Small Claims Division, in which he alleged that Williamson owed him the sum of $1,281.30, which included $407.15 for parts taken from the vehicle and $75 for services performed. The remaining amount represented wages Whitworth allegedly lost while pursuing his claims against Williamson. Williamson, who was served on March 29, did not file a pleading in that proceeding. The matter was tried on April 24, 1995. Both Williamson and Whitworth were present. Whitworth had subpoenaed Charles to testify, however, Charles did not appear. The trial court allowed Whitworth to introduce a written, unsworn statement, purportedly prepared and executed by Charles, which supported Whitworth's claims against Williamson.[1]

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[1]The statement reads in its entirety as follows:

> I[,] Charles B. Williamson[,] bought a 1958 Volkswagon [sic] from Steve Whitworth for my brother Ken Williamson who said he wanted it. Ken gave me a small deposit on the car and never paid me the rest of the money on the car. Both Steve and I went to the trouble of moving the car and getting the paperwork ready for Ken. Ken later decided he didn't want the car. For the trouble I have gone through to get and move the car[,] I am keeping the deposit. Ken has forfeited this since he doesn't want it anymore.
>
> On 3/16/94[,] Steve Whitworth gave me my money back on the car and took it back in his possession on 5-18-94. My brother is apparently upset about his forfeited deposit and took several items from the car (hood emblem, the right rear fender, and the keys). I have in fact seen some of the missing parts in Ken's [p]ossession.

(continued...)

Whitworth was awarded a judgment against Williamson in the amount of $482.15, which judgment was affirmed by the Jefferson Circuit Court in an opinion and order entered on January 30, 1996. On March 20, 1996, Williamson filed suit in the Jefferson Circuit Court alleging that Whitworth "abused the criminal justice system by using it for the ulterior motive or purpose of extorting personal property from [him]," and that Whitworth instituted and pursued the criminal prosecution against him without probable cause and with malice. The complaint also contained a claim of wrongful use of civil proceedings predicated on Whitworth's action in small claims court.

Whitworth, pro se, answered the complaint, filed a counterclaim, and filed a motion for summary judgment. On July 10, 1996, the trial court dismissed that portion of the complaint concerning the wrongful use of civil proceedings, reasoning that Williamson's "proper avenue of redress" would have been an appeal. The order further provided that "[t]he remaining issues contained within the complaint and the counter claim remain viable and subject to further action[.]" The matter was set for trial in January 1997.

Prior to trial, and in response to Williamson's motion in limine to exclude any reference to the small claims action

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[1](...continued)

> Both Steve and I have asked for the parts back, but Ken has refused and ignored us. I am just stating this for the fact that my brother[,] Ken Williamson[,] has taken these items from Steve.

before the jury, Whitworth raised the issue of res judicata and again moved to dismiss the action. On January 24, 1997, the trial court summarily dismissed the remainder of the complaint as follows:

> The Court, in attempting to straighten out the various twists and turns of this action must agree that [Hays], et al v. Sturgill, et al, 193 SW2d 648 [1946,] controls. In that action, Kentucky's highest Court at that time found that the plea of res judicata applies not only to points upon which the Court was required by the parties to form an opinion and pronounce Judgment, but to every point which properly belonged to subject of litigation in which parties, exercising reasonable diligence might have brought forward at the time. Here, the criminal action against the plaintiff herein was dismissed on the same day that the defendant herein filed a Small Claims action which resulted in the plaintiff in this action being found liable to the defendant in this action. The plaintiff in this action, as the defendant in the Small Claims action, could have and should have at that point, counter-claimed in keeping with [Hays], supra, concerning his wrongful prosecution issues. This Court is of the opinion that CR[2] 13.001 [sic] rested upon the same foundation as have all disputes between these parties.

On April 3, 1997, the trial court denied Williamson's motion to alter, amend or vacate the order of dismissal, and made the order final and appealable.

In this appeal, Williamson raises three issues in support of his argument that the trial court erred in summarily

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[2]Kentucky Rules of Civil Procedure.

dismissing those counts of his complaint against Whitworth which had alleged abuse of process and malicious prosecution in instituting and prosecuting the criminal action against him. First, Williamson argues that the trial court erred in its application of CR 13.01. Specifically, Williamson contends that his claims for abuse of process and malicious prosecution were not compulsory counterclaims as contemplated by the civil rule. We disagree.

CR 13.01 is designed to "eliminate circuity of action and multiple litigation." Philipps, 6 Kentucky Practice, CR 13.01, Comment 1, (5th Ed. 1995). CR 13.01 provides:

> 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. The pleader need not state the claim if (a) at the time the action was commenced the claim was the subject of another pending action, or (b) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under Rule 13. Any counterclaim against the Commonwealth, or any agency or political subdivision thereof, may be stated at the pleader's option.

There is no argument made that any of the exceptions to the rule apply. Instead, the issue is whether Williamson's claim

arose "out of the transaction or occurrence that is the subject matter" of Whitworth's small claims action. Id. In interpreting CR 13.07, the rule which pertains to cross-claims against co-parties, this Court held that the "words within the rule 'transaction or occurrence' are to be given a broad and liberal interpretation." Bickel-Gibson Associates Architects, Inc. v. Insurance Company of North America, Ky. App., 774 S.W.2d 469, 470 (1989). The purpose for CR 13.07 is the same as that for CR 13.01, that is to "avoid multiplicity of suits." Id. at 471. See also England v. Coffey, Ky., 350 S.W.2d 163, 164 (1961) (CR 13.01 corrects a previous procedural defect and promotes the "general policy of the law that a multiplicity of suits should be avoided").

Further, two of the tests to be applied in determining whether a counterclaim is compulsory is (1) whether "the same evidence support[s] or refute[s] plaintiff's claim as well as defendant's counterclaim" and (2) whether there is "any logical relation between the claim and the counterclaim." C. Wright, A. Miller, M. Kane, Federal Practice and Procedure: Civil 2d § 1410, (1990).[3] With these tests in mind, and considering the purpose of the rule, it is our opinion that the trial court did not err in its application of CR 13.01. See also Cianciolo v. Lauer, Ky. App., 819 S.W.2d 726 (1991), and Egbert v. Curtis, Ky. App., 695 S.W.2d 123 (1985).

[3]CR 13.01 is nearly identical to its counterpart, Federal Rules of Civil Procedure 13(a).

Although Williamson attempts to convince us that the "transactions" or "occurrences" which underpin Whitworth's small claims action and his own lawsuit in circuit court for abuse of process and malicious prosecution "are obviously entirely separate and distinct" and "in no way compulsory", there is no question that Williamson's circuit court action against Whitworth was based on Williamson's arrest on the charge of theft by unlawful taking of the disputed vehicle parts and on a claim that Williamson breached his agreement to pay Whitworth for services the latter performed. The subject matter of Whitworth's small claims action against Williamson was the dispute between the two over the missing car parts and the alleged $75 debt for services rendered. Despite Williamson's arguments to the contrary, it is readily apparent to this Court that the claim for abuse of process and malicious prosecution arose out of the very same transaction that was the subject matter of the small claims suit. Accordingly, these claims were compulsory counterclaims that should have been asserted in the small claims action in the Jefferson District Court.

Next, Williamson argues that he was forbidden from bringing his claims in the small claims action as they did not meet the criteria for compulsory counterclaims and they exceeded the $1,500 maximum jurisdictional limit of small claims court. Our holding that Williamson's claim did comprise compulsory counterclaims resolves the first portion of this argument. The second prong of this argument is easily disposed of by reference

to Kentucky Revised Statutes (KRS) 24A.290, which provides that only compulsory counterclaims can be filed in small claims court. There is, however, no prohibition in that statute preventing a defendant from filing a counterclaim in excess of that court's jurisdictional limits. In fact, such a counterclaim is contemplated by this statute, which also provides that "[i]f the defendant's counterclaim is in excess of the jurisdictional limits of the division, then the provisions of KRS 24A.310(1) shall apply." KRS 24A.310(1) provides: "An action shall be removed from the small claims division to the regular docket of district or circuit court as appropriate whenever the defendant's counterclaim exceeds the jurisdictional limit of the division or the district court." Thus, had Williamson filed his counterclaim, the entire action would necessarily have been transferred. Certainly, he was not prohibited from filing a counterclaim because it exceeded the jurisdictional limits of the court.

Thirdly, Williamson argues that even if his claims were compulsory counterclaims with respect to the small claims court action, he was under no duty to file them as counterclaims. He relies on the wording of KRS 24A.290 which states that a defendant "<u>may</u> file with the clerk a counterclaim against the plaintiff" as opposed to CR 13.01 which uses the mandatory language, "[a] pleading <u>shall</u> state as a counterclaim . . ." (emphases added). This argument has some merit, particularly

considering this Court's holding in Hibberd v. Neil Huffman Datsun, Inc., Ky. App., 791 S.W.2d 726 (1990), as follows:

> [T]he basic thrust of the small claims division is to the simplification of the legal system to allow laymen easy and understandable access to our courts. As a result, we must construe the statute to avoid introducing additional complicating procedural requirements such as the post-judgment motions at issue.
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> Moreover, the small claims division is a special statutory proceeding. As such, its procedures prevail over the Civil Rules to the extent that they differ.

Id. at 728. Nevertheless, Egbert v. Curtis, supra, established that a compulsory counterclaim must be asserted in a small claims action or forever lost. In that case, this Court affirmed the summary dismissal of a claim based on the doctrine of res judicata where the appellant's claim "properly belonged in the earlier litigation" in the small claims division of the Caldwell District Court. 695 S.W.2d at 124.

Finally, Williamson argues that the trial court also erred in summarily dismissing his claim for wrongful use of civil proceedings. The tort of wrongful use of civil proceedings is described in the Restatement (Second) of Torts, § 674 (1977), as follows:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
>
> (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

Obviously, the small claims action did not terminate in Williamson's favor. He contends that this fact is not an impediment and that his case falls within the exception to the above favorable termination requirement where it is shown that the underlying judgment was "obtained by fraud or perjury." Taylor v. Nohalty, Ky., 404 S.W.2d 448, 449 (1966). See also Kentucky Farm Bureau Mutual Insurance Company v. Burton, Ky. App., 922 S.W.2d 385 (1996) (judgment creditor can be liable for wrongful garnishment where its judgment was the "product of a forgery"). In his reply brief, he states that "[a]t trial [he] would offer proof that the purported statement of Charles B. Williamson, . . . is a forgery."

The problem with Williamson's argument in this regard is that he mischaracterized Whitworth's motion for summary judgment as a motion to dismiss governed by CR 12.02. The record discloses that the motion which resulted in the dismissal of Williamson's claim arising from the small claims action was brought pursuant to CR 56. Williamson, who was represented by counsel, did not produce any affidavits establishing the existence of a fact question about the authenticity of Charles'

statement or any other evidence suggesting that the judgment was obtained by fraud, corruption or perjury. See Freeman v. Logan, Ky., 475 S.W.2d 636, 638-639 (1972). Nor did Williamson ask for more time to obtain affidavits or other evidence to overcome the motion.

We are familiar with the directive of Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991), that a summary judgment should be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." However, that case also holds that the nonmoving party cannot "defeat" such a motion "without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. Williamson's failure to produce any evidence that the statement was a forgery or that Whitworth perjured himself in the underlying action, precludes his bid for a trial on the merits. Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

Whitworth, who is frustrated by Williamson's refusal to pay the small claims court judgment and by his unsuccessful efforts to obtain discovery so as to enable him to otherwise collect the judgment, has requested that this Court sanction Williamson and his attorneys for filing a meritless appeal and "for deliberately and knowingly making material misleading statements." Having reviewed the entire record, we are unconvinced that Williamson has misrepresented its contents to

this Court. Further, while we have rejected each of Williamson's legal arguments, they have not been so "totally lacking in merit" as to suggest that the appeal was taken in bad faith. See Leasor v. Redmon, Ky., 734 S.W.2d 462, 464 (1987). Accordingly, Whitworth's request for sanctions is denied.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Hon. Jacqueline K. Schroering Hon. Harry L. Gregory, III Louisville, KY	Steve A. Whitworth, Pro Se Prospect, KY