Sorsby v. Turner
No. 23704

McHugh, Justice, concurring:

Although I agree with the majority that the circuit court in this case should not have dismissed Sorsby's amended complaints against McAfee and Paetzold, I believe that the applicable legal principles and procedural rules have been obscured in the majority's opinion. I write separately, therefore, in an effort to clarify what I believe to be the principles underlying the result reached by the majority.

A.

As the facts reveal, Sorsby's original complaint, which was filed against various defendants, failed to include as defendants McAfee and Paetzold. McAfee and Paetzold subsequently filed complaints against Sorsby, among others, who answered the complaints and, instead of asserting counterclaims against these parties, moved to amend her complaint to add them as defendants. In the meantime, the actions already instituted by Sorsby against various other defendants, but not McAfee and Paetzold, and by McAfee and Paetzold against various defendants including Sorsby, were consolidated by court order.

As the majority held, the parties herein were involved in a single car accident and all claims arising therefrom "arise out of a common occurrence or transaction." Thus, under W. Va. R. Civ. P. 13(a), Sorsby's claims against McAfee and Paetzold were compulsory counterclaims and, accordingly, should have been asserted by Sorsby by counterclaim. Rule 13(a) provides:

> (a) Compulsory counterclaims. -- 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. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of the another pending action, or (2) 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 this Rule 13.

(emphasis added).

The purpose of Rule 13(a) is "to prevent the fragmentation of litigation, multiplicity of actions and to conserve judicial resources." Provident Life and Accident Ins. Co. v. United States, 740 F. Supp. 492, 496 (E.D. Tenn. 1990) (citing, e.g, Sue & Sam Mfg. Co. v. B-L-S Const. Co., 538 F.2d 1048, 1051 (4th Cir. 1976).

Ordinarily, a party who fails to assert a compulsory counterclaim may do so, under certain circumstances, by amendment, under W. Va. R. Civ. P. 13(f), which provides: "(f) Omitted counterclaim. -- When a pleader fails to set up a counterclaim

through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

As indicated above, however, Sorsby did not seek to amend her answers in order to assert counterclaims against McAfee and Paetzold. Rather, she sought to add these parties as defendants by way of an amended complaint, pursuant to W. Va. R. Civ. P. 15(a).[1] It was these amended complaints which were dismissed by the circuit court.

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[1] W. Va. R. Civ. P. 15(a) provides:

> (a) Amendments. -- A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

B.

It is well-established that a failure to plead a compulsory counterclaim precludes a party from bringing a later independent action on that claim. 6 Charles A. Wright et al., Federal Practice and Procedure, § 1417 p.129 (2d ed. 1990). This principle is based upon the former adjudication doctrines of "merger," "bar," and "res judicata." Id. at p. 131. See Id. ("[i]f defendant loses in the first action, the judgment serves as a bar to any subsequent suit he may bring on claims arising from the cause of action that was before the court."); Carper v. Kanawha Banking & Trust Co., 157 W. Va. 477, 515, 207 S.E.2d 897, 920 (1974) ("[f]ailure to assert a compulsory counterclaim is a waiver and abandonment of such a claim and an adverse decision to the putative claimant is res judicata."). We note, however, that in the present case, the above-mentioned prior adjudication doctrines were not implicated, as Sorsby sought to add McAfee and Paetzold as defendants while the actions against her were still pending and at a time when no final judgments had yet been rendered.

In any event, what is significant in this case, as the majority has pointed out, is that the various actions instituted by Sorsby, McAfee and Paetzold were consolidated by court order for all purposes except for trial. I agree with the majority that dismissal of Sorsby's claims against McAfee and Paetzold would fail to serve the purposes of Rule 13(a) -- to prevent fragmentation of litigation, multiplicity of actions and to conserve judicial resources -- as these interests have been satisfied by consolidation of the actions. Jack LaLanne Fitness Centers, Inc. v. Jimlar, Inc., 884 F.

Supp. 162, 164 (D.N.J. 1995); Provident Life and Accident, 740 F. Supp. at 496. Indeed, several courts "have determined that consolidation obviates the concerns of Rule 13(a), thereby making dismissal inappropriate." Jack LaLanne Fitness Centers, 884 F. Supp. at 164 (citing Branch v. Federal Deposit Insurance Corporation, 825 F. Supp. 384, 401 (D. Mass. 1993); Provident Life and Accident, 740 F. Supp. at 496). See Parker Rust Proof Co. v. Detrex Corp., 14 F.R.D. 173, 174 (E.D. Mich. 1953) (where subject matter of second action belonged as counterclaim in first action, complaint and amended complaint in second action "considered as setting out a counterclaim.")

Based upon the above, I would hold that when two or more civil actions have been consolidated, a claim which should have been asserted as a compulsory counterclaim in one or more of the answers in the actions consolidated but is, instead, alleged in the complaint or amended complaint in another of the actions consolidated, should not be dismissed under W. Va. R. Civ. P. 13(a), as the purposes of that rule are satisfied by consolidation of the actions.

I am authorized to state that Chief Justice Workman joins in this concurring opinion.