

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION

CLAUDE J. TOMPLAIT
Plaintiff

vs

CIVIL ACTION 5402

COMBUSTION ENGINEERING, INC., ET AL
Defendants

BE IT REMEMBERED that on the 4th day of April, A. D. 1969, came on to be heard Motion to Enter Judgment in the above entitled and numbered cause, whereupon the following proceedings were had before the Hon. Joe J. Fisher, Chief Judge, United States District Court for the Eastern District of Texas, to-wit:

THE COURT: We are ready to proceed with the hearing in Cause 5402, Claude J. Tomplait vs. Combustion Engineering, Inc., and others.

MR. TUCKER: If the Court please, this is a motion by five defendants in this case who have effected a settlement with the plaintiff. We have submitted and ask the Court Reporter to mark a copy of the settlement agreement. Under this agreement five of the six defendants have effected a settlement and the plaintiff has given a release and indemnity agreement. The instrument provides that the defendants, however, reserve their rights against the non-

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settling defendant, The Fiberboard Paper Products Company. We have filed a motion based upon this settlement agreement, moving the Court to enter judgment that the plaintiff, having settled with these five named defendants, recover nothing, and the claims of the intervenors likewise have been disposed of we request dismissal of those , and including in the judgment the dismissal of the respective cross actions, which would include a dismissal of the cross action brought by The Fiberboard Paper Products Company against the settling defendants.

It is our position, in support of the motion, that these defendants who have settled have no business remaining in this case and that under the holding of the Texas Supreme Court in Palestine Contractors vs. Perkins, 386 SW2 764, that the remaining defendant can get all of the relief it is entitled to without having these five defendants who have settled remain in the case.

As I understand the plaintiff's attorney he will be agreeable should the jury find that any of these defendants, who have settled, are joint tort feasors under the holding in the Palestine case, whether they are in the case or not Fiberboard would be entitled to the same relief, one way or the other. Likewise, any questions of evidence, as I understand it, all of the testimony that has already been taken in depositions and interrogatories can, and will be,

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available to the Faberboard Products Company. For that reason we see no reasm for these five defendants to be required to remain in the case since the remaining defendant, without their presence, would be entitled to absolutely everything that they would be entitled to if they were here, so we submit the judgment which would dispose and dismiss all these cross actions. That is briefly our position.

THE COURT: All right. Anyone else care to be heard on the Motion. I presume Mr. Tucker is speaking for all the defendants who have entered into a settlement with plaintiff, and the record will so reflect, with the exception of the defendant represented by Mr. Weller.

MR. WELLER: Your Honor: I have not been furnished with a copy of the exhibit that has been tendered, so I have no knowledge of its contents.

THE COURT: Hand that to Mr. Weller.

MR. WELLER: May I have just a second to peruse it?

THE COURT: Yes. Mr. Stephenson, do you care to be heard in connection with this matter?

MR. STEPHENSON: Nothing, your Honor, except to just affirm what Mr. Tucker says. I recognize and understand the law to be as he stated it and, from the plaintiff's standpoint, we interpose no

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objection to the introduction of any of the interrogatories or deposition testimony.

THE COURT: All right.

MR. STEPHENSON: Your Honor: When I say we interpose no objection to the introduction, I mean to the ability to introduce them, there may be some technical objection or something of this nature.

THE COURT: The Court so understands.

MR. WELLER: If the Court, please: The position of the defendant, Fiberboard Paper Products Company, is that under the Federal Rules the plaintiff and the cross defendants cannot by agreement destroy the right of Fiberboard Paper Products Corporation to retain these cross defendants in this lawsuit. We are not a party to the settlement or the release and covenant not to sue, or the indemnity. Now, as I understand it, under the law, we must retain these co-defendants or cross defendants in this lawsuit, they must be treated as defendants and the matter brought in proper perspective before the jury. They are couched as cross-defendants, they are sued as cross defendants, as joint tort feasors and, in order to make any proper presentation of this case before a jury on behalf of the defendant, Fiberboard, I think that we are entitled to retain these defendants in here as co-defendants or cross defendants and to so state to the jury that they were charged with jointly

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contributing to the alleged damage to the plaintiff in this case, and then to present what evidence there is about the products that the plaintiff Tomplait worked with. In other words, he alleged that he worked with each and all of the products of these various co-defendants or cross-defendants. Now, under ART.2212, I believe, of the REVISED CIVIL STATUTES of Texas, I believe that is the article on contribution, we must maintain these people in the suit in order to get and obtain contribution. We are not a party to this agreement, this document that has been entered into between the co-defendants and cross defendants and the plaintiff.

We further say that any testimony that we might offer or call, or any witnesses or employees of these co-defendants, should be called as adverse parties and we be permitted to examine them as adverse parties and, for the Court at this stage in this proceeding, and this case has been pending in this Court since December, 1966, all the depositions have been taken of various witnesses, interrogatories have been propounded, so it would be highly prejudicial to the rights of this defendant, at this stage, and actually I do not think that the Court has the power under the Rules to enter this Order of Dismissal.

I submitted to the Court a Memoranda in a letter stating that dismissal of actions is covered by Rule 41 and I cited one case where the Court -- actually there was no

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objecting defendant -- I mean the objecting defendant had not served a cross claim against the moving defendant, and the Court said this: "Even if the objecting defendants had already served a cross claim for contribution on the moving defendants, the moving defendants would have been entitled to have the plaintiff's complaint against them dismissed and they would remain in the case only as third party defendants opposing the objecting defendants cross claim." Now that is where we are here . I can't prevent the plaintiff from dismissing his case against these defendants, but on the cross claim I think they have no control over it. Now, in another case that I cite, by Judge Hand, by the Second Circuit, I believe, they held that the plaintiff could take a voluntary dismissal but the ability or the right to take a voluntary dismissal has to be before the issue is joined. Now, there is nothing in the Rules - I think Rule 41C makes the provision of Rule 41 on dismissal of plaintiff's claim applicable to the dismissal of counterclaims and cross-actions.

Further, I would submit some language from Palestine Contractors, Inc., by the Supreme Court: "A plaintiff cannot cut off a defendant not a party to the settlement the right to contribution by agreement with a third party." And the Court, in that case, recognized an early case in Texas as stating the law. In a subsequent case the Court

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held that where the co-defendant was not a party - I believe in Petco Corporation vs. Plummer, 392 SW2 163, by the Texas Court of Civil Appeals at Dallas, they held that this defendant was not entitled to a reduction in the amount of the verdict by reason of contribution because there was no cross defendant. So, I am in the position here of where I have already filed a cross action and I know of no rule of law, there is no motion for summary judgment here on behalf of these cross-defendants on a cross action, all in the world that they are presenting is a voluntary action on their part and on the part of the plaintiff, and I submit there is no authority under the rules to do what the plaintiff and the co-defendants are asking to be done, and here is a little additional language, which is quoted from an earlier case. It's a Federal case which had the Uniform Act, I believe, on contribution and indemnity, but it says that "anything else would be unfair to the settling tortfeasor who has bought his peace and unfair to the defendant tort feasor who should not be disadvantaged by a settlement to which he was not a party, and to which he did not consent."

Now, Fiberboard is in the position here, as opposed to the plaintiff, that if the Court takes this action requested, Fiberboard will be the sole defendant and there will not be any cross defendants. As the pleadings are now couched and as this lawsuit is on the record, Fiberboard is a defendant, the others are still defendants in this case, they

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are cross defendants and the cross actions have been on file for quite sometime. I do not think that the Court can force Fiberboard to dismiss or discontinue their cross-action, and the posture or the position that these cross-defendants occupy at this time, by some voluntary action on the part of the plaintiff and the defendants, who are also cross defendants, so I would submit that there is nothing to prevent these people -- I think initially they were advised before this settlement was made that this would be the position of Fiberboard, and they said they were going ahead with it and would not be represented by counsel in the trial of this case, they merely would rely on whatever agreement that they had with the plaintiff.

I submit to the Court, in regard to the posture of this case at the present time, or the posture of it at the time it will be tried, is that Fiberboard, as a cross plaintiff, has the right to treat the cross-defendants as parties defendant in this Court, and to have all of the advantages both before the jury as well as on evidence and every other point that they now occupy, without any voluntary agreement between the opposing parties which would attempt to cut off these rights.

THE COURT: Any of the proponents of the motion wish to be heard in response?

MR. TUCKER: Your Honor, I might point

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out one thing. The right of contribution that Mr. Weller is talking about is a right for judgment only if he is required to pay more than his proportionate share of the judgment. Under this settlement, and under Mr. Stephenson's stipulation, he will never be required to pay more than his proportionate share and consequently there would be no right of contribution to ever arise, and there is no way consequently in which he will ever be cast in judgment, whether these people are here or not, this judgment is going to be the identical amount under this agreement, and with the stipulation that all of the evidence will be available to him just as if we were here, I see no way, as a practical matter, at least no harm in trying the case before a jury because whether here or not the amount of the judgment will always be the same and he will have available all of the evidence. So I think it would be appropriate then for the Court to simplify the case by eliminating these five defendants.

MR. WELLER: Your Honor, may I reply to that?

THE COURT: Yes, sir.

MR. WELLER: Your Honor, the fallacy of that argument is this: Under the cases on contribution there must be introduced evidence, there must be submitted to the jury issues of fact for findings as to whether Johns Manville, for instance, furnished or used any asbestos products that Tomplait subjected himself to.

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THE COURT: Any reason why those issues cannot be submitted.

MR. WELLER: Well, your Honor, my position is this: These people are not defendants and if they appear as defendants before a jury --

THE COURT: They will not necessarily appear as defendants, but they might appear as tort feasors.

MR. WELLER: Well, if I understand the law in some of these cases that I have cited, it is necessary that the joint tort feasor be brought into the lawsuit in order for you to reduce the amount by contribution. Now, here we have....

THE COURT: You mean the fact they are not parties to the suit that the principal defendant would have to pay it all?

MR. WELLER: Yes, sir. We are in the position here that -- I say, well, there were six contributing defendants so that if they are still in this lawsuit and the jury finds that all of them contributed, then Fiberboard at best, if there is any liability, would only be liable for one-seventh of any judgment that may be found by the jury in the way of damages.

Now I tried to take this approach with them, and I say I will do it, that if they would stipulate that in the event of a judgment in this case that the defendant Fiberboard would be liable for one-seventh. I believe I said

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one-sixth but one-seventh of it because there are seven ... no, there are six, I suppose six contributing defendants... well, I would be seven, so it would be one-seventh of any final amount that the jury might find, then I would be willing to dismiss these defendants, but neither the plaintiff, who has the control over that situation, nor the defendants, would make that stipulation, so accordingly I am in a position now --

THE COURT: I don't think they would have to make that stipulation if the jury so found.

MR. WELLER: Well, I am in this position now that I must, before this Court, insist that these cross defendants remain as cross defendants in this lawsuit before the jury.

THE COURT: I get your point, Mr. Weller, and I think it is well taken. As a general rule I think you are absolutely correct but, while the Court could dismiss the defendants in the absence of cross action, with the cross action pending there would be some question. Now, as I view it, you are not affected in your defense in the least by the absence of these defendants being actual parties to the suit as defendants or cross defendants. In fact you might be better off because they are not there to offer any evidence that would exonerate themselves and to offer any evidence

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that would point to any liability on the part of your client, so from that standpoint you would be better off. On the other hand considering them cross defendants and you having a cause of action against them, in the event you should be found liable for a proportionate part, I am of the opinion that those issues can still be submitted to the jury, and from that standpoint you would be protected and it would just be a matter of policy and judgment on the part of the defendant and cross defendants and the plaintiff in settling the case in advance. It would simplify the matter to have fewer parties in the suit and from that standpoint the Court would be interested in granting the motion. I would not grant it if I thought it would prejudice your rights in the least, either as a defendant or as a cross plaintiff. I fail to see how it could possibly affect your rights, how you could be prejudiced, however in order to guard against it the Court would dismiss, not with prejudice but with the understanding that the cause of action which you have against the cross defendants could be reinstated if it develops that it is necessary to reinstate it and if the Court is incorrect in its

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interpretation of the law.

MR. WELLER: Let me address myself to the Court once more, to this language of the order. Now the court is dismissing my cross action, at this time, when all the evidence is fully developed, this case has been fully developed and the whole case could be tried at one time.

THE COURT: And you will not be prejudiced in the least in offering deposition testimony affecting the other defendants, or any other evidence you wish to offer to show that the other defendants are in fact liable rather than your client. How can you be prejudiced in that situation, whenthey are absent and not there to defend themselves, more than you would be if they were present?

MR. WELLER: Your Honor,I still am entitled to have them as cross defendants in this lawsuit. I don't think that the Court has the power or the jurisdiction under the rules to dismiss my cross action at this time.

THE COURT: I do not think, Mr. Weller, if your rights cannot possibly be prejudiced. Now, if your rights are prejudiced in any way then that presents another picture and if you can show me how your rights will be prejudiced then I would give some weight to your position.

MR. WELLER: Well, I think I have done that. Let me ask one further question: Is the Court severing

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out all of these claims and entering a final judgment at this time or is this an interlocutory judgment?

THE COURT: I presume it would probably be interlocutory, I haven't looked at the judgment, but certainly I am not going to enter a judgment that could not, in some way, be modified a little later if it developed that for some reason your interest was affected and was not known to the court at the time of entering the judgment.

MR. WELLER: All I can say, Judge, is that I think that you realize that if somebody is couched as a cross defendant in this lawsuit the jury can understand that they are cross defendants, whereas if I've got to talk about some third party who isn't named in this lawsuit, to the jury, that is an entirely different thing.

THE COURT: If we are talking about a matter of judgment now, from my judgment I think the defendant would be better off if the parties were not made a party to the suit than if they were made a party to the suit. Now the plaintiff may not be better off but the defendant would definitely be better off if he is able to place the blame on someone else. It is very easy for the jury to

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say "Well, they've got the wrong party, they should sue the other party."

MR. WELLER: My position is further, to show you the prejudice that can accrue: Here, if they are defendants in this lawsuit I certainly can point to them and say, "Now these people are cross defendants in this lawsuit, the plaintiff charged them with negligence, that they contributed to his damage and we have a cross action against them to show that they contributed to whatever it is, we say we didn't do it but they did, and here they are defendants and they are not even defending this thing."

THE COURT: We are now discussing a matter of policy and not a matter of judgment, or strategy or technique. I think we are getting back to the proposition of whether or not the Court would have discretion in permitting you to file suit against the third party defendants, that is really what it gets down to. If I can deny that right in the first instance I could so so later and, under the circumstances, I fail to see how your interest can be prejudiced by the court's judgment --

MR. WELLER: Let me point out one thing that you are doing, I don't think you intend to do it, but under Rule 41 you cannot dismiss a cross plaintiff or a cross

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action or cross claim -- as a matter of fact the plaintiff can't dismiss his suit so as to prejudice a crossclaim or a cross action once an issue has been joined. For instance, in one case by Judge Hand, in Harvey Aluminum verus American Cynamide, the Court held the plaintiff could not take a voluntary dismissal under Rule 48a1 where there had been a hearing on a preliminary injunction . In other words, once an answer is filed there cannot be any voluntary dismissal and the Court, if you read, and I haven't seen anybody cite any authority for any right that the Court has under the rules to dismiss my cross action at this stage and, therefore, I would object to any dismissal of the cross complaint at this time.

THE COURT: Even if dismissed without prejudice?

MR. WELLER: Even if dismissed without prejudice.

THE COURT: In other words, what it really gets down to, Mr. Weller, you are objecting to the dismissal because you will not be able to refer to the cross defendants in your suit, as cross defendants, rather than as tort feasors. That is what it really amounts to.

MR. WELLER: No, Judge. They are now

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cross defendants. I am not a party to this stipulation or agreement. My client is not a party. Therefore, Fiberboard isn't bound by it and they aren't bound by it and I would judge, if the Court is not going to let me introduce this instrument before this jury --

THE COURT; The settlement?

MR. WELLER: Yes, sir.

THE COURT: Well, I wouldn't think that it would be proper but I don't know that the Court has any objection to the introduction of the instrument. I would not think that you would probably want it introduced but maybe you and Mr. Stephenson have no objection to it being introduced.

MR. WELLER: I am sure Mr. Stephenson would.

THE COURT: I'm not too sure he would.

MR. STEPHENSON: I don't think I'll have any objection to it, your Honor.

THE COURT: I don't think he would.That is what it really gets down to, Mr. Weller, as to whether or not your interest is affected. You certainly have no interest against these cross defendants, have no cause of action unless in some

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way you are held, your client is held responsible, so you still have all of the defenses that you have ever had; it is just a question of contribution and the judgment that the Court would enter will provide that it will be entered without prejudice to you to reinstate your cause of action against the defendants at a later time, if it develops that you are entitled to do so.

MR. WELLER: Judge, all that could do here, we've spent some two years developing all this testimony --

THE COURT: Well, it would take care of these questions of limitation, that will be the purpose of it.

MR. WELLER: In other words, if I am entitled to trial against these cross defendants I am entitled to do it in this lawsuit.

THE COURT: You have to look at both sides. If these defendants are willing to settle with the plaintiff, why would they be required to have to come back in this lawsuit and spend money for counsel

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to sit and defend them in the lawsuit. You have to look at that side, too.

MR. WELLER: Well, I've looked at that side of it and that doesn't concern me, but Judge, will you enter this as an interlocutory --

THE COURT: That is the position the Court is placed in, I cannot look at it from your standpoint or from any of the cross defendants, or the plaintiff's, I have to look at it as a whole, and it looks to me like this is the fair course to pursue. If it isn't, if I am wrong, then this is the best ruling that you could possibly have for yourself.

THE COURT: Will you let me ask this of the Court, please: Will you enter this as an interlocutory order and not a final judgment?

THE COURT: That would be my opinion. I would have to hear from counsel if they object to it, but I think it should be an interlocutory order.

MR. WELLER: One other thing: Do I understand that the rules of evidence will be applied the same as if --

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THE COURT: They were present.

MR. WELLER: ....these defendants were still cross defendants.

THE COURT: Yes, sir, certainly will. Now, if there is anything further, if counsel understands the observations made by the Court, we will grant the motion for judgment and enter the judgment in line with our observations.

MR. TUCKER: Your Honor, I have amended this by adding, on the language of the dismissal, by stating "without prejudice to Fiberboard Paper Products Corporation," that is his client. I think that will take care of it.

MR. WELLER: Your Honor, he ought to put at the bottom "This is an interlocutory judgment."

THE COURT: Yes, I think we should enter it as an interlocutory judgment, unless some of you see some objection to it.

MR. TUCKER: We have no objection to that, your Honor.

THE COURT: Maybe that you will need to revise the last page of the Order for the court to enter.

MR. TUCKER: Yes, sir, I will revise the last page.

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THE COURT: Submit a copy to Mr. Weller and also to Mr. Stephenson. We stand adjourned.

UNITED STATES OF AMERICA
EASTERN DISTRICT OF TEXAS

I, Marguerite E. Dimerling, Official Court Reporter for the United States District Court for the Eastern District of Texas, do hereby certify that the above and foregoing 20 and a fraction pages of typewriting comprise and contain a full, true and accurate transcription of the proceedings upon hearing on Motion in the above entitled and numbered civil action, April 4, 1969.

This the first day of May, A. D. 1969.

Marguerite E. Dimerling
Official Court Reporter, United States District Court for the Eastern District of Texas.

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Official Court Reporter
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