Michigan Law Review

Volume 34 | Issue 7

1936

FEDERAL PRACTICE-COUNTERCLAIM BY INTERVENORS

FEDERAL PRACTICE—COUNTERCLAIM BY INTERVENORS—Plaintiff sued Freeman Company for infringing a patent by selling a certain patented device. The manufacturer of the device, and vendor of Freeman Company, obtained leave to intervene as a defendant under federal equity rule 37,[1] and thereupon filed a counterclaim against the plaintiff for alleged infringement of other patents, claiming the right to do so as a "defendant" under federal equity rule 30.[2] The plaintiff moved to dismiss the counterclaim. The motion was granted by the district court and affirmed on appeal by the circuit court. On certiorari the United States Supreme Court *held* that "defendant" under equity rule 30 did not include an intervening defendant. Hence the motion was properly

[1] 28 U. S. C., § 723; HOPKINS, FEDERAL EQUITY RULES 232 (1933): "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

[2] 28 U. S. C., § 723; HOPKINS, FEDERAL EQUITY RULES 209 (1933): "The defendant by his answer shall set out in short and simple terms his defense to each claim asserted in the bill. . . . The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject mater of the suit, and may, without cross bill, set up any set-off or counterclaim against the plaintiff which might by the subject of an independent suit in equity against him. . . ."

granted. *Chandler & Price v. Brandtjen & Kluge, Inc.*, (296 U. S. 53) 56 S. Ct. 6 (1935).

Had rule 30 been interpreted to include an intervening defendant, the result would have been to give an intervenor the broad rights of counterclaim granted by that rule. In attempting to avoid this result the Supreme Court apparently has denied to an intervenor any right to counterclaim at all. The reason given is that the introduction by an intervening defendant of issues which could not be raised by the original defendant is likely to over-complicate the suit and impose an undue and unfair burden upon the plaintiff. That new issues could not be thus introduced was the majority view in the lower federal courts.[3] But this decision seems to go even farther in the direction of a rigid rule than did the lower federal court decisions, as they allowed an intervenor any affirmative relief open to the original defendant.[4] In other words the rule barring counterclaims which introduce new issues apparently has been extended to constitute a bar against all counterclaims by intervenors. There may be reason in the interest of flexibility and convenience to doubt the expedience of such a rule. In particular cases it may be more convenient to settle the matter in one action than to require the intervenor to make his counterclaim the subject of a separate action. As under rule 37 intervention is placed in the discretion of the trial court in the majority of cases,[5] it would seem that flexibility and convenience would be served by construing rule 30 to include an intervening defendant,[6] and then allowing the court in the exercise of the discretion given by rule 37 to deny intervention in a case where a proposed counterclaim would overcomplicate the suit,[7] or to permit it on condition that the intervenor does not

[3] Allington v. Shevlin Hixon Co., (D. C. Del. 1924) 2 F. (2d) 747; Powell v. Leicester Mills, (C. C. Pa., 1899) 92 F. 115; De Sousa v. Crocker First National Bank of San Francisco, (D. C. Cal. 1927) 23 F. (2d) 118; Board of Drainage Commissioners of Pender County v. LaFayette Southside Bank of St. Louis, (C. C. A. 4th, 1928) 27 F. (2d) 286.

[4] Leaver v. K. & L. Box & Lumber Co., (D. C. Cal. 1925) 6 F. (2d) 666 at 667, where the court said that "the range of activity of the newcomer in the prosecution or defense of the interest he is thus permitted to assert must necessarily be as extensive as, but no greater than, that allowed the original parties to the suit." Tretolite Co. v. Darby Petroleum Corp., (D. C. Okla. 1934) 5 F. Supp. 445 at 446, where the court said the intervenor could not "enlarge the issue to embrace matters not involved in the bill and answer," nor "set up a counterclaim against plaintiff which is not available to defendant."

[5] Wham, "Intervention in Federal Equity Cases," 17 A. B. A. J. 160 (1931); Credits Commutation Co. v. U. S., 177 U. S. 311, 20 S. Ct. 636 (1899); City of New York v. Consolidated Gas Co. of New York, 253 U. S. 219, 40 S. Ct. 511 (1920); City of New York v. New York Telephone Co., 261 U. S. 312, 43 S. Ct. 372 (1923). In the principal case the court said the petitioner's right to intervene was in the discretion of the trial court and not a matter of equitable right.

[6] Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc., (C. C. A. 2d, 1935) 75 F. (2d) 472. In the opinion of the circuit court it was stated that rule 30 *could* be construed to include an intervening defendant and under rule 37 a counterclaim recognizes the "propriety" of the bill and is "subordinate" to it.

[7] Atlas Underwear Co. v. Cooper Underwear Co., (D. C. Wis. 1913) 210 F. 347; Tretolite Co. v. Darby Petroleum Corp., (D. C. Okla. 1934) 5 F. Supp. 445.

make such a counterclaim.[8] Such construction would have the advantage of allowing the counterclaim in cases where the trial court might feel the balance of advantage to be on the side of settling the controversy in one action.[9]

K. K. L.

[8] Leaver v. K. & L. Box & Lumber Co., (D. C. Cal. 1925) 6 F. (2d) 666. In this case intervenor was permitted to intervene on condition that he not introduce new issues into the suit.

[9] The circuit court below in the principal case, (C. C. A. 2d, 1935) 75 F. (2d) 472 at 473, stated: "Conceivably it might be desirable to give the court discretion in such cases to treat the situation as though the plaintiff had joined him in invitum."