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214 Va. 476

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 8245

STANDARD PRODUCTS COMPANY, INC.,
Appellant,

v.

WOOLDRIDGE & COMPANY, LTD., AND
JAMES V. FINNEGAN,
Appellees.

APPENDIX

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MOTION FOR JUDGMENT
(Filed February 12, 1971)

[1] * * *

The plaintiff, Standard Products Company, Inc., (Standard Products) moves the Circuit Court of Henrico County for judgment against the defendants, jointly and severally, for the sum of Eleven Thousand Five Hundred Twenty Six Dollars and Eighty-Eight Cents ($11,526.88), with interest thereon, together with the costs incident to this proceeding, all of which is justly due from the defendants by reason of the following:

(1) Standard Products is a Virginia corporation and owns and operates its principal place of business in Virginia.

(2) Wooldridge & Company, Ltd., (Wooldridge) is a Virginia corporation engaged in the operation of an insurance brokerage business with its principal offices in Henrico County.

[2] (3) James V. Finnegan is an employee and representative of Wooldridge and has authority to negotiate and contract on behalf of Wooldridge.

(4) On or about the 1st day of December, 1969, the plaintiff, for good and other valuable consideration, purchased a policy of fire insurance from the defendants who were acting as brokers for the insurer.

(5) Under the terms and conditions of the aforementioned policy of insurance, plaintiff was insured against 5% of any loss, not to exceed $300,000.00, occurring to its Fairport, Virginia, warehouse and stock contained therein.

(6) On or about the 15th day of May, 1970, plaintiff received notice from the insurer that the aforementioned policy of insurance would be cancelled within 10 days of receipt of such notice.

(7) On or about the 15th day of May, 1970, Mr. Thomas Kirkup, acting on behalf of the plaintiff, telephoned the defendant, James Finnegan at Wooldridge & Company, Ltd., and during the conversation Mr. Finnegan, acting within the scope of his employment as an employee and/or representative of the defendant, Wooldridge, represented to Mr. Kirkup that he would procure insurance coverage for the plaintiff

to replace the insurance being cancelled before the cancellation took effect.

(8) On or about the 1st day of June, 1970, Mr. Kirkup again called Mr. Finnegan on behalf of the plaintiff and again Mr. Finnegan represented to the plaintiff that he would obtain insurance coverage for the plaintiff to replace the cancelled policy and for the plaintiff not to worry.

[3] (9) Relying on the representations of defendant, James Finnegan, that he would obtain insurance coverage to replace the policy being cancelled, the plaintiff did not procure or attempt to procure insurance coverage from any other source on its Fairport, Virginia, warehouse and stock contained therein.

(10) On or about the 1st day of July, 1970, plaintiff's Fairport, Virginia, warehouse and most of the stock contained therein were destroyed by fire.

(11) The loss occasioned by such fire was immediately reported to the defendants, James Finnegan and Wooldridge, but plaintiff was advised by defendants that no insurance had been procured as previously represented by Mr. Finnegan.

(12) Plaintiff has made numerous demands upon the defendants for compensation in an amount equivalent to 5% of the loss sustained by plaintiff as a result of the fire at its Fairport, Virginia, warehouse without response from the defendants.

(13) As a direct and proximate result of the defendants' misrepresentations the plaintiff has sustained a loss of Eleven Thouand Five Hundred Twenty Six Dollars and Eighty-Eight Cents ($11,-526.88).

Wherefore, plaintiff prays for judgment against defendants, jointly and severally, in the sum of Eleven Thousand Five Hundred Twenty Six Dollars and Eighty-Eight Cents [4] ($11,526.88), with interest thereon, together with the costs incident to this proceeding.

* * *

MOTION
(Filed August 31, 1971)

[39] * * *

This day came the plaintiff, Standard Products Company, Inc., by counsel, and moved the Court for leave to amend its Motion for Judgment previously filed herein on the 12th day of February, 1971, by deleting therefrom paragraph (7) on page 2 of said Motion for Judgment which reads as follows:

> (7) On or about the 15th day of May, 1970, Mr. Thomas Kirkup, acting on behalf of the plaintiff, telephoned the defendant, James Finnegan at Wooldridge & Company, Ltd., and during the conversation Mr. Finnegan, acting within the scope of his employment as an employee and/or representative of the defendant, Wooldridge, represented to Mr. Kirkup that he would procure insurance coverage for the plaintiff to replace the insurance being cancelled before the cancellation took effect.

And substituting the following paragraph in lieu of paragraph (7):

[40] (7) On or about the 15th day of May, 1970, Mr. Thomas Kirkup, acting on behalf of the plaintiff, telephoned the defendant, James Finnegan at Wooldridge & Company, Ltd., and during the conversation Mr. Finnegan, acting within the scope of his employment as an employee and/or representative of the defendant, Wooldridge, contracted and represented to Mr. Kirkup that he would procure insurance coverage for the plaintiff to replace the insurance being cancelled before the cancellation took effect.

Plaintiff further moved the Court for leave to amend its Motion for Judgment by deleting therefrom paragraph (13) on page 3 of said Motion for Judgment which reads as follows:

> (13) As a direct and proximate result of the defendants' misrepresentations the plaintiff has sustained a loss of Eleven Thousand Five Hundred Twenty Six Dollars and Eighty-Eight Cents ($11,526.88).

And substituting the following paragraph in lieu of paragraph (13):

(13) As a direct and proximate result of the defendants' breach of contract and misrepresentations the plaintiff has sustained a loss of Eleven Thousand Five Hundred Twenty Six Dollars and Eighty-Eight Cents ($11,526.88).

* * *

ORDER
(Entered November 11, 1971)

[45] * * *

This day came the plaintiff, Standard Products Company, Inc., by counsel, and moved the Court for leave to amend its Motion for Judgment previously filed herein on the 12th day of February, 1971, by deleting therefrom paragraphs (7) and (13) on pages 2 and 3 of said Motion for Judgment which read as follows:

> (7) On or about the 15th day of May, 1970, Mr. Thomas Kirkup, acting on behalf of the plaintiff, telephoned the defendant, James Finnegan at Wooldridge & Company, Ltd., and during the conversation Mr. Finnegan, acting within the scope of his employment as an employee and/or representative of the defendant, Wooldridge, represented to Mr. Kirkup that he would procure insurance coverage for the plaintiff to replace the insurance being cancelled before the cancellation took effect.
>
> (13) As a direct and proximate result of the defendants' misrepresentations the plaintiff has sustained a loss of Eleven Thousand Five Hundred Twenty Six Dollars and Eighty-Eight Cents ($11,526.88).

[46] And substituting the following paragraphs in lieu of the paragraphs to be deleted:

(7) On or about the 15th day of May, 1970, Mr. Thomas Kirkup, acting on behalf of the plaintiff, telephoned the defendant, James Finnegan at Wooldridge & Company, Ltd., and during the conversation Mr. Finnegan, acting within the scope of his employment as an employee and/or representative of the defendant, Wooldridge, contracted and represented to Mr. Kirkup that he would procure insurance coverage for the plaintiff to replace the insurance being cancelled before the cancellation took effect.

(13) As a direct and proximate result of the defendants' breach of contract and misrepresentations the plaintiff has sustained a loss of Eleven Thousand Five Hundred Twenty Six Dollars and Eighty-Eight Cents ($11,526.88).

Upon consideration thereof, it is Ordered that the Motion for Judgment be, and the same hereby is, amended accordingly and defendants shall have leave to file amended responsive pleadings within five days if they shall be so advised.

Enter this: 11/11/71

/s/ E. W. Hening, Jr.
Judge

* * *

MOTION TO REQUIRE PLAINTIFF TO ELECT
(Filed November 22, 1971)

[48] * * *

Defendants, by counsel, move the Court to put the plaintiff to its election as to whether it will proceed in contract in this action or in tort in this action, which election is made necessary by the fact that in the amendment to the original motion for judgment (which original motion for judgment purported to state a cause of action in tort for constructive fraud and deceit) a new claim not resting in tort but based upon an alleged breach of contract between a purported representative of the plaintiff, one Thomas J. Kirkup, and the defendants Wooldridge & Company, Ltd. and James V. Finnegan acting by and through the defendant James V. Finnegan.

The plaintiff may not proceed in one action in both tort and contract and must elect as to which purported cause of action it will rely upon when it goes to trial.

* * *

DEMURRER
(Filed November 22, 1971)

[50] * * *

Defendants come and say that the motion for judgment against them, as amended, is insufficient in law and may not be prosecuted on grounds as follows:

1. The original motion for judgment in this action declared upon a case in tort on the ground of misrepresentation on the part of the defendants with respect to the obtaining of insurance coverage upon property belonging to the plaintiff to replace a policy of insurance which had been cancelled which said original motion for judgment in essence is a charge of constructive fraud and deceit.

2. As a result of the amendments made to the motion for judgment on motion of the plaintiff, the plaintiff has joined with the cause of action in tort for constructive fraud and deceit as set forth in its original motion for judgment a new cause of action based upon an alleged contract entered into by the defendants with one Thomas J. Kirkup who purportedly was acting on behalf of the plaintiff in the making of said contract and agreement and seeks damages for breach of contract and for [51] constructive fraud and deceit in tort arising out of alleged misrepresentations of the defendants to the plaintiff.

3. That under the law and practice in Virginia joinder of tort and contract in one action is not permissible and constitutes a misjoinder of causes of action and subjects the pleading in which such misjoinder occurs to demurrer.

* * *

ORDER
(Entered March 17, 1972)

[54] * * *

This Court having maturely considered the motions heretofore filed on behalf of the defendants and the demurrer likewise filed, being of opinion that the motion to require the plaintiff to elect whether it will proceed in contract or in tort in this action is well taken and should be sustained, the Court doth accordingly Order and direct that the plaintiff do elect whether it will proceed further herein as an action in tort or

an action on contract, to all of which action of the Court the plaintiff objected and saved due exception on all of the grounds relied upon in argument.

Whereupon the plaintiff, by its attorneys, without waiving said objection and exception, stated at the bar of this Court that it elected to proceed herein in tort on theories of both misrepresentation and negligence, which such election is now noted as of record herein, and it is Ordered that this action shall so proceed.

And it appearing from the statement of counsel during the course of argument that in the event the defendants' motion [55] requiring election was sustained by the Court, the defendants no longer desired to proceed on their demurrer, such fact is noted as of record, and the said demurrer is considered to have been withdrawn.

And this case, which is set for trial on March 16, 1972 at 10:00 a.m. before a jury, is continued generally pending such further action as the plaintiff may be advised to take in the light of such election.

Enter: 3/17/72

/s/ John Wingo Knowles
Judge, Circuit Court of Henrico County

* * *

SPECIAL PLEA
(Filed August 1, 1972)

[62] * * *

Now comes the defendant, James V. Finnegan, and says that since the last continuance of this case the plaintiff has prosecuted a certain action at law bearing number 694 in this Court under the short style of Standard Products Company, Inc. v. Wooldridge & Company, Ltd. and James V. Finnegan and has tried the said action, and has obtained therein a judgment against Wooldridge & Company, Ltd. for the sum of $11,526.88 with interest from September 29, 1970 and the costs, the said judgment was rendered on the 25th day of July, 1972.

Wherefore, defendant says that the said plaintiff, having elected to proceed in an action on a contract and having obtained judgment therein for the identical losses and damages claimed herein, is precluded by law from further maintaining this action.

And of this the said defendant puts himself upon the Country.

* * *

ORDER
(Entered September 21, 1972)

[71] * * *

The Court having on September 7, 1972 heard argument of counsel on the plea *puis darrien continuance* heretofore filed by the defendant, James V. Finnegan, being of opinion that the plea is well taken and should be sustained, doth accordingly sustain the same.

It is, therefore, Ordered that the plaintiff take nothing by this action and that the defendant James V. Finnegan, recover herein his costs, to all of which action of the Court the plaintiff saves due exception upon all grounds urged in oral argument.

Enter: 9/21/72

/s/ John Wingo Knowles
Judge, Circuit Court of Henrico County

* * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR BY STANDARD PRODUCTS COMPANY, INC.
(Filed October 10, 1972)

[72] * * *

Notice is hereby given pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia that Standard Products Company, Inc., appeals from a final order rendered by this Court on the 21st day of September, 1972, wherein this action was dismissed and the defendant, James V. Finnegan, was awarded his costs. Notice is further given that Standard Products Company, Inc., will file a written statement of facts and incidents of this case within 60 days after September 21, 1972.

Standard Products Company, Inc., assigns as Error the following:

(1) The trial court erred in sustaining the defendants' Demurrer to the Amended Motion for Judgment and requiring plaintiff to elect between contract and tort.

(2) The trial court erred in sustaining defendant's, James V.

Finnegan, plea *puis darrien continuance* whereby this action was dismissed and the defendant was awarded his costs.

* * *

STATEMENT OF FACTS AND INCIDENTS OF CASE
(Filed November 20, 1972)

* * *

Standard Products Company, Inc., by counsel, files this Statement of Facts and Incidents of Case Pursuant to Rule 5:9(c) of the Rules of the Supreme Court of Virginia:

(1) On the 12th day of February, 1971, Standard Products Company, Inc., filed an *ex delicto* action against Wooldridge & Company, Ltd., and James V. Finnegan, jointly and severally, for the sum of Eleven Thousand Five Hundred Twenty-Six Dollars and Eighty-Eight Cents ($11,526.88), with interest and costs.

(2) Defendants filed their grounds of defense on the 26th day of February, 1971.

(3) On the 31st day of August, 1971, Standard Products Company, Inc., moved the Court to allow it to amend its Motion for Judgment by adding a count for breach of contract. The breach of contract was based on the same facts as the *ex delicto* action filed on February 12, 1971.

(4) On the 11th day of November, 1971, the Court entered an Order amending the Motion for Judgment as requested by plaintiff without objection from the defendants.

(5) On the 22nd day of November, 1971, defendants answered and also demurred to the Amended Motion for Judgment on the ground that it constituted a misjoinder of actions.

(6) On the 17th day of March, 1972, this Court entered an Order sustaining defendants' demurrer and requiring the plaintiff to elect between its tort and contract counts. Thereafter, the plaintiff elected to proceed in this action in tort.

(7) On the 17th day of March, 1972, the plaintiff filed a Motion for Judgment against Wooldridge & Company, Ltd., and James V.

Finnegan for breach of contract arising out of the same facts which give rise to the instant action seeking judgment, jointly and severally, against the defendants in the amount of Eleven Thousand Five Hundred Twenty-Six Dollars and Eighty-Eight Cents ($11,526.88). The contract action was assigned docket No. 694.

(8) Defendant, Wooldridge & Company, Ltd., answered Civil Action No. 694 and defendant, James V. Finnegan, demurred.

(9) On the 18th day of July, 1972, the Court entered an Order allowing the firm of Sands, Anderson, Marks & Clarke to withdraw as counsel of record for defendant, Wooldridge & Company, Ltd., in Civil Action Nos. 364 and 694 on the grounds that Wooldridge & Company, Ltd., had gone out of business and was insolvent.

(10) On the 24th day of July, 1972, the Court entered a nonsuit Order against the defendant, James V. Finnegan, in Civil Action No. 694.

(11) On the 25th day of July, 1972, the Court awarded Standard Products Company, Inc., a default judgment in Civil Action No. 694 against Wooldridge & Company, Ltd., in the amount of Eleven Thousand Five Hundred Twenty-Six Dollars and Eighty-Eight Cents ($11,526.88). This judgment has been docketed, but to date has not been satisfied.

(12) On the 1st day of August, 1972, James V. Finnegan, by counsel, filed a special plea to Civil Action No. 364 asserting that by virtue of the unsatisfied judgment against Wooldridge & Company, Ltd., Standard Products Company, Inc., was precluded by law from proceeding against him.

(13) On the 7th day of September, 1972, after hearing argument on defendant's, James V. Finnegan, special plea, the Court ruled that the plea was well taken and dismissed Civil Action No. 364. During the course of the argument, plaintiff, Standard Products Company, Inc., by counsel, advised the Court that it would nonsuit defendant, Wooldridge & Company, Ltd., prior to the trial and argued that the unsatisfied judgment against Wooldridge & Company, Ltd., did not prevent it from seeking recovery against defendant, James V. Finnegan.

(14) On the 21st day of September, 1972, the Court entered an Order dismissing Civil Action No. 364 and awarded the defendant, James V. Finnegan, his costs.

Dated: 11/28/72

/s/ John Wingo Knowles
Judge

* * *

EXCERPTS FROM DEPOSITION OF JAMES V. FINNEGAN, JR.

[4] * * *

Q Would you state your name? A James V. Finnegan, Jr.

[5] * * *

Q What is your occupation? A I'm employed by Wooldridge & Company, Ltd.

Q In what capacity are you employed? A Vice-President.

[6] * * *

Q What type of business is Wooldridge, Ltd.? A Wooldridge & Company is primarily in the excess and surplus lines of the insurance business.

[45] * * *

Q Did you have occasion in 1969 to have some contact with Standard Products or an agent? A An agent for Standard Products, not Standard Products.

Q Would you state for the record, sir, [46] what occasioned or what prompted this contact with an agent? A Yes. Well, the latter part of April or the first part of May, 1969, being at the same approximate time as the inception of Wooldridge & Company, we contacted American Standard Agency in Kilmarnock, Virginia.

Q You say we contacted them, who do you mean? A Wooldridge & Company did. I don't recall whether it was specifically myself or whether it was Mr. Wooldridge who made the initial contact. How-

ever, contact was made indicating to the agency, and I believe it was made to Mr. Thomas Kirkup. We recognized that historically Standard Products had a capacity problem. We advised them that we were in the business of brokering business for agents, and inquired as we might be of some assistance.

* * *

EXCERPTS FROM DEPOSITION OF THOMAS J. KIRKUP

[3] * * *

Q Will you state your full name? A Thomas J.Kirkup?

[38] * * *

Q Your first knowledge that there was anything amiss as far as Security is concerned is the Notice of Cancellation? Who received the Notice of Cancellation? Did you receive it or did Standard Products, Inc., and its affiliate companies receive it? A If you will just hold it, I will tell you.

Q Please do. A Standard Products, Inc., received it on the 15th day of May, 1970. They immediately got in touch with [39] me.

[40] * * *

Q And what did you do when you got that Notice? What is this (indicating)? A I picked up the phone and put in a collect call to Mr. Finnegan.

Q This was on what date? A On the 15th. It was on the 15th of May, 1970.

Q Did you get Mr. Finnegan? A Yes, sir.

Q All right. And did you talk with Mr. Finnegan? A Yes, sir.

Q What did he tell you?

[41] * * *

A If you will hold on, I will tell you. I did not write it down. I told my secretary. I said I had talked with Jim Finnegan and that he said he would place coverage by 5-25-70. I can go a little bit further.

He told me not to worry about it. It is merely a matter of [42] changing companies.

* * *

Q All right. On June 1, I believe, you called him again? A I certainly did.

Q At that time were you told, or were you not told, that a replacement policy had been procured? A Would you repeat the question?

Q I will. You called him again on June 1, [43] 1970? I believe you talked with Mr. Finnegan at that time and were you told that a replacement policy had been procured? A No, sir.

Q Then you were aware on June 1, 1970, that there was no replacement in existence? A Yes, sir.

Q What action, if any, did you then take to try to do something about it? A None because since Finnegan, as of this date, June 1, 1970, told me not to worry about it. He told me that it would be covered.

[44] * * *

Q You had no definitive knowledge that it had been placed, did you?

* * *

The Witness: No, I had not. This one point is really important here. If I had felt that it was not going to be placed, I would have tried to procure it some place else.

* * *

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