

September 2, 1997
FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

September 2, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

MARY BLAKE,)
)
Plaintiff-Appellant,)

v.)
)
PLUS MARK, INC., AND SUE ANN)
HEAD, DIRECTOR OF THE)
DIVISION OF WORKER'S)
COMPENSATION, TENNESSEE)
DEPARTMENT OF LABOR,)
Defendants-Appellees.)

GREENE CHANCERY

Hon. Dennis H. Inman,
Chancellor

No. 03-S-01-9512-CH-00137

For Plaintiff-Appellant: _____ For Defendant-Appellee Plus Mark:

Bob McDaniel Green
Johnson City

Gene P. Gaby
Milligan & Coleman
Greeneville

For Defendants-Appellees Sue
Ann Head, Director of the
Division of Worker's Compensation

Anne T. Widseth
Tennessee Department of Labor
Knoxville

Sandra Keith
Tennessee Department of Labor
Nashville

O P I N I O N

JUDGMENT OF TRIAL COURT
REVERSED; CASE REMANDED.

REID, J.

1 for trial on May 31, 1995. On the day of the trial, the employee
2 filed a motion for a continuance stating that she had not been able
3 to schedule the deposition of her medical expert. The court denied
4 the motion for a continuance. Thereupon, the employee made a motion
5 that her complaint be dismissed without prejudice, which was granted.
6

7 According to the judgment entered in the trial court, the
8 case then "proceeded" on the employer's counterclaim "for a
9 determination of the workers' compensation benefits, if any, to which
10 Mary Blake was entitled from Plus Mark, Inc." No proof was presented
11 by any party. The court entered judgment that the employee "recover
12 no workers' compensation benefits for her claimed injury."
13

14 On appeal, the case initially was referred to a Special
15 Workers' Compensation Appeals Panel for findings of fact and
16 conclusions of law. The case was withdrawn for review by the Court
17 pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A) (Supp. 1996).
18

19 II

20

21 The employee insists that the trial court erred in denying
22 her motion for a continuance, hearing the case on the employer's
23 counterclaim and determining, without proof, that she was not
24 entitled to any benefits.
25

1
2
3 **B.**

4 The right of the employee to take a nonsuit and the order
5 granting the nonsuit without prejudice is not contested. The
6 employee insists that proceeding further on the employer's prayer for
7 a declaratory judgment was error. She insists that since the
8 counterclaim asserted no grounds for relief other than the denial of
9 liability, dismissal of the complaint required the dismissal of the
10 counterclaim as well as the answer. The provisions of Tenn. Code
11 Ann. § 50-6-225 and Tenn. R. Civ. P. 41.01(1), do not support the
12 employee's position.

13 Tenn. Code Ann. § 50-6-225 (Supp. 1993) authorizes the
14 employee and also the employer to submit a workers' compensation
15 controversy to the court for determination. Subsection (a)(1)
16 provides:

17
18 In case of a dispute over or failure to agree
19 upon compensation under the Workers' Compensation
20 Law between the employer and employee or the
21 dependents of the employee, either party may
22 submit the entire matter for determination to the
23 judge or chair of the county court in which the
24 accident occurred, and such judge or chair is
25 vested with jurisdiction to hear and determine
26 the issues and render and enforce judgment.
27
28

29 Subsection (b) provides:
30

1 The party invoking the power of the court shall
2 file a petition setting out the facts on which
3 the claim is based under the Workers'
4 Compensation Law.

5
6 Under this statute, any dispute between the employer and the employee
7 will be resolved upon a suit by either party "setting out the facts
8 on which the claim is based under the Workers' Compensation Law." In
9 this case, the employer asserted that right in the form of a
10 counterclaim.

11
12 Rule 41.01(1) states the circumstances under which a
13 plaintiff may voluntarily dismiss a complaint without prejudice and
14 the effect such a dismissal has on a counterclaim. It states:

15
16 Subject to the provisions of Rule 23.05¹ or Rule
17 66² or any statute, and except when a motion for
18 summary judgment made by an adverse party is
19 pending, the plaintiff shall have the right to
20 take a voluntary nonsuit to dismiss an action
21 without prejudice If a counterclaim has
22 been pleaded by a defendant prior to the service
23 upon the defendant of plaintiff's motion to
24 dismiss, the defendant may elect to proceed on
25 such counterclaim in the capacity of a plaintiff.

26
27
28
29 Since a defendant may proceed on a counterclaim even though the
30 plaintiff has taken a nonsuit, the question is whether the employer's

¹Rule 23.05 states that a "class action shall not be voluntarily dismissed or compromised without the approval of the court...."

²Rule 66 states that an "action wherein a receiver has been appointed shall not be dismissed except by order of the court...."

1 pleading set forth a counterclaim within the meaning of the rule.
2 Apparently, this precise issue has not been considered previously by
3 an appellate court in this jurisdiction.
4

5 Historically, in equity practice, the dismissal of an
6 original bill ordinarily carried with it the dismissal of a cross
7 bill or an answer filed as a cross bill, unless the answer or cross
8 bill set up grounds for affirmative relief. Henry R. Gibson, Suits
9 in Chancery § 726 (2nd ed. 1907); McDowell v. Hunt Contracting Co.,
10 133 Tenn. 437, 181 S.W. 680, 681 (1916). The general rule is that
11

12 [a]s used in a particular statute or rule
13 precluding dismissal where the adverse party has
14 sought affirmative relief, the term "affirmative
15 relief" requires the allegation of new matter
16 that, in effect, amounts to a counterattack. The
17 relief sought, if granted, must operate not as a
18 defense, but affirmatively and positively to
19 defeat the plaintiff's cause of action. Thus,
20 where the pleadings in a counterclaim constitute
21 mere denials of the plaintiff's cause of action
22 and state no facts on which affirmative relief
23 could be granted, the plaintiff's right to
24 voluntary termination of the suit is not
25 affected.
26
27

28 24 Am. Jur. 2d Dismissal § 66 (1983). This general rule is
29 consistent with the language of Tenn. R. Civ. P. 13. Under Rule
30 13.01 a compulsory counterclaim is "any claim, other than a tort
31 claim, which at the time of serving the pleading the pleader has
32 against any opposing party, if it arises out of the . . . occurrence
33 that is the subject matter of the opposing party's claim. . . ."

1 the case was pending on the employer's pleadings.³ The pleading
2 party has the burden of proving that the controversy is justiciable
3 and of establishing the facts needed to bring an action. Although
4 the counterclaim was filed under the authority of the workers'
5 compensation statute and not under the Declaratory Judgment Act,⁴ it
6 is in the nature of an action for declaratory judgment.

7
8 [The majority view is that] the burden of
9 proof in a declaratory judgment action is the
10 same as in ordinary actions at law or suits in
11 equity, and the plaintiff bringing a declaratory
12 judgment action must, in order to succeed, prove
13 his case in accordance with and within the
14 meaning of such rules, and this rule is not
15 affected by the fact that a negative declaration
16 is sought - of nonliability. It may be stated as
17 a general rule, that the burden of proof is upon
18 the plaintiff to show that conditions exist to
19 justify the court in exercising its discretionary
20 powers to grant declaratory relief pursuant to
21 the declaratory judgment statute. It seems that
22 an applicant for a declaratory judgment has the
23 burden of showing that present justiciable
24 controversy exists, and if this fact is not shown
25 then a cause of action for declaratory relief is
26 not established. . . .

27
28
29
30 2 Walter H. Anderson, Actions for Declaratory Judgments § 375 (2d ed.
31 1951). See also Jared v. Fitzgerald, 183 Tenn. 682, 195 S.W.2d 1,4

³The employee's response to the employer's counterclaim, as required by Tenn. R. Civ. P. 7.01, is not included in the record presented to this Court; however, this is not raised as an issue by the parties. No responsive pleadings by the Second Injury Fund, aside from the initial answer to the complaint, appear in the record, nor did that party participate at the trial or on appeal.

⁴Tenn. Code Ann. §§ 29-14-100 to 29-14-113 (1980). See also Tenn. R. Civ. P. 57.

1 (1946); Century Indus., Inc. v. Wenger Corp., 851 F. Supp. 1260, 1263
2 (S.D. Ind. 1994).

3
4 The employer had the burden of proving the allegations set
5 forth in its pleadings - jurisdictional facts, the issue in
6 controversy and the circumstances that gave rise to the controversy.
7 The employee will be entitled to such benefits, if any, as this
8 evidence may show, unless the employee produces evidence which shows
9 that she is entitled to additional benefits. Consequently, even
10 though the employer's pleading alleging a counterclaim was not
11 dismissed with the employee's complaint, the pleading, without proof,
12 does not entitle the employer to a judgment.

13
14 The judgment of the trial court is reversed, and the case
15 is remanded to the trial court for further proceedings.

16
17 Costs of the appeal are taxed to Plus Mark, Inc.

18
19
20 _____
21 Reid, J.

22
23 Concur:
24
25 Anderson, C.J., Drowota, Birch, and
26 Holder, JJ.