



In the Missouri Court of Appeals Eastern District

DIVISION TWO

TRAVELERS PROPERTY CASUALTY)	No. ED96780
COMPANY OF AMERICA and)	
JACOBSMEYER-MAULDIN)	
CONSTRUCTION COMPANY,)	
)	
Plaintiffs,)	
)	
v.)	
)	
THE MANITOWOC COMPANY, INC.,)	Appeal from the Circuit Court of
)	the County of St. Louis
Defendant/Third-Party Plaintiff/)	Cause No. 09SL-CC04791
Appellant,)	Honorable Tom W. DePriest, Jr.
)	
v.)	
)	
UNITED STATES STEEL CORPORATION,)	
as successor-in-interest to)	
LONESTAR TECHNOLOGIES, INC.)	
a/k/a/ LONESTAR STEEL,)	
)	
Third-Party Defendant/Respondent.)	Filed: January 24, 2012

This case is about third-party practice and pleading requirements.

Background and Procedural History

On 4 November 2009, Travelers Property Casualty Company of America and Jacobsmeyer-Mauldin Construction Company filed a petition against Grove U.S., L.L.C.

and The Manitowoc Company, Inc.¹ captioned “Petition for Property Damage and to Enforce Settlement.”² The lawsuit was the result of an accident that occurred on 9 January 2009 at a construction site on the campus of Washington University in St. Louis. Jacobsmeyer was the owner of a crane that was being used in the construction project. Travelers Property is Jacobsmeyer’s insurer.

The petition alleged that on 9 January, a crane owned by Jacobsmeyer “suddenly and unexpectedly fell down” and landed on a building under construction. It was alleged that the crane fell because the main hoist lift cylinder split laterally, causing a loss of pressure. The petition alleged that the accident resulted in damage to both the crane and the building. It further alleged that the crane was designed, manufactured and sold by Grove. Finally, the petition alleged that Grove and Manitowoc entered into a settlement agreement with Travelers and Jacobsmeyer, but had breached that agreement. The petition sought damages for that breach.

On 12 March 2010, Manitowoc filed its answer to the petition and a third-party petition against U.S. Steel. In its third-party petition, Manitowoc alleged that U.S. Steel provided the hoist lift cylinder and/or the material which formed the cylinder, the failure of which was the direct cause of the accident and ensuing damage. Manitowoc alleged that if Travelers/Jacobsmeyer suffered any injury attributable to the crane, that U.S. Steel was liable, in full or in part, to Manitowoc for those damages. U.S. Steel filed a motion to dismiss the third-party action for failure to state a claim for relief. The trial court granted the motion after a hearing. It dismissed the third-party petition with prejudice.

Manitowoc appeals the trial court’s dismissal, arguing that dismissal was

¹ The Manitowoc Co. is the parent company of Grove U.S.

² The caption of the first-amended petition read in full: “First Amended Petition for Property Damage and to Enforce Settlement.”

inappropriate because the court had jurisdiction over the third-party claim, or alternatively, if the court lacked jurisdiction, the proper remedy was to strike the petition.

Standard of Review

There is no right to implead a third-party, but leave to do so is given in the discretion of the trial court. *Missouri Dept. of Transp. ex rel. PR Developers, Inc. v. Safeco Ins. Co. of America*, 97 S.W.3d 21, 40-41 (Mo. App. E.D. 2002). The trial court's decisions in these matters are presumed correct, and this Court will disturb its ruling only on a showing by the complaining party that the court abused its discretion. *Id.* "To constitute an abuse of discretion, the trial court's ruling must be so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. If there is any reasonable ground upon which the trial court could have denied leave, there is no abuse of discretion." *Id.*

Discussion

Manitowoc claims the trial court erred in dismissing (with prejudice) its third-party petition against U.S. Steel because the petition stated a valid third-party claim for contribution/indemnity.

Manitowoc's argument regarding the trial court's dismissal of its third-party action focuses almost exclusively on the issue of jurisdiction. Manitowoc argues that because U.S. Steel's liability to it is wholly contingent on its liability to Travelers/Jacobsmeier, the trial court had jurisdiction over the third-party petition, and thus it was error for the trial court to dismiss the claim.

Manitowoc's argument ignores the fact that there are *two* issues to be analyzed when reviewing a trial court's decision on a Rule 52.11 third-party petition: jurisdiction

and discretion. See *State ex rel. Green v. Kimberlin*, 517 S.W.2d 124, 126-27 (Mo. 1974).

A trial court has jurisdiction to hear a third-party claim only “if the person upon which it is served ‘is or may be liable to [defendant/third-party plaintiff] for all or any part of the plaintiff’s claim against him.’” Rule 52.11; *Kimberlin*, 517 S.W.2d at 127.

The determinative issue when it comes to jurisdiction:

is whether the facts set forth in the third-party petition constitute a basis for a theory by which the third-party defendant would be liable to the third-party plaintiff if such third-party plaintiff is found to be liable to the original plaintiff. If the liability of the third-party defendant is not dependent on the liability of the third-party plaintiff, the claim would not come within the provision of Rule 52.11.

Kimberlin, 517 S.W.2d at 127.

In this case, Manitowoc’s (third-party petitioner) claim against U.S. Steel (third-party defendant) is wholly contingent on the outcome of the underlying case between Travelers/Jacobsmeier and Manitowoc. If Manitowoc prevails in the underlying case, it will have no claim against U.S. Steel because it will not have suffered any damage. As there can be no liability by U.S. Steel to Manitowoc independent of the initial litigation, the trial court had jurisdiction over the third-party case.

However, as mentioned above, the analysis does not end there. The right to bring a third-party petition is not absolute even if the matter falls within the jurisdiction of the court. *Id.* at 126.

The purpose of third party practice is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence to obtain consistent results from identical or similar evidence and to accomplish ultimate justice for all concerned with economy of litigation and without prejudice to the rights of another. If the above purposes would not be served by the adjudication of the third-party claim, it is proper for the trial judge to exercise discretion and dismiss the third-party petition.

Id. at 126-27.

Factors the court may consider when exercising its discretion include whether the third-party claim is based on a different theory from that alleged in the original petition, and whether the third-party petition introduces new factual issues. *S. P. Personnel Associates of San Antonio, Inc. v. Hospital Bldg. & Equipment Co., Inc.*, 525 S.W.2d 345, 348 (Mo. App. 1975).

From the record, it appears the trial court's exercise of discretion dismissing the third party petition was reasonable as the purposes of third party practice would not be served by maintaining the action. First, the theory of recovery was different in the two cases. The primary theory of recovery as framed by the amended petition of Travelers/Jacobsmeier was breach of contract. Travelers/Jacobsmeiers alleged that they reached a settlement agreement with Manitowoc and Manitowoc breached that agreement.³ Even if both cases are considered tort cases, the evidence which would need be presented is not sufficiently similar, let alone identical, to indicate an abuse of discretion. If Travelers/Jacobmeiers proceeded on a tort theory, they would merely need to demonstrate that the crane was in some way defective. By contrast, in Manitowoc's case against U.S. Steel, Manitowoc would need to prove that a particular component of the crane was defective. It was not unreasonable for the trial court to decide that it would be better to try these two cases separately.

Review of the trial court's decision not to entertain the third-party claim is not

³ While the first amended petition is titled "Petition for Property Damage and to Enforce Settlement" the overwhelming majority of the petition is devoted to allegations related to the settlement agreement. There is only one mention of the property damage issue in the whole petition, in paragraph 9: "As a direct result of said occurrence, the crane was significantly damages, as was the building being constructed." This paragraph is included in Count I. In paragraph 20 of Count I, Travelers/Jacobsmeiers alleged that Manitowoc (through its predecessor in interest "Grove") entered into a settlement for \$114,852.70. As damages for Count I, Travelers/Jacobsmeiers prays solely for judgment of \$114,852.70 (plus costs). The fact that the damages prayed for are the exact same as the amount of the alleged agreement supports this Court's conclusion that Travelers/Jacobsmeiers was more concerned with the agreement/contract issue than the property damage/tort issue.

dispositive of this case though. The issue now becomes whether the trial court employed the proper procedure to dispose of the third-party claim. Manitowoc argues that the trial court erred in dismissing the petition with prejudice because the appropriate disposition of an improper third-party claim is to strike the petition.

It is true that when the trial court lacks jurisdiction to hear a third-party claim, the proper remedy is to strike the claim. Rule 52.11; *State ex rel. Ashcroft v. Gibbar*, 575 S.W.2d 924, 929 (Mo. App. 1978). But again, this is only when the court lacks jurisdiction. *Gibbar*, 575 S.W.2d at 929. When a court would otherwise have jurisdiction, but a petition fails to state a claim for relief, the appropriate disposition is dismissal with prejudice. *Pennyrich, Inc. v. Lawton-Byrne-Bruner Ins. Agency*, 613 S.W.2d 473, 474 (Mo. App. E.D. 1981). As discussed above, the court would have had jurisdiction over a properly-pleaded petition for contribution/indemnification. But if, as alleged by U.S. Steel, Manitowoc failed to effectively plead its claim for contribution/indemnification, then the trial court's disposition was entirely proper.

It is the law of this state that “that one seeking contribution as a joint tortfeasor must allege that he was a joint tortfeasor;” i.e. that he, the one seeking contribution, is liable to the injured party himself. *Mid-Continent News Co., Inc. v. Ford Motor Co.*, 671 S.W.2d 796, 800 (Mo. App. W.D. 1984) (internal citations omitted). Thus, if Manitowoc failed to admit/allege its liability to Travelers/Jacobsmeier, it has failed to state a claim for relief. *See Miles ex rel. Miles v. Rich*, 347 S.W.3d 477, 482 (Mo. App. E.D. 2011). There is nothing in the record by which this Court can discern or even *infer* that Manitowoc has alleged its own liability. Indeed, in its third-party petition Manitowoc explicitly denies that it has any liability to Travelers/Jacobsmeier: “That [Manitowoc]

denies any and all liability to [Travelers/Jacobsmeier].” In so stating, Manitowoc pled itself out of court. *Id.*

As Manitowoc failed to admit or allege its own liability, it did not state a claim of relief based on contribution/indemnity and the trial court acted correctly in dismissing the claim with prejudice.

Kenneth M. Romines, J.

Kathianne Knaup Crane, P.J. and Robert M. Clayton III, J., concur.