

**LASA PER L'INDUSTRIA DEL MARMO SOCIETA PER AZIONI v.
SOUTHERN BUILDERS, INC.**

United States District Court for the Western District of Tennessee, 1967.
45 F.R.D. 435, *rev'd*, 414 F.2d 143 (6th Cir. 1969).

BAILEY BROWN, Chief Judge.

Southern Builders, Inc. of Tennessee, City of Memphis and Continental Casualty Co. have moved to dismiss a cross-claim filed against them by Alexander Marble and Tile Co., a partnership. A.L. Aydelott and A.L. Aydelott and Associates, Inc. have filed a motion to dismiss a third party complaint filed against them by this same partnership. The contentions are that the cross-claim and third party complaint are not authorized by the Federal Rules of Civil Procedure * * * .

The original complaint was filed by an Italian corporation, referred to herein, for brevity, as "LASA." This complaint, as twice amended and supplemented, alleges in substance as follows. Southern Builders, a Tennessee corporation, as principal contractor, entered into a contract in 1962 with the City to build a city hall and under the contract obligated itself to the City to pay for all labor and materials. Southern Builders procured and furnished to the City a statutory performance and payment bond, with Continental Casualty as surety, under which Southern Builders obligated itself to the City to perform the contract and to pay for all labor and materials. Alexander Marble and Tile Co., a partnership, whose partners are Tennessee residents, together with Marble International, Inc., a Texas corporation, as joint venturers, entered into a subcontract with Southern Builders under which they were to supply all marble and anchoring devices and install the marble. Alexander then contracted with LASA to supply to it all of the marble for a contract price of \$468,641.26, that the marble has been supplied as agreed, and that there is a balance due of \$127,240.80 * * * . The City improperly released retainages to the principal contractor, Southern Builders. LASA therefore sues Alexander, * * * Marble International, Southern Builders, Continental Casualty and the City for the alleged balance due.

To this original complaint Alexander (partnership and corporation) filed an answer and counterclaim * * * [in which] they contend that the actual net contract price for the marble was only \$265,050.00; that, after LASA had failed to ship marble as agreed and had threatened to cease shipments, the price was then under duress increased, first to \$336,030.00 and then to \$370,686.90; that a total of \$406,967.74 has actually been paid to LASA; that much of the marble that was shipped arrived late, was broken, or was of the wrong type; and that LASA had failed to ship all the marble it was obligated to ship. Alexander by this counterclaim sues LASA for overpayment of the contract price and for unliquidated damages for failure to ship marble as agreed.

To this original complaint, Continental Casualty and Southern Builders have filed answers and Southern Builders has filed a counterclaim. They aver that Southern Builders is obligated to pay only "just and valid" claims for labor and materials and that LASA has no such claim; aver that nothing is owed LASA for marble delivered and installed on this job; deny that the City improperly released any retainages; and aver that LASA failed to ship marble as agreed. Southern Builders by its counterclaim sues LASA for all damages to it because of LASA's failure to ship marble as agreed to Alexander.

Alexander (partnership) has filed a cross-claim against Southern Builders, Continental Casualty and the City * * * for a balance alleged to be due under its subcontract with Southern Builders.

In the same cross-claim, it is further averred that Southern Builders, under the insistence of the architect, A.L. Aydelott, hindered Alexander in the performance of the subcontract * * * . It is further averred that Southern Builders, under the insistence of Aydelott, wrongfully terminated the subcontract, forced Alexander off the job, and brought in another

subcontractor which was allowed to finish the job not in accordance with the original specifications (as Alexander had sought) and at an inflated price. It is further averred that Southern Builders and Aydelott injured the business reputation of Alexander by publicly blaming Alexander for many ills not its fault and which were the fault of Southern Builders and Aydelott. Alexander, in this cross-claim, accordingly also sues only Southern Builders for unliquidated damages, actual and punitive.

Southern Builders and Continental Casualty have filed answers to Alexander's cross-claim against them, and Southern Builders has filed * * * cross-claims against Alexander for any amount it is held to be liable to LASA in the original action. Southern Builders further cross-claims against Alexander for unliquidated damages for not maintaining progress schedules, for faulty materials and workmanship, for overdrawing money pursuant to false project information, and failing generally to follow the specifications, the subcontract, and the general contract.

Alexander has also filed a third party complaint, which has been once amended, against A.L. Aydelott and Associates, Inc. and against Aydelott, individually, who is its principal officer (hereinafter collectively referred to as "Aydelott") alleging that they had the architectural contract with the City * * * . It is alleged that Aydelott negligently provided improper specifications and insisted they be followed; negligently failed to require Southern Builders to properly perform its work; wrongfully required Alexander to install marble in inclement weather; wilfully refused to approve Alexander's estimates for work done; wrongfully directed Southern Builders to terminate the subcontract, allowed the new subcontractor to follow different specifications, and approved payment to the new subcontractor at an inflated price; wrongfully misinterpreted the specifications and the subcontract; and wrongfully and maliciously injured Alexander's business reputation. Alexander sues in this amended third party complaint for unliquidated actual and punitive damages under the general law and, under a Tennessee statute, for treble damages for inducing Southern Builders to breach the subcontract.

* * *

In support of its right to file this cross-claim, Alexander relies on Rule 13(g) * * * .

In support of its right to file the third party complaint, Alexander relies on Rule 13(h) * * * .

In his brief and argument, Aydelott contends that the right to file a third party complaint is controlled by Rule 14, which deals with "Third Party Practice." Aydelott further argues that, since he could not be liable and it is not contended that he is liable to Alexander for all or any part of LASA's claim against Alexander, as is required by Rule 14, this third party complaint cannot be maintained against him. While Aydelott is technically correct, it is also true, as Alexander contends, that by the simple expedient of amending the third party complaint to style it as a cross-claim against an additional cross-defendant, Alexander could then rely on Rule 13(h). It was therefore agreed at argument that the Court should test the propriety of the filing of this third party complaint by treating it as a cross-claim against an additional party under Rule 13(h).

It should be noted that Rule 13(h) provides that the right to make an additional party a cross-defendant is governed by Rules 19 and 20. Alexander does not contend that Rule 19 would allow Alexander to make Aydelott an additional cross-defendant. Alexander does contend, however, that this is authorized by that part of Rule 20, which provides:

All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

It is Alexander's contention, in other words, that since Southern Builders *et al.* have been properly made cross-defendants and since its claims for relief against Aydelott arise out of the same transaction or occurrence or series of transactions or occurrences as its claims against Southern Builders *et al.*, Rule 13(h) allows the joining of Aydelott as an additional cross-defendant. Alexander is correct in this contention, if, as it assumes, its claims against Southern Builders *et al.* are authorized by Rule 13(g) * * * .

This brings us to the ultimate question, which is: does Alexander's cross-claim, or any part of it, arise out of the transaction or occurrence that is the subject matter of the original action of LASA or the two counterclaims against LASA?

The original action is to collect an alleged balance due on the contract price of marble sold and delivered by LASA to Alexander. Alexander's counterclaim against LASA is to collect an alleged overpayment for marble sold and delivered and for unliquidated damages for the alleged failure of LASA to supply marble as agreed. The counterclaim of Southern Builders against LASA is for unliquidated damages for alleged failure of LASA to supply marble to Alexander as agreed. On the other hand, Alexander's cross-claim against all cross-defendants is to collect an alleged balance due on its subcontract with Southern Builders, and its cross-claim against Southern Builders alone is for unliquidated damages, compensatory and punitive, for alleged hindrance of Alexander in the performance of its subcontract, for failure to make payments to it when due, for wrongful termination of the subcontract, and for injury to its business reputation.

* * *

Alexander argues that the same general contract, bond, and subcontract, and some of the same evidence which would be involved in the original action and the counterclaims therein would also be involved in that part of its cross-claim against Southern Builders *et al.* for the balance alleged to be due under the subcontract. It then goes on to relate the remainder of its cross-claim, against Southern Builders alone, including even that for injury to its business reputation, to its cross-claim for the balance due, thus by this claim relating all of its cross-claims to these other claims.

It seems absolutely clear to us that none of that part of Alexander's cross-claim which includes a claim for damages for hindrance in performance of the subcontract and for cancellation of the subcontract and for damage to its business reputation has any logical relation to the original action or the counterclaims therein. Furthermore, none or hardly any of the issues of fact or law relating to the original action or the counterclaims therein would be the same as those relating to this part of Alexander's cross-claim, nor would a judgment on the original action or the counterclaims therein bar a subsequent suit on this part of the cross-claim, nor would any or hardly any of the same evidence support or refute this part of the cross-claim and the other claims. The only claim asserted by Alexander in its cross-claim that even arguably, applying these tests, arises out of the same transaction or occurrence that is the subject matter of LASA's claim and the counterclaims against LASA is that part of Alexander's cross-claim for the alleged balance due under the subcontract * * * . [I]t would be stretching the "logical relation" test to its utmost limits to say that Alexander's claim for a balance due under its subcontract with Southern Builders is logically related to LASA's claim as a supplier of marble for a balance due under its contract with Alexander or to the counterclaims against LASA for failure to supply marble to Alexander as agreed. We do not believe, in spite of the admonition of some courts that Rule 13(g) is to be liberally interpreted, that the rule was ever intended to go so far. We therefore conclude that the cross-claim filed by Alexander must be dismissed in its entirety.

Inasmuch as we have previously stated that the merit of the motion to dismiss the third party complaint (treated as a cross-claim) against Aydelott depends on whether or not the cross-claim against Southern Builders *et al.* is authorized by Rule 13(g), and since we herein do hold that the cross-claim filed by Alexander against Southern Builders *et al.* is not author-

ized by Rule 13(g), it follows that the third party complaint filed by Alexander against Aydelott should likewise be dismissed.

It further appears that the cross-claim filed by Southern Builders against Alexander for unliquidated damages for breach of the subcontract likewise does not arise out of the same transaction or occurrence that is the subject matter of the original action or the counter-claims therein. On the other hand, insofar as Southern Builders cross-claims against Alexander on the theory that Alexander would be liable to Southern Builders for any amount Southern Builders is held liable to LASA in the original action, the cross-claim is clearly authorized by Rule 13(g). While Alexander has not filed a motion to dismiss the cross-claim of Southern Builders against it, the very position taken and argument made by Southern Builders on the motion to dismiss Alexander's cross-claim is inconsistent with its right to maintain a cross-claim against Alexander for unliquidated damages for breach of the subcontract, and therefore on the Court's own motion we will dismiss this part of the cross-claim of Southern Builders.

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