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Timeliness of Filing Counterclaim under Illinois Law

Question Presented

Whether the defendant is barred from filing a counterclaim after a delay of one year from the filing of second amended complaint by the plaintiff?

Discussion

Section 2-608 of the Illinois Civil Procedure Code deals with counterclaims. It states, in pertinent part:

"§ 2-608. Counterclaims. (a) Any claim by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim."

735 ILCS 5/2-608 (a).

The Code further states that the counterclaim shall be a part of the answer, and shall be designated as a counterclaim. 735 ILCS 5/2-608 (b).

However, Illinois courts had held that the word "may" in subsection (a) of the statute indicates an election is available to defendant and therefore counterclaims in Illinois are permissive rather than mandatory and the statute does not require that a defendant immediately assert his rights by counterclaim. *Davis v. Lowery*, 228 Ill. App. 3d 660, 662 (Ill. App. Ct. 1992) (holding that plaintiff was not barred by *res judicata* from bringing a separate action where he

failed to assert a counterclaim in a prior action between the parties even though both actions arose out of the same accident). See also *YMCA of Warren County v. Midland Architects, Inc.*, 174 Ill. App. 3d 966, 971 (Ill. App. Ct. 3d Dist. 1988) (“The word ‘may’ in the quoted words of the statute indicates an election is available to the defendant and the cases have so interpreted this section.”).

Where it is convenient or strategically advisable to file a counterclaim after the trial, the claimant is not precluded from doing so. *Cox v. Doctor's Assocs.*, 245 Ill. App. 3d 186, 199 (Ill. App. Ct. 1993). See also *Klier v. Siegel*, 200 Ill. App. 3d 121, 128 (Ill. App. Ct. 2d Dist. 1990) (holding that a defendant is not required to immediately assert his rights against a plaintiff by way of setoff or counterclaim if it would be inconvenient or strategically inadvisable to do so under section 2-608(a) of the Code of Civil Procedure); *Kennedy v. First Nat'l Bank*, 129 Ill. App. 3d 633, 636 (Ill. App. Ct. 4th Dist. 1985) (stating that although plaintiff could have asserted his claim in a prior action by way of counterclaim, section 2-608(a) does not require a defendant to immediately assert his rights by way of a counterclaim if it would be inconvenient or strategically inadvisable for him to do so).

The question of the timeliness of pleading a counterclaim is within the sound discretion of a trial judge. *Clay v. Pepper Constr. Co.*, 205 Ill. App. 3d 1018, 1022 (Ill. App. Ct. 1st Dist. 1990) (holding that counterclaim for contribution against co-defendant was not timely where it was not asserted before the co-defendant was dismissed from the case). See also *Otto Real Estate, Inc. v. Shelter Inv.*, 153 Ill. App. 3d 756, 762 (Ill. App. Ct. 4th Dist. 1987) (“It is within the court's discretion to allow the filing of a counterclaim subsequent to the filing of an answer.”).

In *Otto Real Estate, Inc.*, *supra*, the defendants argued that it was error for the trial court to refuse to allow them to file a counterclaim alleging breach of fiduciary duty and self-dealing some 11 months after the filing of their answer. In rejecting the defendants' argument, the Appellate Court held that no satisfactory explanation was offered for the delay in filing the counterclaim, and, under the circumstances, the trial court did not abuse its discretion for denying leave to file it on that basis alone. *Id.* at 762.

In *Benckendorf v. Burlington N. Railroad*, 112 Ill. App. 3d 658, 661 (Ill. App. Ct. 2d Dist. 1983), defendant filed a counterclaim against a codefendant. Thirty days later through other counsel he answered the plaintiff's complaint. *Id.* at 661. The codefendant moved to dismiss the counterclaim because it did not conform to the procedural requirements of Section 2-608 that the counterclaim be part of the answer. *Id.* The trial court denied the motion. *Id.* On appeal, the Appellate Court affirmed and held that the trial court has the discretion to grant a defendant leave to file a counterclaim either before or after the filing of an answer, especially where no prejudice has been shown. *Id.* at 662. See also *Trustees of Schools v. Schroeder*, 8 Ill. App. 3d 122, 124 (Ill. App. Ct. 1st Dist. 1972) (holding that the trial court properly exercised its discretion in denying defendant's motion to file a counterclaim post-decree, especially where defendant was seeking to re-litigate issues now barred by *res judicata*).

The courts have held that a party does not have an absolute right to file a counterclaim any time he wishes to do so and the timeliness of a request to amend a pleading may be considered by the trial court. *National Educ. Music Co. v. Rieckhoff*, 292 Ill. App. 3d 260, 263-264 (Ill. App. Ct. 4th Dist. 1997). In *National Educ. Music Co.*, *supra*, plaintiff filed a two count complaint in January of 1996. *Id.* at 262. Defendant filed an answer in April of 1996. *Id.* Thereafter, in October of 1996 defendant filed a motion seeking leave to assert a counterclaim.

Id. The trial court denied the motion. *Id.* On appeal, the Appellate Court held that the trial court should consider both the timeliness of the counterclaim and the prejudice to the other side before granting the motion for leave. *Id.* at 264. In affirming the trial court, the Appellate Court noted that defendant gave no explanation for the delay in filing the counterclaim or why it could not have been asserted in the answer. *Id.* See also *Beckham v. Tate*, 61 Ill. App. 3d 765, 769 (Ill. App. Ct. 5th Dist. 1978) (holding that the doctrine of laches can bar the assertion of a counterclaim where the passage of time has resulted in prejudice to the other party).

In addition to timeliness, the courts should also consider whether other parties have been prejudiced or surprised by the late filing of the counterclaim. *Long v. Friesland*, 178 Ill. App. 3d 42, 59 (Ill. App. Ct. 5th Dist. 1988). In *Long*, *supra*, on the sixth day of trial defendant was granted leave to file a counterclaim against a co-defendant who had been released from the case. *Id.* at 59. On appeal, the Appellate Court reversed and found that the trial court abused its discretion in permitting a counterclaim to be filed so late in the litigation where there was no reasonable explanation for the delay and the released co-defendant would suffer prejudice. *Id.* In this regard, the Appellate Court noted that defendant was aware of the facts giving rise to the counterclaim long before it was finally asserted. *Id.* at 60. Moreover, the released defendant would suffer prejudice because it had not participated in discovery. *Id.* As such, the Appellate Court held that the trial court abused its discretion in granting leave to the defendants to file a counterclaim. *Id.*

It should be noted that Sec. 1-106 of the Illinois Civil Procedure Code states:

“Sec. 1-106. Act to be liberally construed. This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties. The rule that statutes in derogation of the common law must be strictly construed does not apply to this Act or to the rules made in relation thereto.”

735 ILCS 5/1-106. See also *Giacalone v. Chicago Park Dist.*, 231 Ill. App. 3d 639, 643 (Ill. App. Ct. 1st Dist. 1992) (stating that Sec. 1-106 is to be liberally construed in order to further the ends of justice, and reaffirms the power of the court to permit amendments to pleadings at any time, as mandated by 735 ILCS 5/2-616(a)).

Further, under Federal Rule 13(f), the courts have power, which has been liberally exercised, to permit amendments to assert a compulsory counterclaim that has been omitted. *McDonald's Corp. v. Levine*, 108 Ill. App. 3d 732, 750 (Ill. App. Ct. 2d Dist. 1982). In a deserving case it is even possible to reopen the judgment under Federal Rule 60(b), and allow pleading of the omitted compulsory counterclaim after the first action has been terminated. *Id.*