

IN THE COURT OF APPEALS OF TENNESSEE

SAFECO INSURANCE COMPANY OF AMERICA,

Plaintiff - Appellant,

v.

SIMPSON BRIDGE COMPANY, INC.,

Defendant - Appellant,

and

WATER AND LIGHT COMMISSION OF GREENEVILLE AND THE TOWN OF GREENEVILLE, TENNESSEE,

Defendants - Appellees.

) C/A NO. 03A01-9510-CH-00361
) GREENE COUNTY CHANCERY COURT

FILED

February 29, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

) HONORABLE DENNIS H. INMAN,
) CHANCELLOR

) AFFIRMED AND REMANDED

DEAN B. FARMER of HODGES, DOUGHTY & CARSON, Knoxville, for Appellant SAFECO INSURANCE COMPANY OF AMERICA.

DAVID THOMAS BLACK of KISER AND BLACK, Maryville, for Appellant SIMPSON BRIDGE COMPANY, INC.

RONALD W. WOODS and DANIEL D. COUGHLIN of MLLIGAN & COLEMAN, Greeneville, for Appellees.

O P I N I O N

Susano, J.

This is an action brought by Safeco Insurance Company of America (Safeco) pursuant to the declaratory judgment act, T. C. A. § 29-14-101, *et seq.* Safeco is the surety on a \$488,100 performance bond issued to the Water & Light Commission of Greeneville and the Town of Greeneville, Tennessee (Greeneville¹). The bond was issued to secure the performance of Simpson Bridge Company, Inc.'s (Simpson Bridge) obligations under a contract with Greeneville for the construction of improvements to the Town's water system as well as the construction of a new raw water pumping system (collectively referred to as "the project"). Greeneville and Simpson Bridge were both named as defendants in the complaint. The trial court granted Greeneville's motion to dismiss. In so doing, it deferred to pending litigation in the Greene County Circuit Court involving those parties' competing claims for breach of the contract for construction of the project. Safeco and Simpson Bridge filed a joint appeal to this court. They argue that the Chancellor erred since a justiciable controversy exists as to Safeco's obligations, if any, to Greeneville under the terms of the performance bond.

¹For ease of reference, we will refer to the appellees collectively as "Greeneville."

I

On December 13, 1994, Simpson Bridge sent a letter to Safeco stating that the plans and specifications for the project were defective, and that it considered Greeneville to be in material breach of the contract. Simpson Bridge further advised Safeco that

[b]ecause of that material breach, the performance bond issued by Safeco on this project is no longer valid and any obligations Safeco may have had to the Town have been discharged. . . Should Safeco decide to complete this project, which we do not think can be done given the plans and specifications, and the existing differing site conditions, Safeco will be doing so as a volunteer and we will not honor our indemnity obligations.

This correspondence was followed by a letter from Greeneville dated December 22, 1994, advising Safeco that Greeneville had terminated its construction contract with Simpson Bridge, because Simpson Bridge was in material breach of its contract. The following day, December 23, 1994, Safeco filed this declaratory judgment action in the Greene County Chancery Court. Safeco stated in its complaint that it

is uncertain as to whether or not it has any obligation to Greeneville under the performance bond since it is unable to determine the validity and effect of Simpson Bridge's contention that the performance bond is discharged. Safeco is further unable to determine whether it is Simpson Bridge or

Greeneville that is in material breach of its obligations under the construction contract.

Significantly, Safeco sought not only a declaration of its rights and obligations under the performance bond, but also "the rights and obligations of the parties under the construction contract."

On February 28, 1995, Greeneville filed a complaint for breach of the construction contract against Simpson Bridge in the Greene County Circuit Court. The same day, Greeneville filed a motion to dismiss Safeco's chancery court action. As previously noted, the Chancellor granted Greeneville's motion. He found that

[b]y filing this declaratory judgment action, Safeco in effect has chosen the forum in which the two contracting parties will be required to litigate their breach of contract actions.

* * *

Under the facts set out in the various pleadings, Safeco had no independent cause of action against Greeneville; its declaratory judgment action, when reduced to its essentials, asks only that this court determine which of the contracting parties breached the contract. The real question is, may a surety under a performance bond *require* its principal and the other contracting party to litigate their dispute in a forum and at a time the surety chooses? That question must be answered in the negative.

(Emphasis in original). The sole issue before us is whether the Chancellor erred in dismissing Safeco's action.

II

Our analysis begins with the observation that a decision whether to entertain a declaratory judgment action is squarely within a trial court's discretion, and that discretion has been described by the Supreme Court as "very wide" on numerous occasions. *Newsom v. Interstate Realty Co.*, 278 S.W 56, 57 (Tenn. 1925); *Hinchman v. City Water Co.*, 167 S.W2d 986, 992 (Tenn. 1943); *Southern Fire and Cas. Co. v. Cooper*, 292 S.W2d 177, 178 (Tenn. 1956); *Standard Acc. Ins. Co. v. Carvin*, 400 S.W2d 235, 236 (Tenn. 1966). On appeal, the issue for this court is whether the Chancellor acted in an arbitrary manner when he refused Safeco's request that he "declar[e] the rights and obligations of the parties under the construction contract and performance bond." See *Standard Acc. Ins. Co.*, 400 S.W2d at 236; See also *Southern Fire and Cas. Co.*, 292 S.W2d at 178 ("the action of the Trial Court in refusing a declaration should not be disturbed by this, an Appellate Court, unless such refusal be arbitrary.")

The primary purpose of the declaratory judgment act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." T.C.A. § 29-14-113. Although the act is "to be liberally construed and administered," *id.*, the Supreme Court has noted that "[n]evertheless, certain limitations must be placed upon the operation of the statute." *Hodges v. Hamblen County*, 277 S.W

901, 902 (Tenn. 1925); *City of Johnson City v. Caplan*, 253 S.W2d 725, 726 (Tenn. 1952). A court will not entertain a request for a declaration regarding a merely theoretical question, *Miller v. Miller*, 261 S.W 965, 972 (Tenn. 1924), nor will it provide an advisory opinion which may help a party in another transaction. *Hodges*, 277 S.W at 902. The Court of Appeals has made the following observations regarding declaratory judgment actions:

That to maintain an action for a declaratory judgment a justiciable controversy must exist between persons with adverse interests is well settled. *Jared v. Fitzgerald*, 183 Tenn. 682, 689, 195 S.W2d 1, 4 (1946). For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a real legally protectable interest must be at stake on the part of plaintiff. *Cummings v. Beeler*, 189 Tenn. 151, 156, 223 S.W2d 913, 915 (1949). If the controversy depends upon a future or contingent event or involves a theoretical or hypothetical state of facts, the controversy is not justiciable under the Tennessee Declaratory Judgments Act. *Story v. Walker*, 218 Tenn. 605, 607-08, 404 S.W2d 803, 804 (1966); *United States Fidelity & Guaranty Co v. Askew*, 183 Tenn. 209, 212-13, 191 S.W2d 533, 534-35 (1946). The Declaratory Judgments Act does not give the courts jurisdiction to render advisory opinions to assist the parties or to allay their fears as to what may occur in the future.

Parks v. Alexander, 608 S.W2d 881, 891-92 (Tenn. App. 1980).

Applicable Tennessee caselaw has made it clear that

[a] declaratory judgment will not determine the rights of parties upon a state of facts

which has not arisen, nor upon a matter which is speculative, *future, contingent*, or uncertain.

Jared v. Fitzgerald, 195 S.W2d 1, 4 (Tenn. 1946) (Neil, J., concurring) (emphasis added); *see also Parks*, 608 S.W2d at 892; *Hester v. Music Village U.S.A., Inc.*, 692 S.W2d 426, 427 (Tenn. App. 1985); *Tennessee Farmers Mut. Ins. Co. v. Hammond*, 290 S.W2d 860, 862 (Tenn. 1956) ("the court will not anticipate the rights of the parties in deciding future contingent interests.")

In the case at bar, Safeco's rights as a surety are entirely contingent upon a determination of which party, Simpson Bridge or Greeneville breached the contract. As noted by the Chancellor:

Safeco's rights and liabilities will be determined by the resolution of the underlying dispute between Simpson and Greeneville which necessarily will involve a determination of which of them breached their contract. If Greeneville breached the contract, then Simpson has no further obligation to Greeneville under the construction contract and, by extension, Safeco's obligation as surety under the performance bond will be terminated. On the other hand, should it be determined that Simpson breached the contract, then Simpson will be required to answer in damages to the town of Greeneville, and Safeco will be required to either complete the contract on Simpson's behalf or pay to Greeneville the cost of completion of the project up to the amount of the bond.

We agree with the Chancellor's analysis. The primary parties at interest in the contract controversy are Simpson Bridge and Greeneville, and Safeco's rights are completely contingent on the outcome of that dispute. Safeco, as surety, has no obligations under the performance bond unless Simpson Bridge has, without justification, failed to perform its obligations under the contract.

The Chancellor found that the instant action was brought in anticipation of the breach of contract lawsuit later filed in Circuit Court. The case of *Tennessee Farmers Mut. Ins. Co. v. Hammond*, 290 S.W2d 860 (Tenn. 1956) teaches that such "preemptive strikes" are improper for declaratory judgment:

The power to render declaratory judgments should not be exercised for the purpose of trying issues involved in cases already pending, especially where they can be tried with equal facility in such cases, *or for the purpose of anticipating the trial of an issue in a court of co-ordinate jurisdiction.*

Id. at 863 (emphasis in original). We note, as did the Chancellor, that it is difficult to understand what, if anything, Safeco would accomplish if this suit were allowed to go forward, other than choosing the forum. See *Aetna Life Ins. Co. v. Bellos*, 13 S.W2d 795, 797 (Tenn. 1929) ("we find no ground on which complainant can force defendant into a forum, and at a time, of complainant's choosing. . ."). The Court of Appeals has stated that the declaratory judgment act "deals only with present

rights that have accrued under presently existing facts." *Third Nat. Bank in Nashville v. Carver*, 218 S.W2d 66, 69 (Tenn. App. 1948). We find that Safeco has no such presently-accrued rights or obligations. Those rights will only mature when the underlying dispute is resolved.

Our holding today does not preclude a surety on a performance bond from seeking a declaratory judgment in an appropriate case, even one involving disputed facts. See T. C. A. § 29-14-108. For example, if a surety presents a question regarding construction or validity of terms in a bond or other related document, declaratory judgment may well be appropriate. See T. C. A. § 29-14-103.² In the present case, however, Safeco did not present any question or controversy regarding the construction, interpretation or validity of any instrument related to its performance bond; Safeco in essence sought only a determination of which party breached the construction contract. That is the precise issue that will be decided in the pending circuit court litigation. In the final analysis, that litigation--without more--justifies the action of the Chancellor. He correctly concluded that it was not appropriate for Safeco to

²T. C. A. § 29-14-103 provides as follows:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

be the moving party (as it would be as plaintiff in this action) in a dispute that is basically a breach of contract controversy between Greeneville and Simpson Bridge. They are obviously the "main players" in that dispute and should be permitted to take the lead roles in that controversy³.

We do not find that the Chancellor abused his discretion when he dismissed this action.

For the aforementioned reasons, we affirm the Chancellor's judgment. This matter is remanded to the trial court for the collection of costs assessed there. Costs on appeal are taxed and assessed to the appellants.

Charles D. Susano, Jr., J.

³We express no opinion as to whether Safeco is entitled to intervene in the circuit court action under Tenn. R. Civ. P. 24.

CONCUR:

Herschel P. Franks, J.

Don T. McMuray, J.