IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

VIOLA B. ATWOOD and EDWARD D. ATWOOD, Plaintiffs,	)	
v.	)	C.A. No.: 11C-08-055 FSS **(E-FILED)**
JAMES A. CAMERON, ENCOMPASS INSURANCE COMPANY OF AMERICA, and 3RD SCREEN WIRELESS, INC., Defendants.	)	

Submitted: April 23, 2012
Decided: July 31, 2012

ORDER

Upon Defendant 3rd Screen Wireless, Inc.'s Motion to Dismiss - *GRANTED.*

This is a personal injury case. Plaintiffs filed suit almost two years after the collision, just before the statute of limitations had run. A few months later, Plaintiffs discovered that the defendant driver was on company business when he collided with Plaintiffs. So, Plaintiffs amended their complaint to name the company, insisting the amendment relates back to their original filing. The record, however, does not show that the company knew about the collision or even Plaintiffs' existence

before the statute ran, much less that Plaintiffs were trying to sue the company.

I.

On September 10, 2009, Plaintiff Viola Atwood and Defendant James Cameron collided on an I-95 on-ramp. Allegedly, Cameron and his boss were running an errand for their employer, Defendant 3rd Screen Wireless, Inc., buying cleaning supplies for 3rd Screen's store. Cameron's boss informed the store manager about the collision. It is unclear if Cameron was driving his own car or a company car, and the court will presume Cameron was driving his own. In context, that makes sense in several ways. Atwood never alleges Cameron was driving a company car, a circumstantially important allegation for present purposes.

On August 8, 2011, Atwood and her husband, Plaintiff Edward Atwood, sued Cameron and Defendant Encompass Insurance Company of America, Plaintiff's UM/UIM carrier. Atwood amended her complaint on August 11, 2011, alleging a "loss of household services" claim. Atwood learned Cameron was running a work errand when the collision occurred. So, on December 14, 2011, Atwood amended a second time, naming 3rd Screen as a Defendant. 3rd Screen was served on January 9, 2012.

On March 1, 2012, 3rd Screen moved to dismiss, alleging Atwood's second amended complaint, which named 3rd Screen, failed to relate back to the

original complaint.[1] On April 13, 2012, the court heard oral argument, and it took the matter under advisement after Cameron forwarded his answers to Atwood's interrogatories to the court on April 23, 2012.

II.

In a Rule 12(b)(6) motion to dismiss, the court determines whether Atwood has stated a claim upon which relief can be granted. The court accepts all factual allegations in the complaint and will deny the motion unless Atwood could not recover under any reasonably conceivable circumstances.[2]

As mentioned, the statute has run and so, 3rd Screen alleges Atwood's amended complaint fails to relate back to the original complaint. To relate back, the complaint must meet Superior Court Civil Rule 15(c)'s three requirements, and the court has no discretion.[3] Specifically:

> First, the claim asserted by the amendment must arise out of the same conduct, transaction or occurrence asserted in the original pleading. Second, within the time provided by the rules, the party to be added must have received notice of the institution of the action, so that the party will not be prejudiced. Third, within the time provided

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[1] Super. Ct. Civ. R. 15(c).

[2] *Spence v. Funk,* 396 A.2d 967, 968 (Del. 1978).

[3] *Taylor v. Champion,* 693 A.2d 1072, 1074 (Del. 1997).

> by the rules, the party to be added must have known or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be added by the amendment.[4]

3rd Screen admits the claim arises out of the same transaction asserted in the original pleading, but alleges Atwood fails to meet the other two, mandatory requirements. As discussed below, Atwood fails both Rule 15(c)'s "notice" and "mistake" prongs.

III.

A.

Atwood alleges the September 10, 2009 collision "constructively notified" 3rd Screen it may be sued and her original lawsuit's filing "actually notified" 3rd Screen it would be sued. Specifically, Atwood argues:

> 3rd Screen was on constructive notice that there would be potential litigation since [its] employee was involved in the automobile accident while running an errand at the direction of his supervisor. Further, 3rd Screen was on actual notice through [its] agent, Defendant James Cameron, that suit was filed against him for this accident. [Atwood's] intent was to sue all parties.

[4] *Id.*; *see also* Super. Ct. Civ. R. 15(c)(3).

Delaware, however, construes the "notice of the action" as notice of the litigation.[5] Thus, to stave-off dismissal, Atwood must show 3rd Screen received notice of the action, not merely the occurrence.[6]

Without support, Atwood alleges her suing Cameron placed 3rd Screen on notice. Notice is liberally construed and does not have to be formal or in writing, but must "ensure the new party receives sufficient notice of the proceedings."[7] Here, notably, Cameron denied telling 3rd Screen about Atwood's lawsuit. Nothing in the record contradicts or undermines Cameron's denial. And, again, Atwood otherwise does not show how 3rd Screen was put on notice, actual or constructive.

From the pleadings, 3rd Screen only received notice when it was served on January 9, 2012, a month after the original complaint's 120-day service deadline. Atwood fails to point to anything in the record supporting 3rd Screen's receiving timely notice,[8] failing Rule 15(c)'s second requirement.

It bears emphasis that Plaintiffs were not aware of 3rd Screen and its

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[5] *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 265 (Del. 1993) (*citing Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396, 398 (Del. 1975)).

[6] *See Mullen,* 625 A.2d at 265 ("[T]here [is no] basis to question the sufficiency of the notice received by Mrs. Williams that an action had been instituted against the company . . .. At the time of her husband's deposition, Mrs. Williams was fully cognizant of the pendency of the Mullen litigation.").

[7] *Id.*

[8] *See* Super. Ct. Civ. R. 4(j).

possible involvement until after the statute had run. Thus, by definition, Plaintiffs could not have put 3rd Screen on notice and Plaintiffs must rely on imputed knowledge.

B.

Assuming, without deciding, that Atwood showed 3rd Screen had "notice," her complaint still fails for not showing 3rd Screen must have known or should have known that but for a mistake concerning [its] identity it would have been added as a party.

For instance, in *Mullen v. Alarmguard of Delmarva, Inc.,*[9] Mullen deposed Alarmguard's president, a named defendant, which his wife attended. Mullen stated that the deposition's purpose was to determine whether to add other parties as defendants. During the deposition, the president provided misleading answers regarding his wife's role in the company.[10] The court held "the wife should have known, but for a mistake, that she would have been named as a defendant."[11]

Here, Atwood has not alleged any affirmative conduct by 3rd Screen, nor has she presented evidence rebutting Cameron's denying that he told 3rd Screen about

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[9] 625 A.2d 258 (Del. 1993).

[10] *Id.* at 261.

[11] *Id.* at 266.

the lawsuit. Instead, she imputes Cameron's conduct to 3rd Screen, which does not support "mistake."[12] The only "mistake" here is Atwood's failure to ferret-out 3rd Screen's potential involvement sooner, but that sort of mistake is not Rule 15(c)'s concern.[13]

IV.

For the foregoing reasons, 3rd Screen Wireless, Inc.'s March 1, 2012 motion to dismiss is **GRANTED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Timothy H. Rohs, Esquire
Heather A. Long, Esquire
Norman H. Brooks, Jr., Esquire
Marc Sposato, Esquire
Anthony N. Forcina, Jr., Esquire

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[12] *See, e.g., Taylor,* 693 A.2d at 1075-76 ("The record reflects that Leonard [Plaintiff's counsel's secretary] had no personal relationship to or with Champion. . . . Thus, there was no reason for Leonard to know or have reason to know, within the time period required by Rule 15(c), that but for a mistake by Taylor, Leonard would have been named a defendant in the original complaint")

[13] *Lovett v. Pietlock,* 2011 WL 149349 (Del. Super. Jan. 5, 2011) (Young, J.) ("[W]here the plaintiff cannot demonstrate an intent to include the unnamed party before the limitations period expired, the court will hold that this element is not satisfied."), *aff'd*, 32 A.3d 398 (Del. 2011) (TABLE); *see also* 6A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1498.3 (3d ed.) ("If Plaintiff's failure to name the defendant being proposed by amendment resulted from a lack of knowledge, then it was not the result of a "mistake" and thus did not fall under the rule.").