STATE OF MICHIGAN

COURT OF APPEALS

TRACY UDDIN,[1]

Plaintiff-Appellant,

v

FIRST CARE HEALTH PLAN, INC.,

Defendant-Appellee.

UNPUBLISHED
June 22, 1999

No. 208926
Oakland Circuit Court
LC No. 96-535663 NH

Before: Doctoroff, P.J., and Markman and J. B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant summary disposition. We affirm.

Plaintiff filed a complaint against defendant for its failure to timely diagnose that she had Hodgkin's disease. Defendant filed a motion for summary disposition arguing that it was not a proper party to the suit.[2] Defendant pointed out that it was a certified managed care provider and that it did not operate medical offices or provide medical care. Rather, defendant had a contract with the Department of Social Services to service Medicaid patients. Defendant, in turn, contracted with First Care Medical Centers, P.C., to provide services to these patients. Defendant argued that the proper party for plaintiff to sue was First Care Medical Centers, P.C. On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on the basis set forth by defendant.

Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 210 (1998). A motion for summary disposition relying upon MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* A court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id.* The party opposing the motion has the burden of showing that a genuine issue of material fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). All inferences will be drawn in favor of the nonmovant. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). A court must determine whether a record could be developed that would leave

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Plaintiff argues that defendant is estopped from claiming that it was not the proper defendant where defendant supplied plaintiff's medical record on its letterhead. Plaintiff claims that because of this information, she assumed that defendant was her health care provider. In order to demonstrate equitable estoppel, plaintiff would have to show that defendant made a representation upon which she justifiably relied and that allowing defendant to take a contrary position would prejudice her. *West American Ins Co v Meridian Mutual Ins Co*, 230 Mich App 305; 583 NW2d 548 (1998). However, plaintiff's argument for equitable estoppel must fail here given the fact that plaintiff was put on notice that she was suing the wrong party on more than one occasion. Plaintiff was aware as early as September 30, 1996, that the proper party to the suit was not defendant. This was almost two months prior to filing suit. In addition, plaintiff was reminded once again on January 7, 1997, that she had sued the wrong party. Nevertheless, plaintiff took no action to remove defendant from the case. Plaintiff contends that she was led to believe that defendant was the proper party when plaintiff's counsel received her medical records on defendant's letterhead. However, in the face of the two letters from defendant, plaintiff can hardly argue that reliance on this belief was reasonable or justifiable. *West American, supra,* at 310. Therefore, plaintiff's claim that defendant should be estopped from asserting that it is not the proper party to the lawsuit must fail.

Plaintiff next argues that summary disposition was inappropriate where defendant could have been held liable under several other theories. However, none of these allegations were included in plaintiff's original complaint or in her amended complaint. Plaintiff did not even include these theories in her original response to defendant's motion for summary disposition. Plaintiff first argued the theories at the hearing on defendant's motion for summary disposition on July 16, 1997-- more than six months after she filed her complaint. Plaintiff then filed her supplemental response to defendant's motion for summary disposition on September 5, 1997, and briefly argued those same issues. At no time did plaintiff request leave to amend her complaint to include these allegations. Plaintiff cannot argue that defendant expressly or implicitly consented to the inclusion of these theories as part of plaintiff's original claim because defendant immediately contended that plaintiff could not argue theories not originally raised in her complaint.[3]

Plaintiff relies heavily upon the Certificate of Assumed Name in which defendant assumed the name of First Care Medical Centers, P.C. However, there is no evidence that plaintiff conducted discovery on the matter nor did plaintiff present the court with evidence affirming that successor liability applied here. Plaintiff merely relies upon the certificate as evidence of defendant's liability. However, defendant responded that the assumed name of First Care Medical Centers was filed on December 10, 1996, long after plaintiff's claim arose and after F.C. Acquisition's purchase of First Care Medical Center, P.C.'s assets on March 6, 1996. Defendant stated that the reason it assumed the name was to prevent any confusion in the marketplace regarding the name "First Care." First Care Medical Centers, P.C. was no longer in business. Plaintiff has not brought forth any evidence that First Care Medical Centers, P.C.'s liabilities were also purchased such that successor liability applied. Successor liability only applies where a corporation purchases the liabilities of another, or voluntarily assumes liability.

Jeffrey v Rapid American Corp, 448 Mich 178, 189; 529 NW2d 651 (1995). Plaintiff has failed to counter defendant's position that defendant and First Care Medical Centers, P.C., were entirely separate and distinct entities. Nor has it offered any evidence that defendant intended to cause confusion with regard to its name; indeed, the record suggests that defendant operated in good faith by attempting to notify plaintiff on several occasions that she had sued the wrong party.

Plaintiff also argues that discovery was incomplete and, as such, summary disposition was inappropriate. However, the court issued its opinion and order only two weeks prior to the time discovery was scheduled to end. The scheduling order provided that discovery would be cut off on January 1, 1998. Plaintiff was put on notice as early as September 1996 that she was suing the wrong party, and was informed of that again in January 1997. Plaintiff had an entire year to conduct discovery to ascertain the relationship between defendant and First Care Medical Centers, P.C., but failed to do so. In addition, plaintiff does not argue that defendant was uncooperative throughout discovery. Plaintiff has failed to show that further discovery would uncover factual support for her position. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1995). Therefore, while discovery had not officially drawn to a close, the order granting summary disposition should not be viewed as premature. *Id*.

Plaintiff next argues that, if defendant was not the proper party to the suit, she should have been able to amend her complaint to correct a misnomer. We disagree. The grant or denial of leave to amend is within the trial court's discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Plaintiff claims that the court should have allowed her to correct a misnomer, implying that she merely misnamed defendant. However, plaintiff has failed to show any relationship between defendant and First Care Medical Centers, P.C. It appears that rather than seeking leave to amend to correct a misnomer, plaintiff is actually seeking leave to amend her complaint to add an additional party. Because this is not a case of simple misnomer, the trial court did not abuse its discretion when it denied plaintiff leave to amend her complaint. *Id*. While the denial to plaintiff of any day in court is highly regrettable, such denial is not fairly attributable to any error on the part of the trial court.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Stephen J. Markman
/s/ Joseph B. Sullivan

[1] Plaintiff's name was misspelled on the court order.

[2] The motion was also filed pursuant to MCR 2.116(C)(7) in which defendant argued that plaintiff's claim was barred by the statute of limitations. However, the court apparently held that plaintiff's complaint was timely. Defendant has not filed a cross-appeal in this regard. In support of its contention that plaintiff had sued the wrong party, defendant provided the affidavit of Bryan Schefman, executive vice president of legal affairs for Great Lakes Health Plan, F.C.:

2. That First Care Health Plan, Inc. [defendant] is a managed care provider which was acquired by a subsidiary of Great Lakes Health Plan, F.C. Acquisition Corp., on March 6, 1996.

3. That First Care Medical Center[s], P.C., is a separate and distinct professional corporation from First Care Medical Plan [defendant] and was at all times owned and operated by Mark Diem and Paul Forman, physicians, and from whom F.C. Acquisition purchased assets of that practice without liability on March 6, 1996.

4. That Family Care Medical Center[s], P.C., d/b/a First Care Medical Centers, was at all times a professional corporation composed of six medical facilities which employed licensed professionals and, as an independent contractor among hundreds of medical providers, provided all of the care relative to the allegations set forth in the Complaint. . . .

5. That First Care Medical Centers, P.C. provided medical services to various community patients, as well as enrollees in First Care Health Plan.

6. At no time did First Care Health Plan, Inc. render any medical care to Tracy Uddin, and First Care Medical Centers, P.C. was not acquired by Great Lakes Health Plan when First Care Health Plan, Inc. was acquired on March 6, 1996, and there has been no continuation by Great Lakes Health Plan of the professional corporation's business.

[3] Defendant stated in its Affirmative Defense to both plaintiff's Complaint and its First Amended Complaint that "[T]his Defendant is not a proper party of interest in this case. In effect, this is an attempt to file a direct action against an insurer, contrary to the provisions of MCLA 500.3030." Defendant also indicated that counsel for First Care Medical Centers, P.C., would more than likely consent to its substitution.