STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL L. BAUCHAN,

Plaintiff-Appellant,

v

CHEATHAM & ACKER, P.C., LAWRENCE ACKER, GARY SHARP, FOWLER, TUTTLE, CLARK, COLEMAN & MANNON, LARRY FOWLER, and DAVID CLARK,

Defendants-Appellees.

UNPUBLISHED
July 21, 2000

No. 211981
Oakland Circuit Court
LC No. 96-521083-NM

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff appeals as of right from the circuit court's order dismissing his case pursuant to MCR 2.116(C)(5). Plaintiff also challenges the court's order quashing service and vacating its earlier order extending summons with respect to certain defendants. We affirm.

Plaintiff sued the law firm Cheatham & Acker, P.C., and certain of its members ("Cheatham & Acker"), and the law firm Fowler, Tuttle, Clark, Coleman & Mannon, and certain of its members ("Fowler"),[1] over their representation of him in, respectively, a lawsuit seeking first-party personal protection insurance benefits for injuries sustained in a 1989 automobile accident, and a lawsuit seeking recovery for injuries that allegedly occurred during surgery in 1992 that was related to the injuries received in the automobile accident.

Under the weight of liabilities and mediation sanctions arising from the underlying litigation, plaintiff filed for bankruptcy in 1995. The federal bankruptcy court ruled that plaintiff's legal malpractice cause of action was, contrary to plaintiff's assertions, a nonexempt asset that could be pursued only by the bankruptcy trustee, not by plaintiff. The bankruptcy trustee, in turn, indicated that

[1] For convenience, this Court will refer to both the law firms and the individual defendants by the abbreviated names indicated above.

the estate had no interest in pursuing the legal malpractice claims, but that he nonetheless had not abandoned those assets which accordingly remained the property of the bankruptcy estate.

In September 1996, the trial court entered an order quashing service of process on Cheatham & Acker, and a separate order vacating the extended summons that had been issued and dismissing the case against Cheatham and Acker on the ground that plaintiff failed to serve the summons and complaint within the time allowed. In late 1997, Fowler moved for dismissal under MCR 2.116(C)(5), on the ground that plaintiff lacked the legal capacity to maintain the legal malpractice action, and Cheatham & Acker joined in that motion.[2] The trial court granted the motion.

After plaintiff filed his claim of appeal, we granted plaintiff's motion to supplement the record on appeal with additional documentation, including an order from the federal bankruptcy court compelling the trustee to abandon the malpractice claims to plaintiff. We conclude, after reviewing the record and the additional documentation, that the trial court correctly dismissed this case with regard to all defendants.

As noted above, at the time plaintiff initially filed his complaint in this case, he was also involved in bankruptcy litigation. Under the rules governing bankruptcy actions, a claim of action (such as the malpractice claims plaintiff was endeavoring to litigate in the trial court) belongs to the trustee in bankruptcy, unless the trustee chooses, or is ordered, to abandon the claim. 11 USC 541 and 554. According to plaintiff, the trustee gave conflicting indications concerning whether he intended to abandon the malpractice claims; on the one hand, the trustee asserted that he would not abandon the claims, while on the other hand, the trustee stated that he had no interest in litigating the claims on behalf of the bankrupt. For example, the trustee wrote a letter, on March 19, 1996, that stated:

> This is to inform you that [plaintiff] may, on behalf of himself, continue on with any lawsuits that he has pending at this time. As you are aware, it is unclear at this time whether these lawsuits have any value to the estate. At some further time, we will decide upon the value and whether or not the estate has a claim to the equity.

Due to the fact that the statute of limitations on the malpractice action would run on April 15, 1996, MCL 600.5805(4); MSA 27A.5805(4), plaintiff filed his malpractice complaint on that date, listing both himself and the trustee in bankruptcy as plaintiffs. This litigation apparently prompted counsel for the bankruptcy trustee to send the trial court a letter dated July 24, 1996, which stated in relevant part:

---

[2] The order of dismissal with respect to Cheatham and Acker was stayed pending the disposition of plaintiff's appeal to the Court of Appeals and a motion for "tardy" reconsideration plaintiff filed in the trial court. This Court dismissed plaintiff's appeal on May 14, 1997 "for failure to pursue the case in conformity with the rules." (*Bauchan v Cheatham & Acker, PC,* Docket No. 198220). The trial court denied plaintiff's motion for "tardy" reconsideration in its May 8, 1998 order granting Fowler's motion to dismiss.

It has come to our attention that Mr. Bauchan has filed suit in Oakland County Circuit Court, case no. 96-521083-NM, naming himself and the Trustee as party plaintiffs. Please be advised that the Trustee has *not* authorized such a suit on his behalf, nor has the Plaintiff been appointed by the U.S. Bankruptcy Court for the purposes of litigating this cause of action. This cause of action is currently the subject of hearings before the Hon. Arthur J. Spector, Bankruptcy Judge for the Eastern District of Michigan – Northern Division.

In the bankruptcy proceedings, the Debtor has attempted to exempt his interest in numerous causes of action, including the one at issue here, and the Trustee has objected on various grounds. In attempting to resolve certain issues, the Trustee has tentatively agreed to abandon the cause of action at issue in this case to the Debtor. As of today's date, however, no Assignment of the Trustee's rights and interests to the Debtor has been executed.

The point of this correspondence is to emphasize that the Trustee is *not* a Plaintiff to this action, and as such, we would request that his name be removed from any captions or pleadings filed from this date forward. We have also contacted the Debtor's counsel with regard to this matter in order to clarify matters in as expeditious a manner as possible.

Subsequently, the bankruptcy trustee's attorney sent plaintiff a letter dated September 1, 1996, which stated in relevant part:

Pursuant to our discussions, the Trustee is unwilling to amend its pleadings to contain the proposed paragraph faxed to us by Randall Frank. It is the Trustee's position that the subject lawsuit was exempted from the Bankruptcy Estate and that the Trustee would not be authorized to pursue it directly without resolution of the Trustee's objection to exemption. The Trustee has since withdrawn its objection with regard to this particular exemption. *However, the Trustee also does not wish to interfere with your rights to pursue that action in any manner.*

Therefore, as I have indicated, *I will represent to the Court that the Trustee does not object to your continuing this lawsuit as the proper party in interest.* However, I do not wish to confuse the Court or make representations that somehow bring liability upon the Trustee for any further representations. Thus, the Trustee is placed in a precarious situation of advocating a position that is personal to you and is not appropriately [sic] to this Bankruptcy Estate.

As we further discussed, it is our understanding that you proceeded to bring this matter on your own behalf and on behalf of the Trustee as you felt that that was necessary. *Further, that it was your belief that the correspondence from the Trustee dated March 19, 1996 somehow gave you such authority to proceed on his behalf as well.* Although I may disagree with your interpretation of the letter, *it is*

my understanding that you were not acting in any unethical manner when you proceeded in this manner. [Emphasis supplied.]

The trustee's attorney subsequently moved in the circuit court to amend the caption and remove the trustee as a party to plaintiff's lawsuit. The motion asserted that removing the trustee's name from the lawsuit "should not affect the rights, remedies or damages available to [plaintiff]." This motion was granted by order dated October 22, 1996.

Defendant Fowler moved for summary disposition on December 22, 1997, arguing that the bankruptcy trustee had not abandoned the malpractice claims against defendants and therefore plaintiff was never authorized to file suit. In support of this claim, defendant Fowler noted that the bankruptcy court had ruled that the cause of action belonged to the bankruptcy trustee and that the trustee had never authorized plaintiff to bring suit in the trustee's name. Fowler's motion was granted by the circuit court on May 8, 1998. Plaintiff then filed a claim of appeal in this Court.

However, on November 12, 1999, while this case was on appeal, the bankruptcy judge determined that the malpractice claims were "burdensome to the estate, and are of inconsequential value and benefit to the estate" and therefore ordered the trustee to abandon the claims. The order further provided that "by entry of this Order, the causes of action are deemed abandoned to the last party possessing them before the debtor filed bankruptcy." Accordingly, if the order of the bankruptcy judge relates back to the filing of plaintiff's lawsuit against defendant Fowler, plaintiff would be deemed to have the authority to pursue the lawsuit and the trial court's decision granting summary disposition, although correct at the time that it was rendered, should now be set aside.

Plaintiff treats the order of the bankruptcy court as if it corrects the initial defect in his pleadings *nunc pro tunc*. However, plaintiff cites no Michigan authority in support of this proposition[3] and a "mere statement without authority is insufficient to bring an issue before this Court." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). This Court will ordinarily not address a claim that a plaintiff fails to support with any authority or argument. *Id.*

Even if we briefly consider plaintiff's claim, we find it to be without merit. We first note that the bankruptcy court's order does not purport to apply *nunc pro tunc*; in fact, the order was issued because, although the lawsuits were considered to have little or no value to the estate, plaintiff expressed a desire to pursue those claims on his own behalf (and at his own expense), but was prevented from doing so by the trustee's retention of the claims. Because the trustee in bankruptcy had not abandoned the claims, the bankruptcy court was required to issue an express order abandoning those assets to

[3] Plaintiff does cite federal authority. *Rowland v Mutual Life Ins Co of New York*, 689 F Supp 793 (SD Ohio, 1988). However, the result in *Rowland* was dependent on the application of Federal Rules of Civil Procedure 15(c) and 17(a). 28 USC 15(c) and 17(a). These provisions regarding relation-back and real party in interest differ from our state provisions. MCR 2.118(D) and MCR 2.201(B). Plaintiff has failed to provide any authority construing the state provisions in a manner similar to their broader federal counterparts.

plaintiff. 11 USC 554. However, the very fact that the claims were abandoned by order of the bankruptcy court indicates that the trustee did not ratify plaintiff's act of filing the malpractice actions prior to the order of abandonment. Therefore, plaintiff cannot assert that his acquisition of the malpractice claims was ratified by the trustee and thereby related back to the initial filing of those claims. See *Henritzy v General Electric Co*, 182 Mich App 1, 8-9; 451 NW2d 558 (1990) (administrator of estate may subsequently ratify lawsuit instituted by principal's agent who acted beyond the scope of his authority).

We further note that the court rule regarding the relation back of amendments to pleadings, MCR 2.118(D), applies only to subsequent amendments that do not change the cause of action that was initially pleaded. *Rinke v Auto Moulding Co*, 226 Mich App 432, 437; 573 NW2d 344 (1997). The problem presented by plaintiff's pleadings is not a change in the cause of action, but rather plaintiff's lack of standing to commence the lawsuit. Therefore, MCR 2.118(D) is inapplicable to the circumstances presented by this case.

Finally, the bankruptcy judge opined that "[I]f the state rule on real party in interest contains a [provision permitting the trustee in bankruptcy to ratify the action taken by plaintiff], then it would seem that the lawsuit should not have been dismissed on real party in interest grounds." The "real party in interest" court rule, MCR 2.201(B), does not contain any express provision permitting subsequent ratification by a bankruptcy trustee of a lawsuit filed by someone without the capacity to sue. Plaintiff has not cited any other such provision, and our research has failed to disclose one. The closest approximation to the situation presented in this case is the situation presented in *Henritzy*, *supra*, and, as noted, there is no showing that the trustee has ratified plaintiff's unauthorized filing.

This Court has determined that a lawsuit commenced by an individual as an administrator of an estate, where the appointment as administrator is not effective until some time after the lawsuit is filed, will nevertheless be upheld by a relation back from the date of appointment to the date of filing where the individual acted in good faith, and where the defendant is not prejudiced. *Saltmarsh v Burnard*, 151 Mich App 476, 491; 391 NW2d 382 (1986) (relation back is proper "if, at the time the suit was filed, and the plaintiff holds a good faith reasonable belief that he has the authority to bring suit as administrator, provided that the defendant is not prejudiced by the application of the relation-back doctrine"); see also *Estate of Mills v Trizec Properties*, 965 F2d 113, 115 (CA 6, 1992) ("under the relation-back doctrine, the initial error must have been made in good faith and the person filing the suit must have a reasonable belief that she possessed the authority to bring the suit.").

This relation-back exception does not apply to this case. Plaintiff did not act with a good faith reasonable belief. Unlike the situations in the above cases where laypersons acted in the good faith belief that they had the status of either a personal representative or an administrator of an estate, plaintiff, an attorney, knew that the right to file a malpractice lawsuit belonged to the trustee. Plaintiff's recognition of this reality is evidenced by the fact that he listed both his name and the trustee's as plaintiffs, and that he subsequently expressed no objection to either the trustee's assertion that he was not a properly a plaintiff in the malpractice action or to the trustee's motion to remove his name from the case.

This Court therefore concludes that the trial court properly granted summary disposition to defendant Fowler because plaintiff lacked the capacity to sue and the statute of limitations had run by the time that defendant obtained the right to sue as a result of the bankruptcy court's order requiring the trustee to abandon the causes of action to plaintiff.

Plaintiff also argues that the trial court erred by dismissing the malpractice case against Cheatham & Acker on the ground that plaintiff had failed to serve the summons and complaint on them within the time allowed. We conclude that the court neither erred in quashing service on those defendants, nor in vacating its earlier order issuing a second summons extending the deadline for service of process.

This Court reviews a trial court's decision to quash service of process for an abuse of discretion. See *Moyer v Lott*, 86 Mich App 186, 188; 272 NW2d 232 (1978). Plaintiff commenced this action against Cheatham & Acker on April 15, 1996, the summons bearing an expiration date of July 15, 1996. Cheatham & Acker maintain that they were never served in fact. Plaintiff concedes that the service actually effected was procedurally defective under MCR 2.105(D), but insists that the imperfect service provided sufficient actual notice to Cheatham & Acker to cure the defect. We disagree.

> Generally, defective service of process will not warrant dismissal of a party's pleading unless the service failed to notify the defendant of the action "within the time prescribed for service." MCR 2.105(J)(3). However, a complete failure of service . . . warrants dismissal for improper service of process. Still, a party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections. [*In re Gordon Estate*, 222 Mich App 148, 157-158; 564 NW2d 497 (1997) (citations omitted).]

Cheatham & Acker provided an affidavit from an employee of their firm, asserting that the employee, a minor office worker lacking authority to accept service on behalf of his employers, observed a person come into the office, while the principals in the lawsuit were not present, and leave what appeared to be a summons on the front counter of the reception area. Plaintiff does not dispute this version of events, but argues nonetheless that Cheatham & Acker received actual notice of the suit sufficient to cure the defective service, Cheatham & Acker having acted on this notice in filing their motion to quash. However, a motion to quash is not a general appearance to argue the case on its merits, and it is the latter form of appearance that proves actual notice sufficient to cure defective service. *Id.* at 158, n 9. Further, Cheatham & Acker filed their motion to quash service on July 31, 1996, not within the period allowed for service of the original summons, but two weeks afterward, at which time Cheatham & Acker asserted that there had been a complete failure of service to date.

Although merely *defective* service is not grounds for dismissal, an actual *failure* of service within the time provided warrants dismissal. *Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991). In this case, because the method of service actually employed was clearly defective, because Cheatham & Acker neither admitted receiving actual notice of the suit nor made a general appearance to address its merits, and because plaintiff otherwise failed to rehabilitate the

procedurally imperfect service, the trial court did not abuse its discretion in granting Cheatham & Acker's motion to quash service.

Nor did the court err in vacating its earlier order issuing a second summons with a new expiration date. This Court reviews a trial court's decision to vacate one of its earlier orders for an abuse of discretion. See, e.g., *SNB Bank & Trust v Kensey*, 145 Mich App 765, 774; 378 NW2d 594 (1985).

Shortly before the expiration of the original summons, plaintiff, citing his difficulties in serving process on Cheatham & Acker, moved the trial court to issue a second summons with a later expiration date. The trial court assented and issued the new summons. However, in response to Cheatham & Acker's arguments that plaintiff had not in fact induced the court to act in a timely fashion, the court vacated its order for the new summons.

Although a trial court has discretion to issue a new, extended summons, in order to effect a valid extension the court must act before the expiration of the original summons. *Durfy v Kellogg*, 193 Mich App 141, 144-145; 483 NW2d 664 (1992), citing MCR 2.102(D).[4] Where neither service is achieved, nor an extended summons issued, within the life of the original summons, a trial court should dismiss the action. *Durfy, supra* at 145.

Plaintiff argues that the date of July 11, 1996, which appears on the face of the order, should be considered the signing date, and thus the date of entry of the order,[5] regardless of the indication by the date stamp on the document that it was filed on July 16, 1996, one day after the original summons expired. Plaintiff admits that he placed the July 11 date on the proposed order when he prepared it, but argues that that date must to be respected because Cheatham & Acker failed to establish any other date as the date of signing. However, the date stamp on plaintiff's motion to extend summons reflects that the court received the motion on July 16, 1996, which, considered in conjunction with the July 16 date stamp of the order issuing second summons, militates in favor of recognizing that date as the one upon which the order was signed.

Further, in a statement from the bench during the hearing on the motion, the trial court itself referred to July 16, 1996, as the date of the order issuing the second summons. Because this is one day after the expiration of the original summons, and because plaintiff offers no proof that the court in fact acted on July 15 or earlier, we conclude that the trial court properly recognized the effective date of its earlier order granting the request for second summons as July 16, and that the court accordingly did not abuse its discretion in vacating that order on the ground that it was issued after the original summons had expired.

---

[4] *Durfy* concerned MCR 2.102(D) when it allowed 182 days before a summons expired, but acknowledged that the rule had been changed to allow just 91 days. *Id.* at 145 and n 4.

Affirmed.

/s/ William B. Murphy
/s/ Jeffrey G. Collins
/s/ Donald S. Owens

(...continued)

[5] MCR 2.602(A)(1) provides in relevant part that "all judgments and orders must be in writing, signed by the court, and dated with the date they are signed." MCR 2.602(A)(2) provides that "[t]he date of signing an order or judgment is the date of entry."