NO. COA11-539
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

PAIGE TAYLOR-BUTLER,
Plaintiff,

v. Carteret County
No. 10 CVS 1187

FOOD LION, INC.,
Defendant.

Appeal by plaintiff from order entered 7 December 2010 by Judge Paul L. Jones in Carteret County Superior Court. Heard in the Court of Appeals 11 October 2011.

Michael Lincoln, P.A., by Michael Lincoln, for plaintiff-appellant.

Patterson Dilthey, LLP, by Julie L. Bell, for defendant-appellee.

HUNTER, Robert C., Judge.

Paige Taylor-Butler ("plaintiff") appeals from the trial court's 7 December 2010 order granting Food Lion, Inc.'s motion to dismiss plaintiff's complaint. After careful review, we affirm.

Background

On 9 September 2007, plaintiff slipped and fell in a Food Lion store located in Emerald Isle, North Carolina. On 9 September 2010, plaintiff filed a complaint in the Superior Court of Carteret County alleging that she suffered injuries when she fell three years prior. Plaintiff's complaint listed Food Lion, Inc. as the defendant; however, plaintiff's summons listed Food Lion, LLC as the defendant. The summons and complaint were served on the registered agent for Food Lion, LLC. It is undisputed that Food Lion, LLC is the owner of the Emerald Isle Food Lion. Food Lion, Inc. is a separate, but related, corporate entity.

Food Lion, Inc. filed a "Motion to Dismiss/Answer" in which it requested that the claim be dismissed pursuant to Rule 12(b)(2) (lack of personal jurisdiction), Rule 12(b)(4) (insufficiency of process), and Rule 12(b)(5) (insufficiency of service of process), of the North Carolina Rules of Civil Procedure. On 19 October 2010, plaintiff filed a motion to amend the complaint pursuant to Rule 15(c), seeking to change the name of the defendant from Food Lion, Inc. to Food Lion, LLC. On 7 December 2010, after hearing arguments of counsel, the trial court entered a written order granting Food Lion, Inc.'s motion to dismiss. The trial court determined that no

summons had been issued for Food Lion, Inc., "the only Defendant in the lawsuit[,]" and, consequently, the trial court lacked personal jurisdiction over Food Lion, Inc. Additionally, the trial court determined that there was a lack of sufficiency of process and service of process on Food Lion, Inc. The trial court did not enter an order pertaining to plaintiff's motion to amend; however, the trial court necessarily denied this motion when it granted Food Lion, Inc.'s motion to dismiss. Plaintiff timely appealed from the trial court's order.

Discussion

Plaintiff argues on appeal that the trial court erred in granting Food Lion, Inc.'s motion to dismiss and failing to grant her motion to amend the complaint to refer to the correct defendant, Food Lion, LLC. It is undisputed that plaintiff's cause of action has a three-year statute of limitations. N.C. Gen. Stat. § 1-52(16) (2009). Plaintiff could only proceed with a claim against Food Lion, LLC if she were permitted to amend the complaint to match the summons. Consequently, the trial court's refusal to allow plaintiff to amend the complaint to relate back to the 9 September 2010 filing is the crucial issue in this case.

"'A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse.'" *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 601 (2004) (quoting *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). Rule 15(c), which permits the relation back of amendments to complaints in certain circumstances, provides:

> (c) *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2009). Our Supreme Court has interpreted Rule 15(c) and held:

> Nowhere in the rule is there a mention of parties. It speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading. When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. We hold that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim

against a new party.

Crossman v. Moore, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995). "We have construed the *Crossman* decision to 'mean that Rule 15(c) is not authority for the relation back of claims against a new party, but *may* allow for the relation back of an amendment to correct a mere misnomer.'" *Liss v. Seamark Foods*, 147 N.C. App. 281, 283, 555 S.E.2d 365, 367 (2001) (quoting *Piland v. Hertford County Bd. of Comm'rs*, 141 N.C. App. 293, 299, 539 S.E.2d 669, 673 (2000)); *accord Bob Killian Tire, Inc. v. Day Enters., Inc.*, 131 N.C. App. 330, 331, 506 S.E.2d 752, 753 (1998) ("The notice requirement of Rule 15(c) cannot be met where an amendment has the effect of adding a new party to the action, as opposed to correcting a misnomer."). "A misnomer is a '[m]istake in name; giving incorrect name to person in accusation, indictment, pleading, deed or other instrument.'" *Liss*, 147 N.C. App. at 285, 555 S.E.2d at 368 (quoting Black's Law Dictionary 1000 (6th ed. 1990)). "A misnomer would be technical in nature and subject to remedy." *Id.*

Food Lion, Inc. argues that allowing plaintiff to amend the complaint to name Food Lion, LLC would, in effect, add a new party to the action, and, therefore, relation back is not permitted. Plaintiff argues that the amendment seeks to correct

a mere misnomer, and, therefore, the amendment should have been permitted and allowed to relate back to the original filing date of the complaint.

In support of its position, Food Lion, Inc. cites ***Franklin v. Winn Dixie Raleigh, Inc.***, 117 N.C. App. 28, 450 S.E.2d 24 (1994), ***aff'd per curiam***, 342 N.C. 404, 464 S.E.2d 46 (1995), and claims that this Court is bound by that decision. We agree. In ***Franklin***, the plaintiffs filed their original summons and complaint against "Winn-Dixie Stores, Inc." the day before the passing of the statute of limitations. ***Id.*** at 38, 450 S.E.2d at 30. Seven months later, the plaintiffs sought to amend the complaint to name "Winn Dixie, Raleigh Inc." as the defendant, claiming that the amendment was intended to fix a misnomer in the original complaint. ***Id.*** It was later shown that "Winn-Dixie Stores, Inc. and Winn-Dixie Raleigh, Inc. [were] both Florida corporations authorized to do business in North Carolina[; however,] they . . . were separate and distinct corporations at the time the cause of action accrued." ***Id.*** at 34-35, 450 S.E.2d at 28. This Court determined that "[t]he named defendant in the original summons and complaint, 'Winn-Dixie Stores, Inc.[,]' was the correct name of the wrong

corporate party defendant, a substantive mistake which is fatal to this action." *Id.* at 40, 450 S.E.2d at 32.

We must reach the same result in the present case. Plaintiff filed her complaint against Food Lion, Inc. She then sought to amend that complaint to name the proper defendant, Food Lion, LLC. These two corporations are separate and distinct corporate entities. Plaintiff's motion to amend, therefore, sought to name a new party as a defendant, not merely correct a misnomer. "Quite simply, plaintiff[] sued the wrong corporation." *Id.* at 35, 450 S.E.2d at 35. This case is distinguishable from cases where the plaintiff sues one legal entity that goes by two names and the plaintiff happens to list the wrong name in the complaint. *See Liss*, 147 N.C. App. at 282, 555 S.E.2d at 366 (holding that plaintiff was permitted to correct a misnomer where the complaint listed "Seamark Foods" as the defendant instead of the correct corporate name, "Seamark Enterprises, Inc."). Here, plaintiff made the critical error of suing the wrong corporation and we are bound by the holding in *Franklin*. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Despite our holding, we recognize that plaintiff did list the correct defendant on the summons and served both the summons

and the complaint on the correct defendant, Food Lion, LLC. Undoubtedly, Food Lion, LLC had notice that plaintiff sought compensation for an accident that occurred in its Emerald Isle store. Arguably, denying the motion to amend places form over substance. As Judge Wynn aptly stated in his dissent in *Franklin*, "the purpose of our Rules of Civil Procedure is to resolve controversies on the merits rather than on pleading technicalities." 117 N.C. App. at 41, 450 S.E.2d at 32 (Wynn, J., dissenting). Judge Wynn further pointed out that

> the test for whether an amendment will relate back to the original filing date depends upon whether the original pleading gave the defendant sufficient notice of the proposed claim. Whether a plaintiff can amend the complaint to add a new defendant depends on whether the new defendant had notice of the claim so as not to be prejudiced by the untimely amendment.

Id. at 42, 450 S.E.2d at 32 (internal citation omitted). Nevertheless, our Supreme Court rejected Judge Wynn's dissent and affirmed the majority in *Franklin* per curiam. 342 N.C. 404, 464 S.E.2d 46.

Subsequently, in *Wicker v. Holland*, 128 N.C. App. 524, 527, 495 S.E.2d 398, 400 (1998), this Court recognized that the fact that the proper defendant had notice of the action and would not be prejudiced by the amendment is "irrelevant under *Crossman*'s

analysis of the limited reach of Rule 15(c)." Recently, in *Treadway v. Diez*, __ N.C. App. __, __, 703 S.E.2d 832, 835 (Jackson, J., dissenting), *rev'd per curiam per the dissent*, __ N.C. __, __ S.E.2d __ (2011), our Supreme Court reversed this Court and adopted then Judge Jackson's dissent wherein she cited *Crossman* and stated that "notice is immaterial with respect to the operation of amendments to pleadings pursuant to Rule 15(c)." Consequently, pursuant to *Crossman* and its progeny, a plaintiff is simply not permitted to substitute or add a party defendant under Rule 15(c) regardless of whether that entity had notice of the action and would not, therefore, be prejudiced by the amendment. As in *Franklin*, plaintiff in the present case seeks to substitute one corporate defendant for another so that her claim will not be barred by the statute of limitations. The fact that Food Lion, LLC had notice of the action is immaterial. Under the statute and pursuant to our caselaw, plaintiff cannot amend her complaint.

Given our holding on this issue, we need not extensively address plaintiff's Rule 12(b)(2), Rule 12(b)(4), and Rule 12(b)(5) violations. If plaintiff could not amend her complaint, there is no cause of action available against the proper defendant, Food Lion, LLC. Plaintiff filed her complaint

against Food Lion, Inc. and Food Lion, Inc. appeared to defend the action. A summons was never issued for Food Lion, Inc. and that corporation did not receive service of the complaint or the summons. Consequently, the trial court did not err in its determination that it lacked jurisdiction over Food Lion, Inc., and that there was insufficiency of process and service of process with regard to Food Lion, Inc. Plaintiff admits that no cause of action lies against Food Lion, Inc. The trial court did not, therefore, err in granting Food Lion, Inc.'s motion to dismiss the case against it.

Affirmed.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).