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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2012-2013

1101403

Carl Weaver

v.

Roger D. Firestone

Appeal from Coosa Circuit Court
(CV-10-900025)

STUART, Justice.

Carl Weaver appeals the trial court's denial of his motion to dismiss the complaint filed against him by Roger D. Firestone. We reverse and remand.

Facts

In May 1995, Firestone, Charles T. Amberson, Jr., and Darrell Thomas were assaulted, battered, and burned. Amberson and Thomas died from their injuries; Firestone suffered extensive physical injuries and incurred over $1,000,000 in medical expenses. In August 2012, Charles Richard Tooley, L.C. Collins, Jr., and Mickie Wayne Collins pleaded guilty to attempted murder as to Firestone.

On August 20, 2012, Firestone sued Weaver; Tooley; Collins, Jr.; Collins; and fictitiously named parties A-M. In his complaint, Firestone alleged that in the spring of 1995 he was injured when Weaver, Tooley, Collins, Jr., and Collins conspired to "maim, torture, and kill" him; committed the tort of outrage; committed an assault and battery on his person; and attempted to murder him.

Recognizing that his causes of action were filed outside their respective limitations periods, Firestone averred in his complaint:

> "On August 9, 2010, Tooley, M. Collins, and Collins, Jr. pleaded guilty to attempted murder of [Firestone]. It was not until this date that [Firestone] discovered the identity of the [individuals] who had attacked him because of the fraudulent concealment of the conspiracy and the identity of the conspirators. [Firestone] avers that despite diligent efforts, he could not discover the

> identity of his attackers before August 9, 2012. [Firestone] has since August 9, 2012, further discovered the identity of Weaver and his role in this matter. [Firestone] avers that none of the acts of [Weaver, Tooley, M. Collins, and Collins, Jr.,] are barred by the statute of limitations. [Firestone] avers that this action is brought against [these individuals] within the time allowed by Alabama law for bringing an action following discovery of facts which have been fraudulently concealed by defendants. [Firestone] further avers that any otherwise applicable statute of limitations has been equitably tolled until the reasonable efforts of [Firestone] to discover the identity of [these individuals] and that [Firestone] has brought this action in the time allowed by law following such discovery. [Firestone] further avers that no statute of limitations is applicable to this case under Alabama law because it is an action for damages for maiming and attempted murder with the relevant facts of the identity of [these individuals] deliberately concealed as a part of a conspiracy by [these individuals] to maim and murder [Firestone] and others."

On September 24, 2010, Weaver moved to dismiss Firestone's complaint, pursuant to Rule 12(b)(6), Ala. R. Civ. P., and §§ 6-2-34 and 6-2-38, Ala. Code 1975. In his motion, Weaver argued that Firestone's claims were barred by the applicable statutes of limitations and did not fall within any tolling provision.

After conducting a hearing on Weaver's motion to dismiss, the trial court denied Weaver's motion, concluding that the statutes of limitations had been tolled.

On October 17, 2011, this Court granted Weaver permission to appeal the trial court's denial of his motion to dismiss. See Rule 5(a), Ala. R. App. P.

Standard of Review

> "The appropriate standard of review under Rule 12(b)(6)[, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 641 (Ala. 1985); Hill v. Falletta, 589 So. 2d 746 (Ala. Civ. App. 1991). In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985); Rice v. United Ins. Co. of America, 465 So. 2d 1100, 1101 (Ala. 1984). We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. Garrett v. Hadden, 495 So. 2d 616, 617 (Ala. 1986); Hill v. Kraft, Inc., 496 So. 2d 768, 769 (Ala. 1986).'
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> "Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)."

DGB, LLC v. Hinds, 55 So. 3d 218, 223 (Ala. 2010).

Analysis

Weaver contends that the trial court erred in denying his motion to dismiss Firestone's complaint against him because, he says, Firestone's claims are barred by the applicable statutes of limitations and do not fall within any tolling provision.

This Court is mindful that "[b]ecause statutes of limitations are a necessary means of ensuring the reliability of the fact-finding process, a court must exercise great caution when a party seeks to apply" tolling provisions. Travis v. Ziter, 681 So. 2d 1348, 1352 (Ala. 1996). Hence, "[a] dismissal based on the statute of limitations is proper only if, from the face of the complaint, it is apparent that the tolling provisions do not apply." Travis, 681 So. 2d at 1351 (citing Williams v. Capps Trailer Sales, 589 So. 2d 159, 160 (Ala. 1991)).

The events giving rise to Firestone's causes of action occurred in May 1995. It is undisputed that Firestone knew in May 1995 that he had been injured. Yet, Firestone did not file his complaint until August 2012, more than 17 years later. It is also undisputed that all the claims are outside their respective statutes of limitations. See §§ 6-2-34 and 6-

2-38, Ala. Code 1975. Therefore, this Court is asked to determine whether tolling of the limitations periods for Firestone's causes of action is appropriate under the "savings clause," see § 6-2-3, Ala. Code 1975, or under the doctrine of equitable tolling.

> "There is a significant distinction between the two equitable doctrines affording relief from unfair and unnecessarily harsh results [caused by application of a limitations period]. The [savings clause] avoids the mechanical application of a statute of limitations by postponing the accrual of a cause of action so long as a party is unaware either that he has been injured or that the injury was due to the fault or neglect of an identifiable person. Equitable tolling assumes the accrual of the action but intercepts and delays the bar of the statute of limitations because the plaintiff lacked vital information which was withheld by a defendant."

Villalobos v. Fava, 342 N.J. Super. 38, 45-46, 775 A.2d 700, 704 (App. Div. 2001).

Section 6-2-3, Ala. Code 1975, Alabama's "savings clause," states:

> "In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action."

In order to prevent a statute of limitations from being used as an instrument of fraud, this Court has held that § 6-2-3 applies not only to the tort of fraud, but also to torts where the existence of the cause of action has been fraudulently concealed. DGB, 55 So. 3d at 224-25.

Section 6-2-3 does not toll the statutes of limitations for Firestone's causes of action. The plain language of § 6-2-3 establishes that it is the discovery of the injury that triggers the tolling, not the discovery of the identity of the tortfeasor. Section 6-2-3 applies when the plaintiff's cause of action is unknown; it does not delay the accrual of the cause of action when the plaintiff knows of the injury but cannot identify the tortfeasor. Here, Firestone knew in 1995 that he had been injured and that a cause of action existed. Consequently, § 6-2-3, which focuses on the discovery of the cause of action, not the discovery of the identity of the tortfeasor, does not toll the limitations periods for Firestone's claims.

Next, we consider whether equitable tolling of the statutes of limitations for Firestone's causes of action is appropriate. In Ex parte Ward, 46 So. 3d 888, 897 (Ala.

2007), a capital case, this Court recognized that equitable tolling is available to suspend the running of a limitations period "in extraordinary circumstances that are beyond [a plaintiff's] control and that are unavoidable even with the exercise of due diligence." See also Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990)(recognizing that generally a party arguing the availability of equitable tolling must establish that the party has been pursuing his or her rights diligently and that some extraordinary circumstance stood in his or her way). We further noted that when determining whether equitable tolling was proper in Ex parte Ward, consideration must be given as to whether the "'principles of "equity would make the rigid application of a limitation period unfair"'" and whether the plaintiff had "'"exercised reasonable diligence in investigating and bringing [the] claims."'" 46 So. 3d at 897 (quoting Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001), quoting in turn Miller v. New Jersey Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998)). Lastly, we observed that "'the threshold necessary to trigger equitable tolling is very high, lest the exceptions

swallow the rule.' United States v. Morcello, 212 F.3d 1005, 1010 (7th Cir. 2000)." Id.

Weaver contends that the trial court erred in denying his motion to dismiss Firestone's complaint because, he says, on its face, the complaint indicates that Firestone did not exercise reasonable diligence in pursing his claims so as to make the application of equitable tolling proper. Specifically, he maintains that because the only information Firestone lacked in pursuing his causes of action was the identities of the tortfeasors, the exercise of reasonable diligence required Firestone to file a timely complaint pursuant to Alabama's fictitious-party practice, see Rule 9(h), Ala. R. Civ. P., to commence the action and to toll the limitations periods. Weaver reasons that a timely filed fictitious-party complaint would have preserved Firestone's causes of action until he could identify the tortfeasors.

Rule 9(h), Ala. R. Civ. P., provides for fictitious-party practice in Alabama. It states:

> "Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in the party's pleading, the opposing party may be designated by any name, and when that party's true name is discovered, the process and all pleadings

> and proceedings in the action may be amended by substituting the true name."

Firestone recognizes that Alabama law provides for fictitiously named parties in a complaint but maintains that the filing of a complaint, against only fictitiously named defendants, would not commence the action and stop the running of the statutes of limitations. Firestone cites Kendrick v. Lewis, 88 So. 3d 899 (Ala. Civ. App. 2012), in support his contention. In Kendrick, the Court of Civil Appeals concluded that the filing of a complaint without a bona fide intent to serve the defendant before the limitations period expired did not toll the statute of limitations. The Court of Civil Appeals opined:

> "Our supreme court has stated that, although filing a complaint is surely a significant factor for a court to consider in determining whether a party has commenced an action and whether a statute of limitations has thus been tolled, it is not the only factor that a court may consider. Freer v. Potter, 413 So. 2d 1079, 1081 (Ala. 1982). For practical reasons, a party's intent is a factor to consider as well. Our supreme court has explained:
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> > "'"We hold that in the present case the action was not 'commenced' when it was filed with the circuit clerk because it was not filed with the bona fide intention of having it immediately served. To hold

> > otherwise would permit a party to extend unilaterally the period of limitations by an oral request that actual service be withheld, thereby giving that party an additional period of time within which he could conduct an investigation to determine whether in fact, he had a claim. To permit this would violate the fundamental concept of repose found within every statute of limitations."
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> "'[Ward v. Saben Appliance Co.,] 391 So. 2d [1030] at 1035 [(Ala. 1980)]. A large number of cases support that rule. Jordan v. Bosworth, 123 Ga. 879, 51 S.E. 755 (1905)(filing with note to "hold it" did not constitute commencement of the action until such instructions were withdrawn); Peterson v. Philadelphia Suburban Transportation Co., 435 Pa. 232, 255 A.2d 577 (1969)("hold" order given to sheriff releases party from suit since there was no proper filing); Green v. Ferguson, 184 S.W.2d 790 (Mo. App. 1945)(filing of suit with instructions to clerk to hold service until further notice was not the "commencement of suit"); Franz v. Radeackar, 264 S.W. 97 (Mo. App. 1924)(if clerk is instructed upon filing to withhold service until further notice, action will not be treated as brought until the clerk proceeds with service); McMullen Oil and Royalty Co. v. Lyssy, 353 S.W.2d 311 (Tex. Civ. App. 1962)(filing of petition does not toll statute of limitations since there must be a bona fide intent to issue process).'

"Freer, 413 So. 2d at 1081."

88 So. 3d at 903-04.

Firestone reasons that the filing of a fictitious-party complaint that does not name at least one defendant does not commence an action and stop the running of the limitations period because, he says, the plaintiff does not have a bona fide intent to immediately serve the complaint. We disagree. In Kendrick and the cases cited therein, the plaintiff and/or his counsel clearly evidenced an intent not to commence the action by engaging in an overt action to prevent service of the complaint at the time it was filed. Clearly, an overt action by a plaintiff to prevent service of the complaint on a defendant indicates that the plaintiff is not ready to commence his or her action. We cannot conclude, as Firestone urges, that a plaintiff's filing of an action naming only "fictitious parties" as defendants, without more, indicates a plaintiff's intention not to commence his or her action. Although an overt action by a plaintiff to hinder service of process on an identified defendant indicates that the plaintiff does not have a bona fide intent to immediately serve the complaint, the filing of a complaint, naming only fictitious parties, within the applicable limitations period

indicates that the plaintiff is ready to pursue his or her cause of action as soon as the tortfeasors are identified. Our conclusion is supported by the exemption of fictitious-party practice, pursuant to Rule 9(h), Ala. R. Civ. P., from the provisions in Rule 4(b), Ala. R. Civ. P., providing the time limit for the service of a summons and complaint.

Firestone did not file a timely fictitious-party complaint; therefore, he did not exercise reasonable diligence in pursuing his causes of action. The facts before us establish that Firestone knew of his causes of action before the limitations periods expired, but he did not know the identities of the tortfeasors. Rule 9(h), Ala. R. Civ. P., is broad enough to address such a situation. Indeed, nothing in the language of Rule 9(h) precludes the filing of a complaint against only fictitiously named parties. Firestone's failure to file a fictitious-party complaint within the limitations periods for his causes of action indicates that he did not exercise reasonable diligence in pursuing his causes of action.

Because Firestone did not satisfy the "reasonable-diligence" standard for equitable tolling and Firestone's

causes of action were filed undisputedly after the expirations of the applicable limitations periods, Firestone's claims against Weaver are barred by the limitations periods and are due to be dismissed.

Conclusion

Based on the foregoing, the judgment of the trial court is reversed, and this case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Woodall, Bolin, Parker, Shaw, and Main, JJ., concur.

Malone, C.J., and Murdock and Wise, JJ., dissent (writing from Murdock, J., to follow).