Third District Court of Appeal

State of Florida

Opinion filed July 3, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-578
Lower Tribunal No. 08-34222

R.J. Reynolds Tobacco Company, et al.,
Petitioners,

vs.

Ray Lacey,
Respondent.

On Petition for Writ of Certiorari from the Circuit Court for Miami-Dade County, John W. Thornton, Jr., Judge.

Shook, Hardy & Bacon LLP and Frank Cruz-Alvarez; King & Spalding LLP and William L. Durham II and Jennifer C. Kane (Atlanta, GA), for petitioners.

John W. Dill (Winter Park), for respondent.

Before SALTER, FERNANDEZ and MILLER, JJ.

SALTER, J.

R.J. Reynolds Tobacco Company ("RJR") and Philip Morris USA Inc. ("Philip Morris") petition for a writ of certiorari quashing an order denying their

motion to dismiss an Engle-progeny[1] tobacco lawsuit for failure by the plaintiff's widow to comply with Florida Rule of Civil Procedure 1.260, "Survivor; Substitution of Parties," following the death of the plaintiff. We deny the petition for two separate reasons, as developed in the opinion which follows.

Facts and Procedural History

Ray Lacey, the original plaintiff, commenced his lawsuit against RJR, Philip Morris, and five other tobacco companies in 2008. Mr. Lacey was represented by the Schlesinger Law Offices, a firm with extensive experience in the representation of plaintiffs in Engle-related tobacco lawsuits. In August 2018, that law firm came before the trial court on a motion to withdraw from the representation, which was granted. During that hearing, counsel for Mr. Lacey advised the trial court and counsel for the tobacco defendants that: he understood Mr. Lacey had passed away; no suggestion of death had been filed; "I don't intend this to be a suggestion of death . . ."; and "[t]he defendant's [sic] do have the surviving spouse's address on file. And they can serve it when they feel necessary."

The order permitting Mr. Lacey's sole counsel to withdraw was signed at the hearing without objection and after review by defense counsel. It provided an address for "Plaintiff" in Astatula, Florida, as well as two phone numbers. The order stated that "Plaintiff," still indicated on the order to be "Ray Lacey," would have 35

[1] Engle v. Liggett Grp., Inc., 945 So. 2d 1246 (Fla. 2006).

days within which to retain counsel and have counsel file a notice of appearance, or to file a written notice of an intention to represent "him/herself."[2] About five hours after the hearing on the motion for withdrawal of plaintiff's counsel, RJR and Philip Morris filed a suggestion of Mr. Lacey's death pursuant to Rule 1.260(a), indicating a date of death of February 24, 2018, "[u]pon information and belief."

Three months later, RJR and Philip Morris moved to dismiss the case with prejudice based on: (1) Florida Rule of Probate Procedure 5.030(a), requiring a personal representative to be represented by a Florida-licensed attorney; (2) Mr. Lacey's estate's failure to obtain successor counsel within 35 days as directed in the order authorizing withdrawal of Mr. Lacey's counsel on August 30, 2018; and (3) the estate's failure to move for substitution as plaintiff pursuant to Rule 1.260 (required to be made "within 90 days after the death is suggested upon the record").

In response, Mr. Lacey's widow, Vickie Lacey, wrote the trial judge a typewritten, signed letter dated December 17, 2018, requesting "more time to retain a lawyer to further this case." Mrs. Lacey recounted that following Mr. Lacey's death, she was in the hospital twice for breast surgery and had lost other family

[2] Although counsel for RJR and Philip Morris had reviewed the form of order and the clause purporting to authorize Mrs. Lacey to represent herself, their subsequent motion would argue that, as a personal representative, Mrs. Lacey could only appear through a Florida-licensed attorney.

members. She wrote that her late husband was "the one to take the reins with this case," and that she needed "more time to get a lawyer and have our day in court."

At a hearing on the RJR and Philip Morris motion to dismiss, Mrs. Lacey confirmed the facts detailed in her letter. She also explained that neither she nor the estate of her late husband had funds to retain attorneys.

The trial court denied the motion to dismiss without prejudice, allowing Mrs. Lacey a further 45 days to retain counsel. 47 days later, RJR and Philip Morris filed a renewed motion to dismiss with prejudice, notifying the trial court that Mrs. Lacey still had not retained counsel or filed a motion for substitution of parties.

Three weeks later, an attorney filed a notice of appearance for "Plaintiff, RAY LACEY," as well as a motion to substitute Mrs. Lacey, personal representative of Mr. Lacey's estate, as party plaintiff. On February 26, 2019, the trial court conducted a further hearing in the case. Mrs. Lacey's counsel advised the court that he had been unable to enter his appearance earlier because of his own hospitalization "for most of the month of January." He confirmed that: Mr. Lacey passed away; an estate had been opened; a probate lawyer was in the process of having Mrs. Lacey appointed as personal representative; and new counsel intended to substitute Mrs. Lacey as the party plaintiff, with "any amendments to the complaint that might be necessary."

Counsel for RJR and Philip Morris reminded the trial court of the prior deadlines and contended that Rule 1.260 is "not discretionary within the Court's power." Based on that rule and the statute of limitations, counsel for the defendants argued that the case should be dismissed with prejudice.

The trial court denied the renewed motion to dismiss with prejudice based on the circumstances described in Mrs. Lacey's letter and successor counsel's filings. RJR and Philip Morris then filed their petition for certiorari in this Court, contending that the order denying dismissal with prejudice must be quashed.

Analysis

The petition presents two separate questions for our consideration: (1) did the order denying the RJR and Philip Morris motion to dismiss with prejudice depart from the essential requirements of law, resulting in irremediable harm to the petitioners; and (2) does the applicable decisional law provide a basis for allowing a motion for substitution to be filed after the 90-day period provided by Rule 1.260 has expired?

1. Failure to Establish a Basis for the Writ of Certiorari

RJR and Philip Morris have cited one appellate case in which the writ was granted based on non-compliance by a plaintiff with the 90-day requirement imposed by Rule 1.260: Kash N' Karry Food Stores, Inc. v. Smart, 814 So. 2d 530 (Fla. 2d DCA 2002). That case acknowledges, however, that the 90-day period is

not immutable; "If a party is unable to procure substitution of parties within the ninety-day period, that party may move for an enlargement of time, pursuant to rule 1.090(b), or it may seek relief under Florida Rule of Civil Procedure 1.540(b), on a showing of excusable neglect." Id. at 532.

And in that case, plaintiff's counsel made a single representation on behalf of the deceased plaintiff: no formal administration of the plaintiff's estate had begun, so that no legal representative for substitution had been appointed as a successor party. See id. The Second District found that counsel's representation "does not suggest that there was any difficulty in securing appointment of a personal representative that might have caused the delay in filing a motion for substitution." Id. Finally, the plaintiff/respondent in that case filed no response to the petition for certiorari.[3]

In the present case, the record reflects a widow's efforts to explain to the trial court her difficulties, including two significant surgeries, after her sole counsel had withdrawn. After successor counsel appeared on her behalf, the attorney also explained the basis for his delay in filing his motion for substitution.

[3] In a more recent decision (which, in fairness to the parties, was not available to the petitioners at the time they filed their petition), the Second District has reversed a dismissal based on a failure to comply timely with the 90-day requirement in Rule 1.260. See Sammons v. Adam Greenfield, D.O., 44 Fla. L. Weekly D1215 (Fla. 2d DCA May 8, 2019).

The petitioners may have overlooked this Court's decision in De Vico v. Berkell, 976 So. 2d 646 (Fla. 3d DCA 2008), a case in which a Miami-Dade circuit court case was dismissed for the deceased plaintiff's failure to file a substitution of parties within the 90-day period specified by Rule 1.260(a). This Court reversed the order of dismissal, finding excusable neglect on the part of decedent's non-attorney daughter and personal representative. "We begin our analysis with recognition of this state's long-standing tradition in favor of the disposition of an action on its merits. Additionally, all doubts are to be resolved in favor of allowing trial on the merits." Id. at 647 (internal citations omitted).

On the record before us, no departure from the essential requirements of law has been shown. Nor has there been a showing by RJR and Philip Morris that the trial court's alleged error results in material injury for the remainder of the case, and that any such injury is incapable of correction on a postjudgment appeal. See Stockinger v. Zeilberger, 152 So. 3d 71, 73 (Fla. 3d DCA 2014). "[T]o establish the type of irreparable harm necessary in order to permit certiorari review, a party cannot simply claim that continuation of the lawsuit would . . . result in needless litigation costs." Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 104 So. 3d 344, 353 (Fla. 2012).

Our first basis for denial of the petition, then, is that the record here falls short of satisfying the rigorous criteria for certiorari review.

2. Liberal Allowance of Substitution After Ninety Days

In Tucker v. Firestone Tire & Rubber Co., 552 So. 2d 1178, 1179 (Fla. 2d DCA 1989), the Second District observed that Rule 1.260 "has been liberally interpreted to permit substitution beyond the ninety-day time period," citing Pearl v. Kelly, 442 So. 2d 1012 (Fla. 3d DCA 1983). "[Rule 1.260] is supposed to dispel rigidity, create flexibility and be given liberal effect." Eusepi v. Magruder Eye Inst., 937 So. 2d 795, 798 (Fla. 5th DCA 2006).

In addition to the oft-repeated principle that "[t]he courts of this state have a long-standing tradition in favor of the disposition of an action on its merits," Tucker, 552 So. 2d at 1179, the origins of Rule 1.260 disclose a purpose inconsistent with the petitioners' motions for a technical default, given the record in this case.

The "Authors' Comment—1967" to Rule 1.260 states:

> [The Rule] is almost identical to Federal Rule 25. Thus, 2 Barron and Holtzoff, Federal Practice and Procedure, Rules Edition (West 1961) should be consulted for a persuasive analysis of the construction of the federal counterpart of substitution of parties in civil actions in cases where a party dies, becomes incompetent, transfers his interest, or, if a public officer, is separated from his office.

The federal and Florida cases on the purpose of the suggestion of the counterpart rules are in agreement that the goal is "to facilitate the rights of persons having lawful claims against estates being preserved so that otherwise meritorious actions will not be lost." Scott v. Morris, 989 So. 2d 36, 37 (Fla. 4th DCA 2008) (internal citation omitted) (i.e., plaintiffs asserting claims against a decedent, and the

decedent's heirs, not defendants, require such protection). "[A] purpose of Rule 25(a) is to protect the repose of decedents' estates by preventing interminable delays in the distribution of assets and the closing of estates." Cheramie v. Orgeron, 434 F.2d 721, 725 (5th Cir. 1970).

> The objective of the suggestion of death set forth in Rule 25(a)(1) is to alert nonparties to the consequences of the death of a party in a pending lawsuit and to signal them that they must act if they desire to preserve the decedent's claim. Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 (4th Cir. 1985). The purpose of Rule 25(a)(1) is to establish a procedure that protects those who have an interest in the litigation and authority to act on behalf of the decedent by permitting substitution for the deceased party without unduly burdening the surviving party and without unreasonably delaying the litigation. Barlow v. Ground, 39 F.3d 231, 233-34 (9th Cir. 1994).

Edwards v. Frank, No. 05-C-1206, 2007 WL 1029086, at *1 (E.D. Wis. Mar. 30, 2007) (i.e., substitution is to protect nonparties, presumably personal representatives, creditors, and heirs of the decedent, and to protect the surviving party from being unduly burdened or delayed).

In short, the Florida rule and its federal counterpart are to prevent a lawsuit from abating or sitting without action for an unreasonable time, and to notify others who may have an interest in the lawsuit. In the present case, RJR and Philip Morris can hardly argue a delay for more than 90 days "burdens" or prejudices them; the Engle class action and the thousands of individual actions that have followed have been underway for eighteen years. Mr. Lacey's lawsuit was underway for ten years before he passed away.

Conclusion

RJR and Philip Morris cannot be faulted for zealous advocacy and seeking dismissal of the circuit court lawsuit. But neither should the trial court be faulted for allowing Mrs. Lacey and her successor counsel additional time, given their difficult, excusable, and distracting personal circumstances. On the record in this case, the petition fails to establish the prerequisites for certiorari review, and the petitioners have failed to address the case law affording trial courts in similar cases appropriate discretion to deny a technical default and dismissal with prejudice.

The petition is denied.