

RENDERED: April 4, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-0754-MR

ROBERT M. BLAKE, M.D.
and LARRY JACKSON

APPELLANTS

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
CIVIL ACTION NO. 95-CI-000124

FLEMING MASON RURAL
ELECTRIC COOPERATIVE
CORPORATION

APPELLEES

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: GUIDUGLI, KNOPF and SCHRODER, Judges.

GUIDUGLI, JUDGE. This appeal is from a judgment dismissing, under CR 12.02, claims against Fleming-Mason Rural Electric Cooperative Corporation for permitting "stray electricity" to escape its system allegedly damaging appellants' farm and dairy cattle. Appellants also appeal the trial court's denial of a motion under CR 15.01 to amend their complaint prior to dismissal.

On October 30, 1995, appellants filed a complaint with jury demand in Fleming Circuit Court alleging negligence against the appellees as well as asserting claims of strict liability for unreasonably dangerous activity and strict product liability.

Appellants sought compensatory and punitive damages. Appellees did not immediately answer the complaint.

Instead, on November 15, 1995, appellees moved to dismiss the complaint under CR 12.02 alleging that it failed to state a claim upon which relief could be granted. Appellees argued below that appellants did not have a cause of action in strict liability or strict product liability and alleged the negligence claim was barred by the applicable one year statute of limitations, KRS 413.140(1)(b).

On January 9, 1996, appellants moved the court under CR 15.01 for leave to file an amended complaint. This motion was noticed to be heard simultaneously with the appellees' motion to dismiss on January 12, 1996. The amended complaint was tendered January 11, 1996. The amended complaint incorporated the original complaint by reference and contained additional counts alleging trespass and nuisance.

At the hearing on January 12, 1996, the court requested memoranda on whether appellants should be allowed to amend the complaint. Both parties filed memoranda addressing the issues. Appellees also filed an answer to the original complaint.

On February 9, 1996, the Fleming Circuit Court, without stating any reasons, entered an order denying appellants' motion to amend the complaint. By order entered February 14, 1996, the trial court dismissed appellants' complaint. No findings of fact or conclusions of law are required for decisions on Rule 12 motions. This appeal followed.

Appellees assert that denying the motion to amend was appropriate because of the "futility" of the amendment. Appellees assert that no matter what causes of action appellants sought to include in their amended pleading, "all were barred by the one-year statute of limitations" citing, KRS 413.140(1)(b); Carr v. Texas Eastern Transmission Corp., Ky., 344 S.W.2d 619, 620 (1961).

KRS 413.140(1)(b) states that "An action for injuries to persons, cattle, or other livestock by railroads or other corporations..." shall be commenced within one (1) year after the cause of action accrues.

But KRS 413.140(1)(b) does not apply to appellants' causes of action for continuing trespass and temporary/permanent private nuisance which allege, inter alia, a diminution of value of their farm real estate; damages to the milking parlor, equipment and soil; lost profits, etc. The statute of limitations for these causes of action is five years. KRS 413.120; West Kentucky Coal Co. v. Rudd, Ky., 328 S.W.2d 156 (1959); Kentucky West Virginia Gas Co. v. McIntosh, 278 Ky. 797, 129 S.W.2d 522 (1939).

CR 15.01 states the following:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served,...A party shall plead in response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders. (emphasis added).

Appellees responded to appellants' complaint by filing a CR 12.02 motion to dismiss rather than an answer. A motion to dismiss is not a responsive pleading. CR 7.01. Because no responsive pleading had been filed at the time the motion was filed, appellants should have been permitted to amend their complaint "once as a matter of course" in accordance with CR 15.01. This is especially true considering the fact the amended complaint contained new causes of action for trespass and nuisance.

The judgment of the Fleming Circuit Court is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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