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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001844-MR

JAMES ALAN CUMMINS
AND DEBORAH CUMMINS

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 99-CI-01365

SDS SERVICES, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: James Alan Cummins and Deborah Cummins appeal from an opinion and order of the Franklin Circuit Court granting summary judgment in favor of SDS Services, Inc. SDS successfully argued that it was entitled to summary judgment because the Cumminses' personal injury claim was barred by the

¹ Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

applicable one-year statute of limitations. For the reasons stated below, we affirm the opinion and order.

On April 20, 1999, James Cummins was performing masonry work on a jobsite when he was injured by a piece of falling plywood. Cummins was laying brick at the lower level of a church building under construction when a carpenter, Tim Stacey, who was working above him on scaffolding, dropped the plywood. Cummins sustained a serious injury including a badly broken collar bone.

Frank Haydon Builders, Inc. was the general contractor on the project. Frank Haydon, the owner of the corporation, hired a subcontractor named Dave Marcum to perform the masonry work on the project. In turn, Marcum hired Cummins and provided workers' compensation insurance for Cummins. Cummins declined the coverage.

Stacey was employed by SDS Services, Inc. SDS is a temporary services or "manpower" company which provided workers to Haydon on his smaller construction projects. Haydon paid SDS, who in turn hired and provided Stacey for the project.

On November 19, 1999, the Cumminses filed the instant personal injury action and loss of consortium claim against Frank Haydon Builders. Frank Haydon Builders answered on December 16, 1999, offering among its ten defenses the claims that the negligent act was brought about by a third party and

that the Cumminses failed to join a necessary party. It is now clear that when the complaint was filed that the Cumminses were not aware that Stacey was employed by SDS rather than Frank Haydon Builders.

The matter proceeded in Franklin Circuit Court. No discovery was taken until March, 2002, some two and one-half years after the complaint was filed. During the intervening period, the Cumminses moved for partial summary judgment on the workers' compensation issue, and Frank Haydon Builders filed a cross-motion for summary judgment.

Apparently as a result of the information set forth in the cross-motion, the Cumminses learned that Stacey was employed by SDS rather than Frank Haydon Builders. Thereafter, the Cumminses sought and received leave to file an amended complaint adding SDS as a party defendant.

After the amended complaint was filed and answered, SDS filed a motion on April 18, 2002, seeking summary judgment. As a basis for the motion, SDS argued that the Cumminses' claim was barred by the applicable one-year statute of limitations. It noted that the injury occurred on April 20, 1999, and that the amended complaint against SDS was filed in September, 2001. The motion was granted by way of an opinion and order rendered on July 3, 2002. The court found in relevant part that the action was time-barred and that nothing prevented the Cumminses

from learning SDS's role in this matter except the Cumminses own lack of due diligence in conducting discovery. After the Cumminses' motion to alter, amend or vacate the summary judgment was denied, this appeal followed.

The Cumminses now argue that the circuit court committed reversible error in rendering summary judgment in favor of SDS. They maintain that there was no way for them to know that SDS was Stacey's employer; that the statute of limitations only begins to run when the relationship between the injury and the tortfeasor can be found; that an evidentiary question exists as to whether SDS misrepresented itself as being Frank Haydon Builders; that the dismissal of their claim is unconstitutional; that questions of fact remain for the jury; and, that they are entitled to proceed with their claim under CR 15.03 relating to mistaken identity. In sum, they maintain that a defendant that hides its identity should not be rewarded with a summary judgment, and they seek an order reversing the judgment and remanding the matter for trial.

We have closely examined the record and the law, and find no error in the Franklin Circuit Court's entry of summary judgment in favor of SDS. The court granted summary judgment based on its findings that, 1) the amended complaint adding SDS as a party defendant was not filed within the one-year statutory period, and 2) that the Cumminses failed to learn of SDS's

identity not because of fraud but due to their lack of due diligence in conducting discovery.

It is uncontroverted that the amended complaint against SDS was not filed within the applicable statutory period. KRS 413.140(1) states, "[T]he following actions shall be commenced within one (1) year after the cause of action accrued: (a) An action for an injury to the person of the plaintiff, or of her husband, [or] his wife" The cause of action accrued on April 20, 1999, and as such the statutory period ended one (1) year later.

The question then becomes whether the Cumminses are relieved of compliance with KRS 413.140(1) by operation of the statutory law or case law. This is the essence of their claim of error, i.e., that the Franklin Circuit Court improperly failed to conclude that they should not be bound by the statutory period because SDS fraudulently concealed its identity. Incorporated in this argument is the claim that the statutory period should not begin to run until the tortfeasor's identity has been discovered.

The circuit court properly found that the Cumminses' failure to learn of SDS's role as Stacey's employer resulted from a lack of due diligence in discovery. The record shows the first "Notice of Deposition" to have been filed by Frank Haydon Builders on January 22, 2002, some 33 months after the injury.

It is clear that the Cumminses did not conduct any discovery in response to the defenses contained in Frank Haydon Builders' December 16, 1999, answer, to wit, that the negligent act was brought about by a third party and that the Cumminses failed to join a necessary party. An inquiry by the Cumminses as to the identity of this third party, or any question for that matter as to the nature of Stacey's employment status on April 19, 1999, would have led to SDS.

Similarly, there is no basis for concluding that either Frank Haydon Builders or SDS acted to conceal SDS's identity or hide the fact that SDS employed Stacey. Frank Haydon Builders had no apparent incentive to protect SDS, and its answer to the April 19, 1999, complaint stated its belief that the Cumminses failed to join a necessary and proper party.

The Cumminses allege that SDS misrepresented itself as being Frank Haydon Builders by having its employees work on a job site with a sign that said Frank Haydon Builders and driving a truck which also displayed the Haydon's name. It also stated that Stacey believed that he worked for Haydon and that he thought SDS was only a payroll company. These facts are not sufficient for us to conclude that SDS engaged in "fraud by concealment" sufficient to toll the running of the statutory period. The fact that Stacey may have believed he worked for Haydon does not constitute actionable fraud on the part of SDS.

The Franklin Circuit Court also properly rejected the Cumminses' argument that the discovery rule tolls the statute of limitations where the actual injury is known to the plaintiff but the defendant is unknown. It correctly found that each of the cases relied on by the Cumminses for this assertion addressed facts with unknown injuries not unknown defendants², and that they do not stand for the proposition that the statutory period is tolled while the plaintiff searches for the tortfeasor. In the matter at bar, the injury was known from the outset, and the failure to file against the correct defendant does not toll the running of the statutory period.

Lastly, the Cumminses argue that CR 15.03 operates to allow the amended complaint to relate back in time to the filing of the original complaint for purposes of compliance with the statute of limitations. We disagree.

CR 15.03 states,

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party

² See Wiseman v. Alliant Hospitals, Inc., 37 S.W.3d 709 (Ky. 2000); Louisville Trust Company v. Johns-Manville Products Corporation, 580 S.W.2d 497 (Ky. 1979).

to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Reese v. General American Door Co.³ addresses the application of CR 15.03 and is dispositive. In Reese, a panel of this Court concluded that the relationship between a garage door manufacturer and the retailer was not so close that they shared an "identity of interest" for purposes of imputing notice from one to the other. That is to say, Reese's notice to the seller of a garage door could not be imputed to the manufacturer even though a business relationship existed between the two.

Though Haydon and SDS do not share a retailer-manufacturer relationship as in Reese, we believe their business relationship is sufficiently similar for the reasoning set forth in Reese to apply. Reese reaffirmed the rule that "the notice requirement of CR 15.03(2) is satisfied whenever the intended defendant receives notice, be it actual, informal, imputed, constructive or a combination thereof, within the limitations period."⁴ While it is plausible that SDS was placed on notice of the Cumminses' claims during the statutory period, we cannot go

³ 6 S.W.3d 380 (Ky. App. 1998).

⁴ Id. at 382.

so far as to say that the trial court erred in failing to provide relief to the Cumminses on this issue.⁵

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁶ "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."⁷ "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact."⁸ Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."⁹

Viewing the record in a light most favorable to the Cumminses and resolving all doubts in their favor, we are nevertheless compelled to conclude that summary judgment in the

⁵ It is also unclear whether this issue was actually raised before the Circuit Court, as it was not addressed in the opinion and order on appeal.

⁶ CR 56.03.

⁷ Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).

⁸ Id.

⁹ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

matter at bar was appropriate. The action was not filed against SDS within the statutory period, and nothing in the record brings us to the conclusion that the Cumminses should be relieved from compliance with KRS 413.140(1). Accordingly, we find no error.

For the foregoing reasons, we affirm the opinion and order of the Franklin Circuit Court granting summary judgment in favor of SDS.

ALL CONCUR.

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