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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001993-MR

JOHN A. ROBERTSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 16-CI-004259

RICHARD WALKER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

DIXON, JUDGE: John A. Robertson appeals an order of the Jefferson Circuit Court dismissing his civil action against Richard Walker because it was barred by the applicable statute of limitations. We affirm.

Generally, "[a] new party cannot be brought into a lawsuit by amended complaint when the statute of limitations governing the claim against that

party has already expired." *Combs v. Albert Kahn Associates, Inc.*, 183 S.W.3d 190, 194 (Ky. App. 2006). Here, Robertson filed a complaint in Jefferson Circuit Court alleging that he was assaulted by corrections officers at the Louisville Metro Department of Corrections facility on September 21, 2015. Pursuant to KRS 413.140(1)(a), the applicable statute of limitations for Robertson's tort claim was one year. Approximately three weeks before the limitations period expired, Robertson filed his original complaint on September 2, 2016, naming as defendants two corrections officers, Rochelle Shipley and Ryan Taylor. Nearly one year later, on August 29, 2017, Robertson filed a second amended complaint naming corrections officer Richard Walker as a defendant. Walker filed a motion to dismiss, asserting that the action was time-barred because it was filed beyond the applicable one-year statute of limitations. Once Walker raised a statute of limitations defense, Robertson bore "the burden of pleading and proving [an] exception to the general statute of limitations." *Boone v. Gonzalez*, 550 S.W.2d 571, 573 (Ky. App. 1977). Robinson filed an affidavit and responsive pleading asserting the one-year statute of limitations was tolled pursuant to KRS 413.190(2) because jail personnel gave him inaccurate information about the officers involved in his alleged assault, which prevented him from timely naming Walker as a defendant. Robertson alternatively argued that the limitations period was tolled because his second amended complaint naming Walker as a defendant related back

to his timely filed original complaint pursuant to CR 15.03. In its written order dismissing the claim as untimely, the circuit court concluded that the limitations period was not tolled pursuant to either exception alleged by Robertson. This appeal followed.

The record reflects that the court considered matters outside the pleadings in ruling on the motion to dismiss. A trial court is free to consider that evidence; however, doing so converts the request for dismissal into a motion for summary judgment. CR 12.02; *McCray v. City of Lake Louisvilla*, 332 S.W.2d 837, 840 (Ky. 1960). Accordingly, "[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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Robertson first contends that the one-year limitations period was tolled by operation of KRS 413.190(2), which provides in relevant part: "[w]hen a cause of action . . . accrues against a resident of this state, and he by . . . concealing himself or by any other indirect means obstructs the prosecution of this action, the time of the continuance of the . . . obstruction shall not be computed as any part of the period within which the action shall be commenced." Robertson specifically argues that unnamed jail officials failed to correctly identify Walker as a

participant in the assault, which constituted an indirect obstruction of his ability to timely prosecute his claim against Walker. We disagree.

KRS 413.190(2) requires "some act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so." *Munday v. Mayfair Diagnostic Laboratory*, 831 S.W.2d 912, 914 (Ky. 1992). "[T]he statute's reference to 'other indirect means' of obstruction of an action still requires an act or conduct that remains affirmatively fraudulent[.]" *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 573 (Ky. 2009).

Here, Robertson's reliance upon KRS 413.190(2) is misplaced. "The statute provides for tolling of the statute of limitations when *a defendant* . . . obstructs the prosecution of the action[.]" *Estate of Wittich By and Through Wittich v. Flick*, 519 S.W.3d 774, 778 (Ky. 2017) (emphasis added). Even if an unnamed jail official incorrectly told Robertson that Ryan Taylor was involved in his assault, there is simply no evidence that Walker, the defendant, engaged in deceptive or fraudulent conduct to hide his identity and prevent Robertson from filing suit against him. Robertson failed in his obligation "to exercise reasonable care and diligence to discover whether he has a viable legal claim[.]" *Id.* We conclude that the trial court correctly determined the limitations period was not tolled pursuant to KRS 413.190(2).

Robertson alternatively argues that his claim against Walker was timely because the second amended complaint related back to the filing of the original complaint. CR 15.03 provides, in relevant part:

> (1) 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 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.

(Emphasis added). Courts must strictly construe the requirements of CR 15.03. *Phelps v. Wehr Constructors, Inc.*, 168 S.W.3d 395, 397 (Ky. App. 2004). "The condition that an added defendant not only must have known about the suit within the normal period for service of process, but also must have had reason to know that he escaped suit only because of a mistake, minimizes the possibility that the application of the Rule will disturb any truly legitimate sense of repose . . . ." *Id*. at 397-98.

Under the plain language of CR 15.03(2), for the second amended complaint to relate back to the original, Robertson had to establish: (1) the claim

asserted in the amended complaint arose out of the same occurrence set forth in the original complaint; (2) Walker had notice of the lawsuit during the limitations period; and (3) Walker knew or should have known that Ryan Taylor was mistakenly identified in the lawsuit instead of him. Here, it is undisputed that CR 15.03(1) was satisfied since the claims asserted in the second amended complaint arose from the same occurrence as set forth in the original complaint; accordingly, our analysis proceeds to the element of notice.

In *Halderman v. Sanderson Forklifts Co., Ltd.*, 818 S.W.2d 270, 273 (Ky. App. 1991), this Court addressed the rule's notice requirement for a newly added party, explaining, "[W]here there is a sufficient identity of interest between the old and new defendants, 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." A sufficient identity of interest exists "where legally binding relationships between the original and added parties imposed on the first-named party a duty promptly to apprise the other later-named entity of the lawsuit." *Reese v. General American Door Co.*, 6 S.W.3d 380, 382 (Ky. App. 1998).

Relying on *Halderman*, Robertson contends the notice requirement was satisfied because a sufficient identity of interest existed between Shipley, Taylor, and Walker since they all had the same employer. We disagree.

Our review indicates a lack of evidence in the record demonstrating that Walker had actual, informal, or constructive notice of the lawsuit during the limitations period. Robertson also failed to establish that notice was imputed to Walker because of a sufficient identity of interest between the old and new defendants to satisfy the notice requirement. Shipley, Taylor, and Walker were merely coworkers, and there was simply no evidence of a legally binding relationship that would impose a duty upon Shipley or Taylor to promptly apprise Walker of the lawsuit. "Notice is not to be presumed where there is no basis for the presumption." *Id.* at 382-83. Under the circumstances presented here, we must conclude that Walker did not have notice as required by CR 15.03(2)(a) to allow the second amended complaint to relate back to the filing of the original complaint. Robertson's failure to establish notice is fatal to his CR 15.03 argument; consequently, we need not address the requirement of mistake found in CR 15.03(2)(b). The trial court properly dismissed the second amended complaint as untimely.

For the reasons stated herein, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy McCarthy
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BRIEF FOR APPELLEE:

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