In the
Missouri Court of Appeals
Western District

ANGELA BROWN,	
Appellant,	**WD84077**
v.	**OPINION FILED:**
VA SECOND LP.,	**AUGUST 3, 2021**
Respondent.	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable John M. Torrence, Judge

Before Division One: Anthony Rex Gabbert, Presiding Judge,
Edward R. Ardini, Jr., Judge, Thomas N. Chapman, Judge

Angela Brown appeals the circuit court's Judgment dismissing Brown's First Amended Petition for Damages against VA Second LP. Brown contends on appeal that the circuit court erred in dismissing her petition because Brown's voluntary dismissal of Victoria Arms Apartment Limited Partnership ("VAALP") cured Brown's defective pleading which added VA Second LP as a defendant, and Brown's Amended Petition and Voluntary Dismissal and Substitution of Parties acted together to substitute VA Second LP for VAALP, thereby making application of the relation back doctrine under Rule 55.33(c) appropriate in this case. We affirm.

Background and Procedural Information

On February 1, 2018, Brown filed suit (Case No. 1816-CV02835) against VAALP alleging that on February 22, 2013, Brown was visiting a tenant who lived in the Victoria Arms Apartments located at 6311 Woodland Avenue in Kansas City, a property "controlled and operated" by VAALP. Brown alleged that, on that date, she slipped on unseen ice and suffered permanent and progressive injury to her body, and that such injuries were a direct and proximate result of VAALP's negligent acts and omissions. The court issued a summons for VAALP on April 2, 2018. On October 3, 2018, the court entered an order dismissing Brown's action without prejudice for "want of prosecution." The court noted that VAALP had yet to be served and that "this case was filed in February and there has been no attempts for service shown in the file since April."

On December 19, 2018, Brown refiled her petition. Although filed outside of the five-year statute of limitations for personal injury actions (Section 516.120(4), RSMo 2016), Brown relied on Missouri's savings statute, Section 516.230, RSMo 2016, contending that the statute allowed her to refile within one year of voluntarily dismissing her initial, timely petition.

On September 22, 2019, Brown filed a Motion for Leave to File an Amended Petition to add VA Second LP as a Defendant in the cause. Brown advised the court that "Counsel for the owner of Victoria Arms Apartments informed Petitioner that the owner of the property at the time of the incident was VA Second LP." The court granted leave and Brown filed her First Amended Petition for Damages on September 26, 2019, naming both VAALP and VA Second LP as defendants, praying "for a Judgment in her favor and against Defendants, jointly and severally[.]"

On October 10, 2019, VA Second LP moved to dismiss Brown's petition with prejudice on the grounds that the applicable statute of limitations had run. VA Second LP argued in its Suggestions in Support that Section 516.120(4) provides that a five-year statute of limitations

applies to "an action for … injury to the person," that Brown's fall occurred on February 22, 2013, and that the five-year period in which Brown could have filed her cause of action against VA Second LP expired February 22, 2018. VA Second LP argued that, as Brown's First Amended Petition for Damages against VA Second LP was filed September 26, 2019, Brown's claim was time-barred.

On October 28, 2019, Brown voluntarily dismissed her claim against VAALP. In opposing the motion to dismiss, Brown argued that, though "inartfully drafted" her addition of VA Second LP, and dismissal of VAALP in the refiled suit amounted to a substitution of parties and that the "relation back doctrine" (Rule 55.33) and Missouri's savings statute (Section 516.230) authorized Brown to voluntarily dismiss her action and refile it within one year of the voluntary dismissal. VA Second LP argued that the relation back doctrine was inapplicable to parties (such as VA Second LP) *added* to the refiled suit.

On September 23, 2020, the trial court ultimately granted VA Second LP's motion to dismiss[1], finding that the statute of limitations for Brown's claims against VA Second LP expired on February 22, 2018, and that "the relation back doctrine of Rule 55.33(c) [was] not applicable in this case." This appeal follows.

Standard of Review

"The standard of review for a trial court's grant of a motion to dismiss is *de novo*." *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). We view the facts as true and in the light most favorable to the plaintiff. *Id.* "If the petition sets forth any set of facts that, if proven, would entitle

[1] The trial court initially overruled VA Second LP's Motion to Dismiss, and then again denied it after VA Second LP filed a Motion to Reconsider. VA Second LP then filed its Second Motion to Reconsider, in light of this court's opinion in *Hartman v. Logan*, 602 S.W.3d 827 (Mo. App. 2020), which had been handed down in the interim.

the plaintiffs to relief, then the petition states a claim." *Id.* We will affirm the dismissal if it was appropriate on any ground supported by the motion to dismiss. *Reid v. Steelman*, 210 S.W.3d 273, 279 (Mo. App. 2006).

Point on Appeal

Brown contends on appeal that the circuit court erred in dismissing her petition because Brown's voluntary dismissal of defendant VAALP cured Brown's defective pleading which added VA Second LP as a defendant, and Brown's Amended Petition and Voluntary Dismissal and Substitution of Parties acted together to substitute VA Second LP for VAALP, thereby making application of the relation back doctrine under Rule 55.33(c) appropriate in this case.[2] Brown argues that reliance on *Hartman* is misplaced because the plaintiffs in *Hartman* never dismissed any of the original defendants to allow the new defendants to take their place. Brown contends

[2] While VA Second LP contends that we should not reach the merits of Brown's claim because she failed to address the voluntary nonsuit savings statute of Section 516.230, VA Second LP never raised this statute as barring Brown's claim. While Brown discussed this statute in her Answer to VA Second LP's motion to dismiss, in reply VA Second LP criticized that Brown only loosely referenced the statute and made no attempt to explain how it applied to the facts, but VA Second LP never alleged the statute was inapplicable. VA Second LP instead stated: "Principally, the issue presented here is whether the relation back doctrine applies …" The court focused its final Judgment on the relation back doctrine, and Brown focuses her appeal on the court's finding in that regard.

VA Second LP also moved to dismiss Brown's appeal for mootness, and this motion was taken with the case. VA Second LP argues that a holding by this court regarding the applicability of the relation back doctrine would not impact the trial court's ruling that Brown's claim was filed outside of the statute of limitations, making Brown's appeal moot. Yet, as discussed above, VA Second LP's motion to dismiss alleged that Brown's claim was filed outside the statute of limitations, and Brown responded to this allegation by contending that the savings statute and the relation back doctrine, as applied to the facts of Brown's case, allowed Brown's claim to survive despite the statute of limitations. Whether the savings statute applied to allow Brown to file a second petition within one year of her initial timely-filed petition was not raised by VA Second LP as prohibiting Brown's claim, and VA Second LP's arguments primarily focused on the applicability of the relation back doctrine, as did Brown's. In ruling on VA Second LP's motion to dismiss, the court addressed Brown's claim regarding the relation back doctrine's impact on the applicable statute of limitations, and it is this ruling we review on appeal. Given the focus of the parties, we cannot make the inferential leap that the court's finding that Brown's claim against VA Second LP ran on February 22, 2018, was a proclamation that the savings statute was inapplicable, which is essentially what VA Second LP argues when arguing mootness. VA Second LP's motion to dismiss is denied.

that, "[w]hile unartfully done using two separate pleadings, Plaintiff effectively substituted original defendant [VAALP] with VA Second LP." We find no error.

Hartman involved plaintiffs involved in real estate investment who sued approximately one hundred unnamed, "Fictitious Defendants" for allegedly publishing defamatory statements about their business on the internet. 602 S.W.3d at 830. Thereafter, the plaintiffs filed an amended petition adding two defendants, Ken Logan and Quentin Kearney ("Named Defendants"), alleging that these individuals were also engaged in the real estate business and were Plaintiffs' former business associates and current competitors. *Id.* at 831. Further, that when the defamatory statements were published online in 2015, the Named Defendants operated several businesses at an address in Blue Springs with a Comcast account containing a specific IP address. *Id.* This IP address was allegedly associated with an email address that included the name, "Russel Harrington," a screen name used to make the alleged defamatory statements. *Id.*

The Named Defendants in *Hartman* moved to dismiss the amended petition, contending among other things that the claims were time barred and the Amended Petition did not relate back to the original petition because the Named Defendants did not have notice of the original petition. *Id.* The circuit court in *Hartman* granted the Named Defendant's Motion to Dismiss, without explanation. *Id.* at 833.

In affirming the trial court's dismissal, in *Hartman*, we concluded:

> 'Rule 55.33(c) is "[the] remedy for a mistake in identity, and the remedy is a change in party."' *Kingsley v. McDonald*, 432 S.W.3d 266, 270 (Mo. App. W.D. 2014) (quoting *State ex rel. Hilker v. Sweeney*, 877 S.W.2d 624, 628 (Mo. banc 1994)). In other words, Rule 55.33(c) applies if the 'plaintiff ... made a mistake in selecting the proper party to sue, i.e., the plaintiff must have brought an action against the wrong party.' *Id.* (quoting *State ex rel. Holzum v. Schneider*, 342 S.W.3d 313, 316 (Mo. banc 2011)). Rule 55.33(c) does not apply, however, 'where the plaintiff seeks to add an entirely new defendant to the case,' as the "'[t]he law distinguishes between the substitution of parties" -- where relation back may be

available—and the addition of parties," where it is not.' *Id.* at 272-73 (quoting *Johnson v. Delmar Gardens W., Inc.*, 335 S.W.3d 83, 88 (Mo. App. E.D. 2011)).

> Here, the Original Petition named John Doe, individually, and Does 1 through 100 as defendants. The Amended Petition also named John Doe, individually and Does 1 through 100 as defendants. The Amended Petition did not add Logan or Kearney as defendants to the case caption, but merely added additional factual allegations in the pleading which specifically addressed Logan and Kearney. In all material respects, the allegations in the Amended Petition addressing the conduct of the 'Doe' defendants remained unchanged from the Original Petition. The Amended Petition did not substitute Logan and Kearney for any of the previously named Fictitious Defendants, and instead added Logan and Kearney as additional defendants. As such, the Amended Petition added new party-defendants after the expiration of the statute of limitations, and the relation back doctrine set forth in Rule 55.33(c) is not applicable. *See*, *e.g., Schultz by Schultz v. Romanace*, 906 S.W.2d 393, 396 (Mo. App. S.D. 1995) (holding that when plaintiff filed amended petition and named specific, new defendants, but did not substitute them for previously named 'Doe' defendants, the amended petition added new parties, and was not eligible for relation back); cf. *State ex rel. Holzum*, 342 S.W.3d at 315-16 (where court examined the specificity of the allegations in original petition naming 'Doe' defendants to see if identity of person being referred to could be ascertained as to permit relation back, but only after noting that the amended petition expressly substituted the newly named defendants for previously named 'Doe' defendants); *Maddux v. Gardner*, 192 S.W.2d 14, 17-18 (Mo. App. 1945) (holding that relation back applied where original petition named 'Doe' defendants and identified them as the engineer and the fireman who were on an identified train that ran over the decedent because the later filed amended petition substituted the named engineer and fireman for the previously named 'Doe' defendants).
>
> Additional time to conduct discovery to determine whether the Named Defendants were aware of the Original Petition would not have aided the Plaintiffs in light of the fact the Amended Petition added new defendants and did not substitute those newly added defendants for previously named 'Doe' defendants.

Id. at 840-841.

On appeal, Brown argues that her intent was always to sue the owner of Victoria Arms Apartments as there "is no reason for her to sue an entity that does not own the apartment complex." Further, that she effectively substituted VAALP with VA Second LP when she dismissed VAALP as a defendant. She contends that *Hartman* is distinguishable because at the time of the *Hartman* court's dismissal, none of the original parties were substituted for any of the

new parties. Further, at the time the court entered its Order of Dismissal here, VA Second LP was the sole defendant.[3]

We find the rationale of *Hartman* controlling in this case as well. Although Brown contends that she always intended to sue the owner of Victoria Arms Apartments, this is not reflected in her pleadings. Brown's December 19, 2018, petition identified Victoria Arms Apartments as being "controlled and operated by" defendant VAALP. Brown did not allege that VAALP *owned* Victoria Arms Apartments such as would indicate a mistake in identity regarding ownership. As Brown did not name VAALP as owner of the Victoria Arms Apartments, but specifically alleged that the apartments were "controlled and operated" by VAALP, the December 19, 2018, petition does not show that Brown always intended to sue the owner of Victoria Arms Apartments or, significantly, *only* intended to sue the owner of Victoria Arms Apartments.

"Missouri Courts have adopted the Restatement (Second) of Torts (1965) with regard to premises liability." *Medley v. Joyce Meyers Ministries*, 460 S.W.3d 490, 495 (Mo. App. 2015). The Restatement (Second) of Torts defines a "possessor" as a party "in occupation of the land with the intent to control it." *Id.* (quoting Restatement (Second) of Torts section 328E(a)). A non-owner of premises may be a possessor, and ownership is not a requirement for possession of the land in order to establish premises liability. *Medley*, 460 S.W.3d at 496 (quoting *Bowman v. McDonald's Corp.*, 916 S.W.2d 270, 285 (Mo. App. 1995) (overruled on other grounds). Consequently, a plaintiff may sue a possessor independently from a landowner. *See Medley*, 460 S.W.3d at 492

[3] We note that, while Brown contends that *Hartman* is distinguishable because the Plaintiffs in *Hartman* never subsequently dismissed any of the original Defendants to allow the new Defendants to take their place, all original defendants (Fictitious Defendants) were dismissed by the *Hartman* plaintiffs prior to appealing the court's dismissal of the Named Defendants. In fact, after the trial court dismissed the plaintiff's claims against the Named Defendants, the plaintiffs requested that the court enter an order dismissing the Fictitious Defendants. The court refused, and the plaintiffs then voluntarily dismissed the Fictitious Defendants, leaving the Named Defendants as the sole remaining defendants.

(*Medley* involved an attendee at a conference hosted by Joyce Meyer Ministries, Inc. at the Edward Jones Dome in St. Louis. The attendee sued Joyce Meyer Ministries, Inc. after tripping and falling in an area of the Dome the defendant had set up to display and sell merchandise. The attendee alleged that the defendant "controlled or had the right to control that area of the premises" where the plaintiff was injured.).

Here, when Brown requested leave to file an amended petition, she advised the court that she had been informed by counsel for the owner of Victoria Arms Apartments that the owner of the property at the time of the incident was VA Second LP. Brown requested leave to "add VA Second LP as a defendant in this cause." Brown's amended petition then named *both* VAALP and VA Second LP as defendants, and prayed "for judgment in her favor and against Defendants, jointly and severally." While Brown's original petition mentioned nothing about ownership, her amended petition alleged that "VA Second LP has held itself out to be the owner of the Victoria Arms Apartment Complex at the time of the incident giving rise to the Plaintiff's injury." Her original allegation regarding control and ownership remained the same: "On February 22, 2013, Plaintiff was visiting a tenant who lived in the Victoria Arms Apartments located at 6311 Woodland Ave, Kansas City, Missouri which is controlled and operated by the Defendant." While Brown did not change "the Defendant" to the plural as she had in other allegations in the amended petition after adding VA Second LP as a defendant, she also did not differentiate between the defendants in that allegation, suggesting that she considered both VAALP and VA Second LP as controlling and operating Victoria Arms Apartments.

VA Second LP then moved to dismiss Brown's claim with prejudice, arguing that it was filed approximately one year and seven months after the statute of limitations expired. Only then did Brown file her "Notice of Voluntary Dismissal and Substitution of Parties" contending that she

was dismissing "her claim against defendant [VAALP] as it was named incorrectly as a party." Brown's answer to VA Second LP's motion to dismiss then alleged that the relation back doctrine applied to save her claim against VA Second LP from dismissal because she had "dismissed her claim against [VAALP], substituting VA Second LP as the defendant in the action."

Yet, VA Second LP could not have been substituted for a defendant after it had already been named a defendant. And the pleadings on their face do not reveal mistaken identity; the pleadings indicate that when Brown added VA Second LP as a defendant, Brown intended to sue all parties that *controlled and operated* Victoria Arms Apartments *as well as* the owner of Victoria Arms Apartments. Hence, we cannot create the fiction that when Brown added VA Second LP as a defendant along with VAALP, asking that the two defendants be jointly and severally liable for their alleged negligence, that Brown actually removed VAALP as a defendant upon adding VA Second LP as a defendant. To do so would render meaningless the Rule 55.33(c) distinction between the substitution of parties, where relation back may be available, and the addition of parties, where it is not. *Hartman*, 602 S.W.3d at 840-841.

Brown's point on appeal is denied.

Conclusion

The circuit court did not err in dismissing Brown's amended petition. Brown's amended petition added VA Second LP as a defendant, and Brown's subsequent voluntary dismissal of another defendant did not convert Brown's addition of VA Second LP as a defendant into a substitution for the dismissed defendant. Consequently, the relation back doctrine under Rule 55.33(c) is inapplicable in this case.

Anthony Rex Gabbert, Judge

All concur.