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NO. COA09-395

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

KEITH NAPOLEAN LAWRENCE,
Plaintiff,

v.

Durham County
No. 07 CvS 6052

EDDIE CORDOVA ALEJANDRO,
Defendant.

Appeal by Plaintiff from order entered 11 December 2008 by Judge James E. Hardin, in Superior Court, Durham County. Heard in the Court of Appeals 3 November 2009.

William L. Davis, III, for Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

WYNN, Judge.

Plaintiff argues in this case that the trial court erred in dismissing his action at an administrative session held on 9 December 2008, at which Plaintiff failed to appear. The trial court concluded as a matter of law that it had not obtained jurisdiction over Defendant before the expiration of the applicable statute of limitations. Because our review of the record reveals that Defendant may have been served by publication before the expiration of the applicable statute of limitations, we now remand for a determination, in light of this evidence, of whether

Plaintiff satisfied the requirements of Rule 4 before the expiration of the statute of limitations.

Plaintiff, Keith Napoleon Lawrence, filed suit against Defendant, Eddie Cordova Alejandro, to recover for injuries allegedly arising from an auto accident that occurred in Durham County, North Carolina on or about 1 December 2004. Plaintiff filed his complaint on 28 November 2007. On the same day, the Durham County Clerk of Court issued a civil summons based on Plaintiff's complaint. A copy of the complaint and summons were mailed to two known addresses for Defendant. It was later determined that one summons was lost in the mail; the other was returned unserved.

On 14 February 2008, Alias and Pluries summonses were mailed to Defendant's known addresses. Both of the summonses were returned unserved. On two more occasions, on 30 April 2008 and again on 16 June 2008, Alias and Pluries summonses were issued and mailed to Defendant; they too were returned unserved. On 29 August 2008 the clerk issued another Alias and Pluries summons. Plaintiff states in his brief that the original summons was left with the clerk of court because service was going to be made by publication.

On 22 December 2008, Plaintiff's counsel received notice that Plaintiff's case had been dismissed with prejudice at a hearing held on 9 December 2008.¹ In its 11 December 2008 order, the trial

¹ Plaintiff's counsel states in his affidavit of 16 February 2009 that his first knowledge that an administrative session had been held was when he received the court's order on 22 December 2008. Plaintiff states in his brief however that he received a copy of the order on 14 January 2009. Plaintiff does not

court found as a fact that: (1) the action was filed on or about 28 November 2007 alleging personal injury that occurred on or about 1 December 2004; (2) a summons was filed with the complaint but not served on Defendant; (3) Plaintiff obtained several alias and pluries summonses, the last on 29 August 2008, and all were returned unserved; and (4) counsel for Plaintiff was not present during the administrative session. The trial court concluded as a matter of law that: (1) the time within which to serve the complaint along with the 29 August 2008 summons had expired and the action is discontinued; (2) the applicable statute of limitations had expired;² (3) the court did not obtain jurisdiction over Defendant prior to the expiration of the 29 August 2008 summons and prior to the expiration of the statute of limitations; and (4) Plaintiff's action is barred by the statute of limitations. The trial court therefore dismissed Plaintiff's case with prejudice.

On 5 January 2009 Plaintiff filed an Affidavit of Service by Publication. Attached was an affidavit from a clerk of the Herald-Sun stating that the summons was published in that newspaper once a week for three successive weeks beginning 1 October 2008. A copy of the published notice appeared on the affidavit of the newspaper clerk.

indicate in his brief that he had any knowledge of the hearing prior to 14 January 2009.

² The trial court's order incorrectly states the applicable statute of limitations as N.C. Gen. Stat. § 1-53 [R32] (listing causes of action for which the statute of limitation is 2 years). The proper statute is § 1-52(16) (providing a 3 year statute of limitations for personal injury actions). See *Jones v. Summers*, 117 N.C. App. 415, 417, 450 S.E.2d 920, 921 (1994).

On 9 January 2009 Plaintiff filed notice of appeal, and also filed a Rule 60(b) Motion for Relief from the trial court's 11 December 2008 order.³ On appeal, Plaintiff argues that the trial court (I) denied him due process because Plaintiff had not received prior notice of the administrative session to be held on 9 December 2008; (II) erred in dismissing Plaintiff's complaint based on its ruling that the 29 August 2008 alias and pluries summons had expired and the action was discontinued; and (III) erred in dismissing Plaintiff's complaint as being time barred by the applicable statute of limitations. We remand for further findings of fact.

The basic issue here is whether the trial court erred in concluding that Plaintiff failed to obtain jurisdiction over Defendant prior to the expiration of the statute of limitations. The record shows that the trial court was apparently not aware when it issued the order that service may have been accomplished by publication. Indeed, based on the information available to the trial court on 9 December 2008 - that the summons, viable for 90 days under N.C. Gen. Stat. § 1A-1, Rule 4(d)(2), had expired on or about 30 November 2008 - the trial court determined that Plaintiff's action was barred by the statute of limitations.⁴ See

³ No brief was filed on behalf of Defendant. Indeed, there is no indication in the record that Defendant has ever obtained actual notification of this action.

⁴ We observed above that the order recites the wrong statute of limitations. The correct statute would allow Plaintiff three years, not two, in which to file his claim. N.C. Gen. Stat. § 1-52(16) (2009). But even under the proper three year statute of limitations, Plaintiff's action would be barred after 1 December

N.C. Gen. Stat. § 1A-1, Rule 4(e).

However, following the dismissal, Plaintiff's counsel submitted an affidavit on 5 January 2009 indicating that service by publication was completed the third week of October 2008.⁵ The record appears to indicate that this information was not known to the court at the time it dismissed Plaintiff's action. Accordingly, we remand for the trial court to consider the additional information provided by Plaintiff which, if valid, may indicate that Plaintiff's action has not been barred by the statute of limitations.

Reversed and Remanded.

Judges MCGEE and BRYANT, concurring.

Report per Rule 30(e).

Judge WYNN concurred in this opinion prior to 9 August 2010.

2007 unless kept alive by the issuance of an alias and pluries summons. *See Williams v. Bray*, 273 N.C. 198, 205, 159 S.E.2d 556, 560 (1968) ("[S]ince the original summons has lost its vitality, to prevent a discontinuance of the action (and thereby toll the statute of limitations), plaintiff must cause alias summons to be issued and served.").

⁵ We observe that while Plaintiff submitted the affidavit after the administrative hearing date, Rule 4(j1) does not state a time limitation on when a Plaintiff must file the affidavit:

Upon completion of such service [by publication] there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2009).