[Cite as *Roche v. On Time Delivery Servs., Inc.*, 2010-Ohio-2358.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94036

WILLIAM ROCHE

PLAINTIFF-APPELLANT

vs.

ON TIME DELIVERY SERVICES, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV 09 685449

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED: May 27, 2010

JOURNALIZED:
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MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Plaintiff-appellant, William Roche, appeals from a trial court judgment dismissing his case against On Time Delivery Services, Inc. ("On Time Delivery Services"). He raises three assignments of error for our review:

{¶ 3} "[1.] The trial court erred by dismissing plaintiff-appellant's case.

{¶ 4} "[2.] The trial court erred by denying plaintiff-appellant's motion for leave to file an amended complaint to properly name defendant-appellee.

{¶ 5} "[3.] The trial court erred by denying plaintiff-appellant's motion to correct typographical errors."

{¶ 6} Finding merit to the appeal, we reverse and remand.

Procedural History

{¶ 7} Roche filed a complaint for personal injuries against On Time Delivery Services, located at 25100 Euclid Avenue, Euclid, Ohio, and John Doe, an unknown employee of On Time Delivery Services, on February 20, 2009. In the complaint, Roche alleged that "On or about March 7, 2007, in the City of Euclid, County of Cuyahoga and State of Ohio, defendant John Doe, an employee of defendant On Time Delivery Services, negligently operated and/or maintained a truck causing it to roll forward and hit the tow motor which plaintiff was operating." Roche further claimed that he was injured as a result of the

alleged negligence.

{¶ 8} The docket indicates that service was completed for On Time Delivery Services on March 6, 2009. On Time Delivery Services never responded to the complaint or filed any other document with the court for the duration of the case despite not being dismissed from the case. Nor did it file an appellee brief in this court.

{¶ 9} But on April 1, 2009, On Time Delivery, Inc. ("On Time Delivery") answered Roche's complaint. It acknowledged that an accident involving Roche happened on the date alleged, but asserted that the accident occurred in Mentor, Ohio, not Euclid. Further, On Time Delivery claimed that Roche caused the accident when he negligently drove "a tow motor onto a truck operated by an employee or agent of, *** On Time Delivery, Inc."

{¶ 10} In its answer, On Time Delivery further asserted several affirmative defenses, including that (1) the complaint failed to state a claim against On Time Delivery; (2) Roche failed to join necessary parties; (3) the court lacked personal jurisdiction over On Time Delivery because it had not received service of process; and (4) Roche did not properly commence an action against it.

{¶ 11} The trial court held a case management conference on April 29, 2009. It ordered that all discovery be completed by July 28, 2009. It set a final pretrial for that same day and a trial date for October 5, 2009.

{¶ 12} On July 9, 2009, Roche filed a "Motion for Leave to File Amended

Complaint to Add New Party Defendant Marsha Ryan, Administrator, Ohio Bureau of Workers' Compensation ["OBWC"] and to Correctly Name Defendants." In the brief attached to his motion, Roche claimed that the OBWC was an indispensable party. And further asserted: "[i]n addition, due to typographical error, the names of the defendants were incorrect in the original Complaint and should be amended to read On Time Delivery, Inc. and John Doe, Unknown Employee of On Time Delivery, Inc."

{¶ 13} On Time Delivery replied to Roche's motion and the trial court denied it, without opinion, on July 20, 2009.

{¶ 14} On July 28, 2009, Roche filed a "Motion to Correct Typographical Errors and Add Marsha Ryan, Administrator, [OBWC], as a new party plaintiff." In his brief, Roche claimed that he made three typographical errors in his complaint. He requested in relevant part: (1) that he be permitted to remove the word Service from defendant's name; (2) that he be permitted to change defendant's address to 6675 Eastland Road, Middleburg Heights, Ohio; and (3) that he be permitted to amend the location of the accident to 9351 Mercantile Drive, Mentor, Ohio.

{¶ 15} On Time Delivery responded to Roche's motion to correct typographical errors, and on August 6, 2009, the trial court denied it without opinion.

{¶ 16} On September 3, 2009, without giving its reasons, the trial court

dismissed the case without prejudice. It is from this judgment that Roche appeals.

Final Appealable Order

{¶ 17} Generally a dismissal without prejudice is not a final appealable order, so long as a party may refile or amend the complaint. See *Schmieg v. Ohio State Dept. of Human Serv.* (Dec. 19, 2000), 10th Dist. No. 00AP. Here, however, the dismissal acted as a dismissal with prejudice since Roche would not have been able to refile the action under the savings statute. See *Children's Hosp. v. Dept. of Pub. Welfare* (1982), 69 Ohio St.2d 23, 433 N.E.2d 187 (savings statute can only be used to refile an action against the same party). Roche could have refiled his complaint against On Time Delivery Service within one year under the savings statute, but it was not the proper party. Thus, we find the trial court's judgment dismissing the case was actually with prejudice, and therefore, was a final appealable order.

Notice Required Before Dismissal

{¶ 18} In his first assignment of error, Roche argues that the trial court erred when it dismissed the case without giving "the requisite notice prior to dismissal." We agree.

{¶ 19} A trial court's discretion to dismiss is limited by the "tenet that disposition of cases on their merits is favored in the law." *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371, 678 N.E.2d 530. This results in an appellate

standard of review that "is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits." Id. at 372.

{¶ 20} The trial court did not give its reasons for dismissing the complaint. It simply stated, "SC/PT Held. Case is dismissed without prejudice. Journal entry to follow. Final. Court cost assessed to plaintiff(s)."

{¶ 21} We agree with Roche that the trial court could have sua sponte dismissed the case pursuant to Civ.R. 4(E) (failure to serve) or Civ.R. 41(B)(1) (failure to prosecute). But under either one, a trial court is required to give notice prior to dismissal.

{¶ 22} Civ.R. 4(E), which deals with summons and the time limit for service, provides as follows:

{¶ 23} "If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion."

{¶ 24} Civ.R. 41(B)(1), failure to prosecute, provides "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim."

{¶ 25} We therefore sustain Roche's first assignment of error and reinstate his case.

Civ.R. 3(A) and 15(C)

{¶ 26} In his second assignment of error, Roche maintains that the trial court erred when it denied his motion to amend his pleading to name the proper defendant. We agree.

{¶ 27} A trial court's ruling on a motion to amend a complaint is reviewed under an abuse of discretion standard. *Wilmington Steel Products, Inc. v. Cleveland Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 122, 573 N.E.2d 622.

{¶ 28} Civ.R. 15(C) sets forth three requirements that must be met before an amendment "*changing the party*" can relate back to the original pleading. First, the claim in the amended complaint must arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Second, the party sought to be substituted by the amendment must have received notice of the action "within the period provided by law for commencing the action," so that the party is not prejudiced in maintaining a defense. Third, the new party, "within the period provided by law for commencing the action," knew or should have known that, but for a mistake concerning the proper party's identity, the action would have been brought against the new party.

{¶ 29} The Ohio Supreme Court has construed the language "within the

period provided by law for commencing the action" in Civ.R. 15(C) to refer to the time allowed for effectuating service on a party under Civ.R. 3(A), which is one year, not the applicable statute of limitations. *Cecil v. Cottrill* (1993), 67 Ohio St.3d 367, 371, 618 N.E.2d 133. Civ.R. 3(A) states: "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C) ***."

{¶ 30} On Time Delivery argues that because it is an entirely different corporation than the original defendant, Civ.R. 15(C) cannot be used to bring it into the action. Rather, On Time Delivery asserts that Civ.R. 15(C) is only used to correct a misnomer, which it claims is "where a middle initial is substituted or where the word 'incorporation' is substituted in place of 'company.'" It cites three cases in support of this argument: *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 635 N.E.2d 323, *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, 537 N.E.2d 208, and *Bykova v. Szucs*, 8th Dist. No. 87629, 2006-Ohio-6424.

{¶ 31} After reviewing these cases, we do not find that any of them stand for On Time Delivery's proposition. When courts state that "a new party" cannot be added, they do not mean that the original party cannot be substituted with a new party. *Kraly* clarified this distinction and held that "Civ.R. 15(C) may be employed to substitute a party named in the amended pleading for a party named

in the original pleading to permit the amended pleading to relate back to the date of the original pleading, provided the requirements of the rule are otherwise satisfied. (*Cecil v. Cottrill* [1993], 67 Ohio St.3d 367, 618 N.E.2d 133, approved and followed.) However, the rule may not be employed to assert a claim against an *additional party* while retaining a party against whom a claim was asserted in the original pleading." (Emphasis added.) Id., paragraph one of the syllabus. Thus, under *Kraly*, a court can substitute an incorrectly named defendant with the correct one, but not bring an additional party into the action.

{¶ 32} The second case cited by On Time Delivery, *Amerine*, addressed the issue of whether the one-year time limit under Civ.R. 3(A) also applied to Civ.R. 15(D), which permits a plaintiff who does not know the name of a defendant to later amend the complaint when the name is discovered (e.g., naming John Doe in the complaint). The Ohio Supreme Court held that it did. Id. at the syllabus. And in the third case, *Bykova*, this court held that because Civ.R. 15(C) has never allowed a plaintiff to add a new party defendant (meaning *additional* party), it may not be used to add a new party plaintiff either.

{¶ 33} Further, we find that the plain language of Civ.R. 15(C) relates to the substitution of a proper party for one previously misidentified in the original complaint. See *Cecil*, supra. The concluding clause of Civ.R. 15(C) provides further support for this view inasmuch as it refers to a mistake regarding the identity of the proper party in the original pleading.

{¶ 34} Indeed, in *Cecil*, the Ohio Supreme Court held that the lower court erred in dismissing a complaint against an incorrectly named defendant — the father of the tortfeasor, rather than permitting the plaintiff to amend under Civ.R. 15(C) beyond the statute of limitations to substitute the correct party — the son — in place of the father. The Supreme Court reasoned, "If we were to accept the conclusion reached by the court of appeals, we would create an anomalous situation in that an accurately named defendant may be served up to one year after the limitations period has expired but a misnamed defendant must receive notice prior to the running of the limitations period. The conclusion reached by the court of appeals is a type of situation this court sought to correct when we accepted the amendment to former Civ.R. 3(A) from the Rules Advisory Committee in 1986." Id. at 370-71.

{¶ 35} There is no dispute as to whether On Time Delivery had the requisite notice. It admits that it received actual notice of the suit "within the period provided for commencing the action." But it argues that since Roche alleged in the complaint that the accident happened in Euclid, Ohio, and not Mentor, Ohio, it does not comport with the first requirement of Civ.R. 15(C), that the claim must arise out of the "same conduct, transaction, or occurrence" set forth in the original pleading. We disagree.

{¶ 36} It is apparent from the complaint and On Time Delivery's answer that the claim arose out of the "same conduct" — i.e., an accident that occurred

on March 7, 2007 involving Roche on a tow motor and an On Time Delivery truck. Further, there is no allegation of bad faith on Roche's part. In fact, in one of its responsive pleadings below, On Time Delivery informed the trial court that "[i]t is believed in this case, the reason the original complaint brought the claim against the wrong party is because plaintiff's attorney was given erroneous information by a representative from *** [the company] in Mentor, Ohio where plaintiff was working when the accident that caused his injury occurred." Finally, there is absolutely no prejudice to On Time Delivery because it knew about the accident when it occurred, as well as the action when it was filed, and it even timely answered the complaint setting forth defenses.

{¶ 37} "The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies." *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113. Application of the civil rules is not a game of skill in which a single misstep by counsel may be determinative of the outcome. See *Society Bank & Trust v. Miller* (Nov. 25, 1994), 6th Dist. No. CV 92-0720. Unless there is a showing of bad faith, undue delay, or undue prejudice to the opposing party, the rules allow for liberal amendment. *Turner v. Cent. Local School Dist.* (1999), 85 Ohio St.3d 95, 99, 706 N.E.2d 1261.

{¶ 38} We further note that Roche cannot add new party defendant Marsha Ryan, Administrator of the OBWC by amendment. Civ.R. 15(C) may not be employed to assert a claim against an additional party while retaining a party

against whom a claim was asserted in the original pleading. *Kraly*, 69 Ohio St.3d at the syllabus.

{¶ 39} Roche's third assignment of error has been rendered moot by our disposition of the first two.

Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR