

IN THE UTAH COURT OF APPEALS

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Voi Aiono and Cheryl Aiono,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiffs and Appellants,)	
)	Case No. 20040769-CA
v.)	
)	
<u>Kendall Hogan</u> , State Farm)	F I L E D
Insurance, and Does 1 through)	(July 29, 2005)
50,)	
)	2005 UT App 331
Defendants and Appellee.)	

Third District, Salt Lake Department, 030905421
The Honorable Ann Boyden

Attorneys: David O. Drake, Midvale, for Appellants
David N. Mortensen and Jared R. Casper, Provo, for
Appellee

Before Judges Billings, Bench, and Greenwood.

PER CURIAM:

Voi Aiono and Cheryl Aiono (the Aionos) appeal from the final judgment of the district court dismissing their complaint. The Aionos argue that the district court erred when it granted Kendall Hogan's motion for summary judgment and when it denied the Aionos' motion to amend their complaint. We affirm.

The Aionos filed a complaint in July 2000 against Hogan, State Farm Insurance (State Farm), and other Doe defendants after an automobile accident. The complaint was not served and the case was dismissed for failure to prosecute. Two days before the one year savings statute expired, see Utah Code Ann. § 78-12-40 (2002), the Aionos refiled their complaint. Hogan was the only party served with a summons and the complaint. After filing an answer and a stipulated discovery plan, Hogan filed a motion for summary judgment.

The Aionos did not file a response to Hogan's motion for summary judgment. Instead, the Aionos filed a motion to amend their complaint or, in the alternative, a motion for additional time. The Aionos alleged that they had named Hogan as the wrong party and that they should be allowed to "reflect Teresa R.

Peterson as the proper defendant." In the alternative, the Aionos sought additional time "to conduct discovery on the issue of potential liability of [Hogan]."

After oral argument, the district court granted the motion for summary judgment and denied the Aionos' motions. Regarding the latter, the district court specifically ruled that there was no unity of interest between Hogan and the alleged tortfeasor, Ms. Peterson, that could permit another amendment to the complaint to relate back to the filing of that complaint. The district court found that any amended complaint filed by the Aionos would thus be timed barred.

Summary judgment is proper if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). We give a trial court's decision to grant summary judgment no deference and review it for correctness. See Norman v. Arnold, 2002 UT 81, ¶15, 57 P.3d 997.

The Aionos' complaint alleged that Hogan negligently operated a motor vehicle and that such negligence directly caused their injuries. Hogan's motion for summary judgment was based upon Hogan's uncontested averments that he was not the driver of the vehicle involved in the underlying accident, but merely the co-owner of the vehicle with his son. Furthermore, Hogan averred that he did not give permission to the driver of the vehicle, Ms. Peterson, to operate the vehicle on the date of the accident. Thus, the uncontested statements set forth in Hogan's affidavit rendered summary judgment appropriate. See Utah R. Civ. P. 56(c) ("The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . 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.").

Further, the district court correctly denied the Aionos' motion to amend their complaint. Utah Rule of Civil Procedure 15(c) governs the relation back of amendments. Rule 15(c) "allows a plaintiff to cure defects in his or her original complaint despite the intervening running of a statute of limitations." Penrose v. Ross, 2003 UT App 157, ¶9, 71 P.3d 631. "Generally, however, 'rule 15(c) will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings.'" Id. (quoting Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976)).

There is an exception to this rule, which "'operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest.'" Id. (quoting Doxey-Layton Co., 548 P.2d at 906). "'New defendants

sought to be added must have an identity of interest with the original party named in the complaint, so it can be assumed or proved the relation back is not prejudicial.'" Id. at ¶20 (quoting Nunez v. Albo, 2002 UT App 247, ¶29, 53 P.3d 2) (additional citations and quotations omitted). "'Identity of interest' as used in this context means that the parties are so closely related in their business operations that notice of the action against one serves to provide notice of the action to the other." Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 217 (Utah 1984); see also Penrose, 2003 UT App 157 at ¶16 (holding that an identity of interest "requires parties to have the 'same' interest"). The Aionos have failed to make any showing that an identity of interest exists between any relevant parties in this case.

At oral argument, the Aionos admitted that there was no identity of interest between Hogan and Ms. Peterson. Instead, the Aionos argued, as they do on appeal, that there is an identity of interest between State Farm, whom the Aionos never served, and Ms. Peterson, of whom there is scant record evidence. The district court correctly held that this relationship was too attenuated and properly determined that the relation back doctrine does not apply to an amendment that adds new parties who have no identity of interest with existing parties. See, e.g., Penrose, 2003 UT App 157 at ¶19 (holding that father who owned vehicle did not have identity of interest with son who drove the vehicle); Perry, 681 P.2d at 217 (third-party action against supplier and manufacturer did not relate back to the filing of the original action as there was no evidence showing of any identity of interest with the third-party defendants other than privity of contract). Accordingly, the district court correctly denied the motion to amend the complaint.

Finally, the Aionos argue that the district court erred when it denied their motion for an extension of time. A review of the record reveals that a proper request under rule 56(f) of the Utah Rules of Civil Procedure was never made to the district court. Rule 56(f) states:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Utah R. Civ. P. 56(f).

By its clear language, rule 56(f) contemplates the filing of an affidavit. See id. Thus, Utah appellate courts have "refused to consider an argument that further discovery was necessary when the appellant had failed to file a Rule 56(f) affidavit." Callioux v. Progressive Ins. Co., 745 P.2d 838, 840 (Utah Ct. App. 1987). The Aionos did not file an affidavit as required by the rule.

Furthermore, "even if a party does file an affidavit or the court is willing to consider other material in place of an affidavit, the opposing party must nevertheless explain how the continuance will aid his opposition to summary judgment." Id. at 841. As set forth in Callioux,

the mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information . . .; and that he is desirous of taking advantage of these discovery procedures.

Id. at 840-41; see also Cox v. Winters, 678 P.2d 311, 312-14 (Utah 1984) (setting forth the requirements for a rule 56(f) application). Aside from the failure to set forth an affidavit, the Aionos failed to make any showing below that additional discovery was required in this case. Therefore, the district court correctly denied the Aionos' motion for addition time.

Accordingly, we affirm the order of the district court.

Judith M. Billings,
Presiding Judge

Russell W. Bench,
Associate Presiding Judge

Pamela T. Greenwood, Judge