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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-443 / 88-1576

IRWIN L. STEHR and BEVERLY M. STEHR,

Plaintiffs-Appellants,

vs.

DAN CONNELL, DAVID P. JENNETT, DUANE K. ROHDE and MIKE PETRICCA,

Defendants-Appellees.

Appeal from the Iowa District Court for Sac County, Ronald Schechtman, Judge.

Plaintiffs appeal an order dismissing their petition. **REVERSED AND REMANDED.**

Lon R. Tullar, Sac City, for appellants.

Dan Connell of Connell & Duffy, P.C., Storm Lake, and Colin J. McCullough of McCullough Law Firm, Sac City, for appellees Connell and Jennett.

Steve Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellees Rohde and Petricca.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

The issue we need address is whether the trial court abused its discretion in its refusal to allow the substitution of a bankruptcy trustee as plaintiff in a suit commenced by the bankrupt debtor when said suit should properly have been an asset of the bankruptcy estate. We determine the trial court abused its discretion in its refusal to allow the amendment. We reverse the order disallowing the amendment and order the bankruptcy trustee be substituted as plaintiff. We remand to the trial court.

Plaintiffs Irvin L. Stehr and Beverly M. Stehr filed a petition at law in five counts against defendants-appellees. After the incidents forming the basis on which the cause of action was predicated, Stehrs filed a voluntary petition for bankruptcy. Stehrs' alleged cause of action against defendants was not listed by the Stehrs as an asset in the bankruptcy.

Stehrs subsequently filed this action in their own name. After motions to dismiss were filed claiming plaintiffs were not the real party in interest because the claim was properly an asset of the bankruptcy estate, the trial court entered an order determining the trustee in bankruptcy, Donald Molstad, should be notified and be given opportunity to abandon or pursue the litigation prior to a hearing on the motion to dismiss. The trustee ultimately filed a motion to be substituted as party plaintiff. The

trial court dismissed the petition, disallowing the substitution.

The issue of substitution of the real party in interest as a party plaintiff under our current rules of civil procedure was addressed in M-Z Enterprises v. Hawkeye-Security Insurance Co., 318 N.W.2d 408, 410-12 (Iowa 1982). A trial court will be reversed on the granting or denial of a leave to amend only where a clear abuse of discretion is shown. M-Z Enterprises, 318 N.W.2d at 411; see also Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 539-40 (8th Cir. 1977).

If the amendment, as here, is to substitute plaintiffs, we need first determine whether the claim pled in the amendment arose from the same facts as the claim in the original petition. See M-Z Enterprises, 318 N.W.2d at 411. The petitions are identical and arise from the same set of facts. We therefore need to look at whether the correct defendants were in the case and received notice as required by the rules of civil procedure within the period of the statute of limitations. See id. Defendants were named and notified within the applicable time frame.

The only question to be resolved is whether defendants received sufficient notice of the action to avoid prejudice in maintaining a defense. "Courts have applied three tests to determine if the latter requirement is met: (1) whether defendant received adequate notice before the statute ran,

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(2) whether defendant would be prejudiced by the amendment, and (3) whether the original and new plaintiffs have an 'identity of interest.'" Id.

The test is, were defendants given fair notice and will the substitution of plaintiffs alter the claim to the prejudice of the defendants. The trial court relied on several points as to its finding of prejudice. First, the trial court found defendants were prejudiced because when the bankruptcy was filed, plaintiffs did not list the claim, and at that time, the trustee did not have authority to prosecute the claim. We disagree with the trial court's determination this is prejudicial to defendants.

The trial court determined plaintiffs and the trustee did not have an identity of interest. We disagree with this determination. The plaintiffs' and trustee's interests were identical: to recover from defendants on the identical cause of action.

We find no evidence to support a finding defendants would be prejudiced by amending to substitute the trustee as plaintiff. The amendment should have been allowed.

REVERSED AND REMANDED.