FILED
AUG 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

478

HAROLD ARTHUR SMITH and JEANETTE RAE SMITH,

Plaintiffs-Appellants,

vs.

NATHAN B. UPDEGRAFF, KENNETH L. WHITEHEAD, DARRELL D. HURLEY, ROBERT TERLOUW, and LOUISE G. McKLVEEN,

Defendants-Appellees.

Filed August 26, 1980

0-121
2-63758

Appeal from Jasper District Court - Robert O. Frederick, Judge.

Plaintiffs appeal from trial court's rulings denying their motion for leave to file an amended and substituted petition and sustaining defendants' motions for summary judgment. REVERSED AND REMANDED.

R. Fred Dumbaugh of Dumbaugh, Booth, Gross & Chapman, Cedar Rapids, Iowa, for plaintiff-appellant.

Herbert S. Selby of Selby, Updegraff & Smith, Newton, Iowa, for defendants-appellees Updegraff, Hurley, Terlouw and McKlveen.

Dennis Chalupa of Brierly, McCall, Girdner, Chalupa & Somers, Newton, Iowa, for defendant-appellee Whitehead.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Plaintiffs, Harold Arthur Smith and Jeanette Rae Smith, appeal from trial court's rulings denying their motion for leave to file an amended and substituted petition and sustaining defendants' motions for summary judgment. They allege trial court erred 1) in overruling their motion for leave to file an amended and substituted petition adding additional defendants and an additional cause of action, and 2) in sustaining defendants' motions for summary judgment. We reverse.

The basic controversy centers around plaintiff Harold Smith's[1] discharge from employment as a deputy sheriff for Jasper County. On February 6, 1976, plaintiff was given official notice by defendant Sheriff Hurley that his employment was terminated. Pursuant to section 341A.12, The Code 1975, he appealed the order to the Jasper County Civil Service Commission, comprised of defendants Updegraff, Terlouw and McKlveen. The Commission affirmed his discharge on March 18, 1976. Plaintiff appealed to district court for review of the Commission's decision alleging: 1) there was no substantial evidence to support the Commission's decision; 2) the Commission applied erroneous legal standards in reaching its decision; 3) the Commission's decision was arbitrary, capricious, an abuse of discretion, and in violation of due process; and 4) the Commission's decision was not made in good faith or for cause. By order entered March 11, 1977, district court affirmed plaintiff's discharge, finding that Hurley's action and the Commission's decision were in good faith and for cause. Plaintiff's subsequent appeal of district court's ruling to the supreme court was dismissed May 3, 1979, on the grounds that he had failed to file a timely notice of appeal.

On February 3, 1978, while his appeal to the supreme court was pending, plaintiff filed his petition in the present action alleging eight theories of liability against defendants Updegraff, Terlouw, McKlveen, Hurley and Whitehead, then Jasper County Attorney, arising from defendants' scheme to obtain plaintiff's discharge in an effort to suppress his investigations of alleged misconduct and unlawful hiring practice of the sheriff's department and to prevent his filing of criminal charges. Plaintiff Jeanette Smith sought damages for loss of consortium.

Plaintiff took discovery depositions of deputies Dick Dunsbergen and Alan Wheeler on November 3, 1978. Based on evidence allegedly elicited through the depositions, on

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[1] Subsequent reference to "plaintiff" is to Harold Smith. Plaintiff Jeanette Smith's action is for loss of consortium only.

March 23, 1979, plaintiff filed his motion for leave to file an amended and substituted petition naming Dunsbergen, Wheeler and Jasper County as additional defendants and asserting an additional claim for violation of his civil rights. Following defendants' resistance, trial court overruled plaintiff's motion, finding 1) that the amendment was not necessary in the interests of justice because the law suit had been at issue for over a year, 2) that plaintiffs had full opportunity to know, discover and consider all possible bases for complaint prior to joining of issues of the case through filing of the petition and answers of the defendants, and 3) that the amendment could result in further delay, burden and expense.

All defendants thereafter filed motions for summary judgment claiming that dismissal of plaintiff's appeal in his challenge to the Commission's decision bars plaintiff's action in this case under the doctrine of issue preclusion. On June 4, 1979, trial court sustained defendants' motions for summary judgment on that ground.

I. Leave to Amend. Plaintiffs argue that trial court erred in overruling their motion for leave to amend their petition. Defendants contend the motion was untimely or, in the alternative, was moot because of plaintiff's subsequent filing of an action in federal district court naming the additional parties in an action for violation of civil rights and because of trial court's ruling on defendants' motions for summary judgment.

Since plaintiffs' action in federal court is outside the record in this case, we cannot consider it in this appeal. Allen v. Highway Equipment Co., 239 N.W.2d 135, 143 (Iowa 1976). Likewise, our finding that trial court should not have sustained defendants' motions for summary judgment requires us to decide the issue on its merits.

The procedure for amending a pleading is governed by Iowa R. Civ. P. 88 which, in relevant part, states: "[After a responsive pleading is served] . . . a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend . . . shall be freely given when justice so requires." While amendment is the general rule and denial the exception, trial court has broad discretion to be exercised in light of all the circumstances of the particular case. Johnston v. Percy Construction, Inc., 258 N.W.2d 366, 371 (Iowa 1977). On review, we are reluctant to find an abuse of discretion when trial court has denied amendment, even though it properly could have been granted. Mora v. Savereid, 222 N.W.2d 417, 422 (Iowa 1977); Webber v. Larimer Hardware Co., 234 Iowa 1381, 1389, 15 N.W.2d 286, 290 (1944). "The advisability of allowing [amendment] is a question of fact, which is to be determined by the trial court, and the determination will not be reviewed by this court except in cases showing

a gross abuse of its discretion. . . . But the presumption is always against such abuse. . . ." Trask v. Gibbs, 200 N.W.2d 565, 568 (Iowa 1972), quoting Roberdee v. Bierkamp, 160 Iowa 687, 693-94, 142 N.W. 217, 219 (1913), (quoted in Lawyer v. Stansell, 217 Iowa 111, 117, 250 N.W. 887, 889 (19__)). Denial constitutes an abuse of discretion only in an exceptional situation where the ruling lacks any sound legal basis. Johnston, 258 N.W.2d at 371.

Applying these principles to this case, we find that trial court's ruling rests on a sound legal basis. The facts giving rise to plaintiffs' action had occurred more than three years prior to the motion; plaintiffs' petition had been on file for more than one year; the depositions of Dunsbergen and Wheeler had been taken several months earlier. While plaintiffs' attorney in colloquy with trial court stated the proposed amendment to include a new theory for recovery was merely cumulative, we conclude that bringing in additional defendants could easily have resulted in delay and expense to the original defendants. Trial court did not err in overruling plaintiffs' motion for leave to amend.

II. Motions for Summary Judgment. Plaintiffs next contend that trial court improperly granted defendants' motions for summary judgment because the record before the court shows there are genuine issues of fact as to whether defendants participated in a conspiracy resulting in plaintiff's unlawful discharge from employment and as to whether plaintiff was denied his right to due process of law in the civil service proceeding.

We first note that the general principles governing entry of summary judgment are set forth in In re Eickman Estate, 291 N.W.2d 308, 311-12 (Iowa 1980). Defendants, as the movants, have the burden of showing no material issues of fact exist and that they are entitled to judgment as a matter of law. 291 N.W.2d at 311. Even if the facts are undisputed, summary judgment is not appropriate if reasonable minds could draw different inferences from the facts. Id.; Tasco, Inc. v. Winkel, 281 N.W.2d 280, 282 (Iowa 1979). In making such determinations, trial court, as well as this court on review, must look at the entire record, including pleadings, affidavits, and answers to interrogatories, in the light most favorable to plaintiff, as the party against whom the motion is made. See Eickman, 291 N.W.2d at 312; Tasco, 281 N.W.2d at 282. Trial court can permit oral testimony to supplement the record. Eickman, 291 N.W.2d at 312; Tasco, 281 N.W.2d at 282; Iowa R. Civ. P. 237(e).

Defendants argue that plaintiffs have already litigated the issues of conspiracy and due process in the civil service appeal, that those issues were decided adversely to plaintiffs, and that the adverse ruling is a bar to relitigation of those issues in the

present action. In affirming plaintiff's discharge on appeal, district court stated: "[t]here is nothing in the record that would indicate that the Commission itself acted in bad faith or in any way abused its discretion, nor is there anything in the record that the Commission acted arbitrarily and in violation of due process of law." Thus, defendants argue, plaintiffs are precluded from relitigating the issues of bad faith (conspiracy) and denial of due process.

Our cases have held that the doctrine of issue preclusion applies if: 1) the issue in both actions is identical; 2) the issue was raised and litigated in the prior action; 3) the issue was material and relevant to disposition of the prior action; and 4) the determination of the issue in the prior action was essential to the resulting judgment. In the Matter of Evans, 267 N.W.2d 48, 51 (Iowa 1978); Mauer v. Rohde, 257 N.W.2d 489, 497 (Iowa 1977). We conclude that the doctrine does not apply in this case because the identical issues were not raised and litigated in the prior action.

In its ruling on appeal, district court stated its review was limited to evidence before the Commission that was offered in support of the alleged grounds for plaintiff's removal, "except such evidence that might have been brought out in cross-examination that would tend to affect the credibility of the testimony of Sheriff Hurley or his witnesses." (emphasis supplied) The court expressly refused to consider evidence that had not been offered at the hearing before the Commission.

This limited review neither placed in issue nor determined the broader allegations of conspiracy and deprivation of due process rights raised by plaintiff in the present action. As a result, we find material issues of fact exist which plaintiff must be permitted to develop in a proceeding on the merits. We therefore reverse trial court's order sustaining defendants' motions for summary judgment and remand the case for trial on the merits.

REVERSED AND REMANDED.