IN THE COURT OF APPEALS OF IOWA

No. 2-665 / 92-337

FILED
MAR 30 1993
CLERK SUPREME COURT

DAVID PORTER,

Appellant,

vs.

GOOD EAVESPOUTING, d/b/a GOOD CONSTRUCTION COMPANY,

Appellee.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

David Porter appeals a district court order granting defendant's motion for summary judgment and dismissing his action for damages. **AFFIRMED.**

John Conger, Wiggins & Anderson, P.C., West Des Moines, for appellant.

John B. Grier of Cartwright, Druker & Ryden, Marshalltown, for appellee.

Heard by Donielson, P.J., Hayden, J., and Perkins, S.J.*

*Senior judge from the 5th judicial district serving on this court by order of the Iowa Supreme Court.

PER CURIAM

David Porter filed a petition at law against "Good Eavespouting a/k/a Good Construction Company" for damages arising out of a personal injury action which occurred on January 11, 1989. Porter apparently did not cause the original notice to be served upon Good Eavespouting a/k/a Good Construction Company, Larry or Sandra Good, or the Goods' business, which is properly known as Good's Eavespouting, before the expiration of the statute of limitations.

On September 5, 1991, an answer was filed on behalf of the named defendant, indicating by way of affirmative defense the named defendant is not a legal entity. Defendants also filed a motion for summary judgment based upon this defense. In an affidavit filed in support of the motion for summary judgment, Larry Good stated he conducts businesses known as Good's Construction Company, Good's Eavespouting Company, and Good's L-S Storage Rental. Larry Good also stated in the affidavit he has never done business under the names set forth in Porter's petition.

Porter then filed a motion to amend the petition. He requested the caption be amended as follows: Good Eavespouting a/k/a Good Construction Company and Larry Good and Sandra Good, individually. Defendants resisted, noting the statute of limitations had run insofar as it pertained to the substitute defendants.

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Following a hearing, the district court denied the motion to amend, granted the motion for summary judgment, and dismissed Porter's action.

Porter now appeals. The Goods filed a motion to strike, contending the only issue presented for appeal was whether the trial court was correct in denying the motion to amend. The Goods argue a second issue addressed in oral arguments, whether the trial court erred in granting the motion for summary judgment, should not be considered on appeal. We note the trial court addressed both the motion to amend and the motion for summary judgment in one order. We interpret the order as the order from which this appeal arises and of necessity, must address the court's rulings on both motions.

I. **Motion to Amend**. The first issue we address is whether the trial court erred in denying Porter's attempt to amend the petition to correctly identify the individuals who owned the property upon which he allegedly had been injured. Porter contends (1) the trial court should have granted the motion to amend, and (2) the amendment should have related back to the original action which was filed within the statute of limitations.

The trial court denied the motion to amend because the amendment sought to change the defendants against whom the claim was asserted. We agree with the trial court in that the amendment proposed by Porter would amount to the

substitution of entirely new parties. See Shellhorn v. Williams, 244 Iowa 908, 918, 58 N.W.2d 361, 367 (1953). The record shows at the time Porter filed his action, there was no business in existence known as Good Eavespouting or Good Construction Company. In his motion to amend, Porter requested "Good Eavespouting a/k/a Good Construction Company and Larry Good and Sandra Good, individually" be substituted for "Good Eavespouting a/k/a Good Construction Company."

> [I]f the effect of the amendment is to substitute for the defendant a new party, such amendment amounts to a new and independent cause of action and cannot be permitted when the statute of limitations has run.

Shellhorn, 244 Iowa at 913, 58 N.W.2d at 365.

The following are examples of cases in which the Iowa Supreme Court dismissed actions because the plaintiff's amendment had amounted to a substitution of new defendants. In Jacobson v. Union Story Trust & Savings Bank, the Iowa Supreme Court dismissed the action because an amendment substituting the personal representative of a decedent originally named as decedent amounted to a new cause of action. Jacobson v. Union Story Trust & Sav. Bank, 338 N.W.2d 161, 164 (Iowa 1983). The court held the amendment did not relate back to the original petition. Id.

This same principle had also been followed in Schellhorn v. Williams. In that case, the plaintiff named

Ward S. Williams, Incorporated and Faye D. Martin as defendants in his original petition. Shellhorn, 244 Iowa at 909, 58 N.W.2d at 362. Evidence showed at the time plaintiff filed his petition, there was no corporation in existence known as Ward S. Williams, Incorporated. Id. at 911, 58 N.W.2d at 363. Plaintiff later sought to amend the original petition by substituting Elizabeth B. Williams and Elizabeth W. Driver d/b/a Ward S. Williams for Ward S. Williams, Incorporated. Id. at 910, 58 N.W.2d at 363. The court dismissed the action because the plaintiff was seeking to substitute entirely new parties after the statute of limitations had run. Id. at 918, 58 N.W.2d at 367.

Iowa Code section 614.1(2) requires an action based on injury to the person be commenced within two years after the date on which the alleged act or omission by defendant occurred. Iowa Code § 614.1(2) (1989). Porter filed the original petition on January 11, 1989, which was the last day of the two-year period. By the time Porter filed the motion to amend on December 19, 1991, the statute of limitations had run. The motion to amend was properly denied because the proposed amendment would have caused a change of parties by adding "Larry Good and Sandra Good, individually" after the statute of limitations had run. We are extremely cautious in reaching this conclusion in light of the the Iowa Supreme Court's comment in Grant v. Cedar Falls Oil Company: "We entertain some uncertainty

whether there is any difference in legal effect between amendments changing parties and amendments changing the name of a party." Grant v. Cedar Falls Oil Co., 480 N.W.2d 863, 866 (Iowa 1992).

Our courts have recognized at least one situation in which an amendment which adds a party does not create a new cause of action. This exception is involved in cases in which the plaintiff names a party by using its business trade name. In Thune v. Hokah Cheese Company, the plaintiff named defendant by his trade name in the original petition and named defendant as an individual in the amendment. Thune v. Hokah Cheese Co., 260 Iowa 347, 350-51, 149 N.W.2d 176, 177 (1967). The court held the amendment did not amount to a substitution of one party for another because the amendment only clarified defendant's identity by adding defendant's real name. Id. at 351, 149 N.W.2d at 178. The court stated the amendment only corrected a misnomer rather than substituted a new party. Id. In upholding the motion to amend, the court in Thune stated: "As long as the real party receives proper notice of the action, we are unable to see any prejudice permitting him to be sued in a trade or fictitious name alone." Id. at 353, 149 N.W.2d at 179 (emphasis added). In the case at hand, even if "Good Eavespouting a/k/a Good Construction Company" is viewed as a trade name and the amendment is viewed as merely clarifying a misnomer, the motion seeking to amend and relate back the amendment still

must be denied because there is no evidence showing the real parties, Larry and Sandra Good, received proper notice pursuant to Iowa Rule of Civil Procedure 89.

Iowa Rule of Civil Procedure 89 provides authority for an amendment to relate back to the filing of the original petition. Iowa R. Civ. P. 89; Jacobson, 338 N.W.2d at 164. Rule 89 provides:

> All amendments must be on a separate paper, duly filed, without interlining or expunging prior pleadings. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by the amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Iowa R. Civ. P. 89 (emphasis added).

The facts of this case fail to meet the notice requirement of rule 89. No evidence existed in the record that proper notice was ever served upon defendants. There is no evidence revealing how defendants became aware of the filing of the action despite no formal notice. The record shows Larry and Sandra Good have not entered this action in any manner.

Arguably the defendant named in Porter's original petition is a trade name under which an individual may conduct business and be sued. In order for a plaintiff to pursue an action against a "trade name" defendant, however, notice must be served. Thune, 260 Iowa at 353, 149 N.W.2d at 179. We conclude the lack of any proof of service in this case supports a conclusion the amendment did not relate back to the original petition. We affirm the trial court on this issue.

II. **Motion for Summary Judgment**. Porter has failed to support his relation back claim with proof which could satisfy the requirements of Iowa Rule of Civil Procedure 89. Dismissal of this suit was necessary because the named defendant did not exist, the amendment amounted to a substitution of new parties, and the amendment failed to relate back to the original petition. The trial court properly granted the motion for summary judgment on the ground the action was barred by the statute of limitations. See Jacobson, 338 N.W.2d at 164 (citations omitted). We affirm the trial court on this issue.

AFFIRMED.