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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001893-MR

PANSY MINIX — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 10-CI-00265

HOUCHENS FOOD GROUP, INC. d/b/a SAVE-A-LOT FOOD STORES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: Pansy Minix appeals an order of the Boyd Circuit Court dismissing her negligence action against Houchens Food Group, Inc., on the basis of the statute of limitations. After careful review, we affirm.

Generally speaking, "[a] new party cannot be brought into a lawsuit by amended complaint when the statute of limitations governing the claim against

that party has already expired." *Combs v. Albert Kahn & Associates, Inc.*, 183 S.W.3d 190, 194 (Ky. App. 2006) (internal footnote omitted). In this case, Minix filed a negligence action in Boyd Circuit Court based upon injuries she allegedly sustained on March 27, 2009, at a Save-A-Lot store that Houchens operated in Catlettsburg, Kentucky. Therefore, the applicable statute of limitations was one year pursuant to Kentucky Revised Statute (KRS) 413.140(1)(a), and Minix's cause of action accrued at the time of her alleged injuries. However, when Minix filed her original complaint on March 10, 2010, she named "F/AF, Inc.," as a defendant. On May 31, 2011, Minix filed her amended complaint changing the name of the defendant in her action from "F/AF, Inc.," to "Houchens Food Group, Inc." Because Houchens was added to Minix's suit after one year and because Houchens asserted the statute of limitations as a defense by way of a motion to dismiss, it became Minix's burden as plaintiff to both plead and prove an exception to the statute of limitations. *Boone v. Gonzalez*, 550 S.W.2d 571, 573 (Ky. App. 1977).

The exception Minix asserted below is the "relation-back" rule that derives from Kentucky Civil Rule (CR) 15.03; in relevant part, that rule provides:

> (1) 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 the original pleading, the amendment relates back to the date of the original pleading.
>
> (2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided

> by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) 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.

The circuit court found that CR 15.03 did not exempt Minix from the statute of limitations, and granted Houchens' motion to dismiss Minix's negligence claim. This appeal followed.

Motions to dismiss, including a motion asserting the defense of the statute of limitations, may be converted into a motion for summary judgment if matters outside the pleadings are considered by the court. CR 12.03; *see also Whittinghill v. Smith*, 562 S.W.2d 649, 650 (Ky. App. 1977). And, although the circuit court's order of dismissal recited that it was based upon CR 12.02 and 12.03, Minix correctly asserts that the circuit court's order was actually one of summary judgment: in her response to Houchens' motion to dismiss, she relied upon matters outside the pleadings in an effort to raise and attempt to prove an exception to the statute of limitations (*i.e.*, CR 15.03).

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, 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." CR 56.03. It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in her

pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co*., 281 S.W.2d 914 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate

court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

With that said, our analysis focuses upon CR 15.03(2). Under that subsection, an amended complaint that adds a party relates back only if the new party received notice of the action within the limitations period and knew or should have known of the action but for a mistake in identity of the proper party. These requirements are to be strictly construed. *Phelps v. Wehr Constructors, Inc*., 168 S.W.3d 395 (Ky. App. 2004). The Kentucky Supreme Court, in addressing the application of CR 15.03(2), has emphasized the necessity that the new party had notice of the proceedings during the relevant statute of limitations period:

> [T]the relation back rule mandates that the party to be named in an amended pleading knew or should have known about the action brought against him. CR 15.03(2)(b). Actual, formal notice may not be necessary. *Cf., Funk v. Wagner Machinery, Inc.*, Ky. App., 710 S.W.2d 860 (1986). Nevertheless, knowledge of the proceedings against him gained during the statutory period must be attributed to the defendant. CR 15.03(2)(b). As noted by the United States Supreme Court in its review of the federal relation back rule, "[T]he linchpin is notice, and notice within the limitations period."

Nolph v. Scott, 725 S.W.2d 860, 862 (Ky. 1987) (footnote omitted).

The notice requirement of CR 15.03(2) can be satisfied by notice that is "actual, informal, imputed, constructive or a combination thereof, within the limitations period." *Halderman v. Sanderson Forklifts Co., Ltd*., 818 S.W.2d 270, 273 (Ky. App. 1991). Notice will be imputed from the original party to a new

party where there exists a "sufficient identity of interest." *Id*. at 273. This sufficient identity of interest arises where the "legally binding relationships between the original and added parties imposed on the first-named party a duty promptly to apprise the other laternamed [sic] entity of the lawsuit." *Reese v. General American Door Co.*, 6 S.W.3d 380, 382 (Ky. App. 1998).

Here, Minix makes no allegation and cites nothing demonstrating that Houchens had actual, informal, or constructive knowledge of her lawsuit during the limitations period. Moreover, Minix makes no allegation and cites nothing demonstrating that Houchens has ever had any kind of relationship with F/AF, let alone any kind of relationship that would have imposed upon F/AF a duty to "promptly apprise" Houchens of Minix's lawsuit. Indeed, the pleadings and other evidence of record unequivocally demonstrate that F/AF and Houchens are unrelated entities with different agents for accepting service of process. Therefore, we cannot conclude that Houchens had the notice required by CR 15.03 that would enable Minix's claim against Houchens to relate back in time to when she filed her original complaint.

There are only two arguments offered by Minix on appeal, and neither has merit. First, Minix argues that Houchens should have had the requisite notice of her lawsuit because, on May 22, 2009, she mailed a demand letter directly to the Save-a-Lot store where she allegedly sustained her injuries, stating in relevant part that she "intend[ed] to pursue litigation with regard to the injuries she sustained while she was a business invitee with your store." But, even assuming Houchens

received this letter, the plain language of CR 15.03(2)(a) requires notice of the "institution" of an action, not the "potential" of an action.

Second, Minix accuses Houchens of failing "to properly identify their ownership and operation of their businesses." She represents in her brief that they prevented her, for "several months," from determining that Houchens was the owner and operator of the Save-A-Lot store in question.

As an aside, the record in this matter is devoid of anything indicating what efforts, if any, Minix made within the one-year limitations period to discover the identity of the owner of the Save-A-Lot store where she sustained her injuries; Minix simply represents in her brief that she was unable to do so. Minix's argument is also devoid of any evidence or authority supporting that Houchens committed any wrongdoing, or took any affirmative act, which would operate to otherwise toll the statute of limitations for negligence. As we stated in *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006),

> Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) states, in part, that an appellant's brief shall contain "[a]n 'ARGUMENT' conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law. . . ." Because [appellant's] brief lacks any citations of authority pertinent to the issue [at hand], it does not comply with CR 76.12(4)(c)(v). Rather than ordering the brief stricken for this deficiency, a more appropriate penalty in this instance is to refuse to consider [appellant's] contentions. . . . Therefore, we need not address the merits of [this] claim. . . .

Because Minix fails to cite any evidence or authority in support of her argument, we will not review it.

For these reasons, the judgment of the Boyd Circuit Court is AFFIRMED.

ALL CONCUR.

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