RENDERED: JULY 3, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-001105-MR

LAURIE M. ROGERS APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 13-CI-000653

YELLOWWOOD FRANCHISE
SERVICES, INC., D/B/A
FANTASTIC SAMS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Laurie M. Rogers has appealed from the May 31, 2013, order of the Jefferson Circuit Court granting the motion for summary judgment filed by Yellowwood Franchise Services, Inc., d/b/a Fantastic Sams and dismissing

her complaint as untimely because it was not filed within the one-year statute of limitations period. We affirm.

Rogers filed a complaint on February 7, 2013, seeking damages for injuries she sustained in a fall at a Fantastic Sams hair salon on Dixie Highway in Louisville, Kentucky on February 8, 2012. She claimed that the owner was negligent in maintaining the premises and created dangerous and harmful circumstances for her and other invitees. Rogers named Tenco, Inc., d/b/a Fantastic Sams Yellowwood (hereinafter Tenco) as the defendant in the action, believing this was the correct name of the owner of the premises. Seven days later, on February 15, 2013, Rogers filed an amended complaint, this time naming Yellowwood Franchise Services, Inc., d/b/a Fantastic Sams (hereinafter Yellowwood) as the correct defendant.

In its March 7, 2013, answer, Yellowwood stated that the amended complaint failed to state a claim upon which relief could be granted, was barred by the statute of limitations, and did not relate back to the date of the filing of the original complaint pursuant to Kentucky Rules of Civil Procedure (CR) 15 because it did not receive actual or constructive notice of the filing of the complaint, as well as several other defenses, including that it was not the owner, operator, or lessee of the premises Rogers identified in her amended complaint. Accordingly, Yellowwood requested dismissal of the complaint.

Shortly thereafter, Yellowwood filed a motion for summary judgment, in which it argued that Rogers did not commence an action against it prior to the

time the statute of limitations expired. Yellowwood claimed that it had never had a relationship with Tenco, which it stated was an unrelated corporate entity, and it included an affidavit from Glen Adams, the president of Yellowwood, stating that Yellowwood was a Kentucky corporation and did not have any directors, officers, managers, or business or personal relationship in common with Tenco. Mr. Adams also stated that Yellowwood did not receive either constructive or actual notice of the suit until February 26, 2013. Yellowwood was not named as a defendant until Rogers filed the amended complaint on February 15, 2013, which was after the one-year limitations period set forth in Kentucky Revised Statutes (KRS) 413.140(1)(a) had expired. Therefore, Yellowwood argued that Rogers' suit against it was time-barred. Furthermore, Yellowwood argued that the amended complaint could not relate back to the filing of the original complaint pursuant to CR 15.03(2) because it had never received notice of the action within the limitations period.

In her response, Rogers stated that she had relied upon a computer search on the Secretary of State's website, which did not list a corporate name or process agent for any Fantastic Sams at that address on Dixie Highway or in Louisville. Rogers also stated that the defendant's liability insurance company mailed correspondence to her listing the defendant's name as Tenco, misleading her as to the legal name of the owner of the franchise. Therefore, Rogers had been unable to discover the correct name for the defendant until after the limitations

period had expired. Under these circumstances, she argued that the amended complaint should be permitted to relate back to the timely filed original complaint.

In reply, Yellowwood stated that Rogers failed to disclose in her response that following the initial correspondence from the adjuster, ten more letters were sent to her between June and December 2012 correctly naming the defendant. The later correspondence listed Teca, Inc., the Kentucky corporation that owns Yellowwood Franchise Services. Tenco, on the other hand, is a foreign corporation and does not have a legal relationship to Yellowwood. Yellowwood cited to *Gailor v. Alsabi*, 990 S.W.2d 597, 602 (Ky. 1999), arguing that the knowledge of the insurance adjuster of a suit is not imputed to the insured. In addition, it disputed Rogers' argument that the amended complaint merely corrected the corporate name or identity of the defendant.

On May 31, 2013, the circuit court entered an opinion and order granting Yellowwood's motion for summary judgment and dismissing Rogers' action. The court determined that the amended complaint naming Yellowwood as the defendant did not relate back to the filing of the original complaint, which named Tenco, because Rogers failed to satisfy the timely notice requirement in CR 15.03(2)(a). Therefore, Rogers' claim was time-barred. The court also rejected Rogers' equitable estoppel argument due to the lack of proof of an act or conduct that misled or deceived Rogers and obstructed her from instituting her suit. This appeal now follows.

On appeal, Rogers continues to argue that her amended complaint should relate back to the filing of her original complaint because she only corrected the corporate name of the defendant and did not add a new party. Yellowwood disagrees and argues that the judgment should be affirmed.

Our standard of review in an appeal from the entry of a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is 'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "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*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). With this standard in mind, we shall review the circuit court's order.

KRS 413.140(1)(a) provides that a personal injury action must be commenced within one year of the date the cause of action accrued. In this case, Rogers' cause of action accrued on February 8, 2012; she filed her amended

complaint on February 15, 2013. CR 15.03 provides for the relation back of amendments if specific conditions have been met:

> (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.
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> (3) The delivery or mailing of process to the attorney general of the Commonwealth, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of paragraph (2) with respect to the Commonwealth or any agency or officer thereof to be brought into the action as a defendant.

Rogers contends that the original and amended complaints had sufficient identity of interest, that the amended complaint did not add a new or adverse party, and that therefore the amended complaint should relate back. She asserts that her failure to locate or identify the exact corporate name was induced by the mistakes of the defendant or its representatives, or by a mistake of the liability insurance company. She cites these extraordinary circumstances as preventing her from discovering the correct and specific corporate name within the statute of limitations period, even though she used due diligence to search for the proper name.

In support of her argument, Rogers relies upon the Supreme Court of Kentucky's opinion in *Underhill v. Stephenson*, 756 S.W.2d 459 (Ky. 1988), which addresses the application of CR 15.03(2). In *Underhill*, the Supreme Court held that the trial court erred in refusing to permit the plaintiffs to amend their complaint to add a nurse as an additional defendant in their malpractice action: "The alleged misrepresentation on the part of the hospital nurse concerning the presence of the physician in the emergency room and the identity of the nurse were not discovered until May 1, 1984 when the physician's deposition was taken." *Id*. at 460. The plaintiffs named the nurse in an amended complaint within one year of discovering the alleged negligence and sought to add an additional claim that the hospital was negligent acting through its officers, agents, and/or employees. The Supreme Court concluded that the plaintiffs had no way to discover the misrepresentation until the deposition was taken and sought to amend their complaint within one year of this discovery. We agree with Yellowwood that the holding in *Underhill* does not support Rogers' argument in this case. Rogers had several months from the date the insurance carrier properly identified the correct entity in correspondence to file her complaint within the limitations period.

Rogers also cites to *Harralson v. Monger*, 206 S.W.3d 336 (Ky. 2006), to support her argument. The Supreme Court permitted an amendment to a complaint outside of the limitations period based upon misrepresentations of a party to the lawsuit in relation to a car accident. The *Harralson* Court relied on *Munday v. Mayfair Diagnostic Laboratory*, 831 S.W.2d 912 (Ky. 1992), in which the Court

stated: "An estoppel may arise to prevent a party from relying on a statute of limitation by virtue of a false representation or fraudulent concealment." *Id*. at 914, citing *Cuppy v. General Accident Fire and Life Assurance Corp.*, 378 S.W.2d 629 (Ky. 1964). The Court concluded that while such concealment would ordinarily require an affirmative act, a failure to disclose when the law imposes such a duty "may constitute concealment" or "at least amount to misleading or obstructive conduct." *Munday*, 831 S.W.2d at 915. Again, we do not find support for Rogers' argument in either *Harralson* or *Munday*, because the misrepresentation of the proper entity was cured months before the limitations period expired, and Rogers did not submit any evidence or argument regarding why the correct corporate name could not have been discovered during the limitations period.

Furthermore, we agree with Yellowwood that it had not received the requisite notice of the filing of the original complaint because there was not a sufficient identity of interest. "[W]here there is a sufficient identity of interest between the old and new defendants, the notice requirement of CR 15.03(2) is satisfied whenever the intended defendant receives notice, be it 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). As Yellowwood points out, a sufficient identity of interest exists where "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). In the present case, there is no relationship between the original defendant, Tenco, and the later named defendant, Yellowwood. Therefore, Yellowwood had no means to receive notice of the originally filed complaint. It is not enough that the name "Yellowwood" was used in the original complaint because it had no relationship with Tenco.

Finally, we disagree with Rogers that any genuine issues of material fact remain to be decided. As a matter of law, we hold that Rogers' amended complaint cannot relate back to the filing of her original complaint and that CR 15.03 does not apply. Therefore, the circuit court did not commit any error in dismissing Rogers' action.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Allen Taylor
Louisville, Kentucky

BRIEF FOR APPELLEE:

Charles H. Cassis
Aaron J. Silletto
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