

RENDERED: JANUARY 19, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001243-MR

ANTHONY ROMANO

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 15-CI-00996

ESTATE OF BEN JOHNSON

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, DIXON, AND STUMBO,¹ JUDGES.

DIXON, JUDGE: Appellant, Anthony Romano, appeals from a judgment of the Daviess Circuit Court dismissing his negligence claim based on the statute of limitations. For the reasons set forth herein, we reverse and remand for further proceedings.

¹ Judge Janet Stumbo dissented in this opinion prior to retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed by administrative handling.

On November 7, 2013, Romano was involved in a motor vehicle accident with Ben Johnson in Owensboro, Kentucky. At the time of the accident, Romano was operating a vehicle owned by his employer and received \$306.55 in workers' compensation benefits. Romano did not receive any personal injury protection (PIP) payments.

Johnson subsequently died on October 25, 2014, and his widow, Ruth Johnson, was appointed executrix of his estate on December 10, 2014. On November 3, 2015, four days before the expiration of the applicable statute of limitations, Romano filed a negligence complaint in the Daviess Circuit Court naming only Johnson as a defendant. Service of process was unsuccessful due to Johnson being deceased, and all documents were returned to Romano.

Thereafter, on April 11, 2016, Romano filed an amended complaint naming Appellee, the Estate of Ben Johnson, as the sole defendant. The amended complaint set forth the same claims from the occurrences stated in the original complaint. Mrs. Johnson, as the executrix of the Estate, was served on April 14, 2016. The Estate then filed a motion to dismiss the complaint, arguing that Romano's claims were barred since the amended complaint was served on the Estate after the termination of the statute of limitations.

Following a hearing on July 5, 2016, the trial court entered a judgment dismissing Romano's complaint. Therein, the trial court concluded that the

language of *Gailor v. Alsabi*, 990 S.W.2d 597 (Ky. 1999), was dispositive and mandated dismissal of Romano’s complaint. The trial court observed that although the action was filed within the two-year statute of limitations, the only defendant named in the complaint was deceased. Further, the trial court relied upon the *Gailor* decision in concluding that the requirements of CR 15.03(2)(b) were not sufficiently met so as to permit Romano’s amended complaint to relate back to the original complaint, and thus be deemed within the limitations period for filing the action. The trial court subsequently denied Romano’s motion to alter, amend or vacate, and he appealed to this Court as a matter of right.

“It is well established that a court should not grant a motion to dismiss a complaint ‘unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.’” *Wagoner v. Bradley*, 294 S.W.3d 467, 469 (Ky. App. 2009), *overruled on other grounds in Hammers v. Plunk*, 374 S.W.3d 324 (Ky. App. 2011) (citing *Pari–Mutuel Clerks’ Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)). In determining whether a trial court properly dismissed a complaint on statute of limitations grounds, the issue is a matter of law. *Wagoner*, 294 S.W.3d at 469. Accordingly, our standard of review is *de novo*. *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 570 (Ky. App. 2005).

In this Court, Romano argues that the trial court erred in concluding that the *Gailor* decision mandated dismissal of his complaint. Romano contends that *Gailor* is clearly distinguishable from the instant matter in that the *Gailor* Court ruled that the amended complaint therein did not relate back because the correct party could not have known of the action as it did not even exist during the limitations period. Romano points out that the executrix herein had been appointed almost a year before the filing of the original complaint, and thus knew or should have known about the action during the applicable time period.

CR 15.03, Relation back of amendments, 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.
- (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.

In *Gailor v. Alsabi*, 990 S.W.2d 597 (Ky. 1999), Alsabi and Whalen were involved in an automobile accident. Alsabi subsequently filed suit against Whalen one day prior to the expiration of the statute of limitations. The summons was returned with the notation that Whalen was deceased. Alsabi then moved to have a public administrator appointed to administer the estate. Following the appointment, Alsabi filed an amended complaint naming the public administrator in place of Whalen. The trial court thereafter granted summary judgment in favor of the administrator on the grounds that Alsabi's action was barred by the statute of limitations. On appeal, this Court reversed, holding that CR 15.03(2) permitted the relation back of the amended complaint to the date the original complaint was filed. The Kentucky Supreme Court subsequently granted discretionary review.

In reversing this Court, our Supreme Court quoted its decision in *Nolph v. Scott*, 725 S.W.2d 860, 862 (Ky. 1987), wherein it had stated that “[t]he 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.... Nevertheless, knowledge of the proceedings against him gained during the statutory period must be attributed to the defendant.” *Gailor*, 990 S.W.2d at 601. In rejecting the relation back argument, the *Gailor* court held that “Appellee did not sue the proper defendant; and the proper defendant (the administrator) could not have had notice

within the limitations period, because he had not yet been appointed.” *Id.* See also *Hendrix v. Holbrook*, 2008-CA-001917-MR² (January 15, 2010) (“[T]here was no administrator of Holbrook’s estate at the time Hendrix filed his complaint and at the expiration of the limitations period. As in *Gailor*, an administrator could not have had notice of the action within the limitations period because he or she had not yet been appointed.”)

Contrary to the trial court’s interpretation herein, *Gailor* did not hold that a suit originally filed against a deceased defendant could never be amended past the limitations period. Rather, it held that CR 15.03 does not permit relation back where the proper party did not exist during the limitations period. However, the facts herein are clearly distinguishable. Unlike the administrator in *Gailor*, the executrix of Johnson’s estate had been appointed almost one year prior to the date Romano filed his original complaint. Thus, this is not a case of a non-existent party at the time suit was originally filed. In fact, the trial court’s conclusion that *Gailor* supports dismissal even where the Estate (the proper party) actually exists would act to vitiate the specific purpose of the relation back rule. Therefore, unlike *Gailor*, there remains a question as to whether the Estate knew or should have known about Romano’s action during the limitations period. Accordingly, Romano was entitled to conduct further discovery on the issue of whether the

² 2010 WL 135122.

Estate “(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” so as to satisfy the requirements of the relation back rule under CR 15.03.

For the reasons set forth herein, the judgment of the Daviess Circuit Court is reversed and this matter is remanded for further proceedings consistent with this opinion.

ACREE, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I dissent. While the majority correctly states that the relation back rule of CR 15.03 could have been applied to find that a question of fact remains to be determined, it appears to me that the affidavit of Mrs. Johnson, administratrix of the estate, clearly demonstrates that no question remains. Her affidavit states that until service was made in April of 2016, she had no notice of the legal claim against the estate. The attempted service against her late husband was via restricted delivery and addressed solely to Mr. Johnson.

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