2013 IL App (1st) 130214-U

FIRST DIVISION
DECEMBER 23, 2013

No. 1-13-0214

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STACEY ARRINGTON and JEFFERY HARRISON,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 10 L 5988
	)	
JAVON COOPER,	)	Honorable
	)	James N. O'Hara,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

1. ***Held:*** Order granting defendant's motion to dismiss plaintiff's complaint affirmed where the motion was timely filed, defendant was not equitably estopped from asserting the statute of limitations as a defense, and there were no genuine issues of material fact.

2. Plaintiffs Stacey Arrington and Jeffery Harrison appeal from an order of the circuit court of Cook County, granting defendant Javon Cooper's motion to dismiss (735 ILCS 5/2-619(a)(5) (West 2010)) their complaint seeking compensation for injuries sustained in an automobile accident. Plaintiffs contend that the circuit court should have denied defendant's motion to dismiss because it was untimely, that defendant should be equitably estopped from asserting the statute of limitations as a defense, and that there are genuine issues of material fact as to whether the controlling statutory requirements were met.

3. The record shows that on May 25, 2008, plaintiffs' car was rear-ended in a hit and run incident near the intersection of 159th and Halsted Streets in Harvey, Illinois.

4. On May 21, 2010, plaintiffs filed a personal injury complaint against the owner of the car, Shelby Scott (Scott), claiming that she was the driver of the vehicle that hit them, and caused their injuries. Scott was served about two weeks later, and on July 12, 2010, she filed an answer and affirmative defense, denying the allegations.

5. On October 4, 2010, Scott responded to plaintiffs' interrogatories, noting that Javon Cooper (defendant) was a witness to the incident and had knowledge of the occurrence. In a further answer two months later, Scott indicated that defendant knew why the vehicle was being used at the time of the occurrence. On the same date, December 1, 2010, Scott filed a motion for summary judgment alleging that she was the owner of the vehicle, but not the driver at the time of the incident. She further alleged that defendant was driving the vehicle for his own personal use in furtherance of his own agenda, and was not acting as her agent. In support of her motion, Scott attached her own affidavit averring that defendant, a family friend, was driving the car at the time of the accident, and that she was not the driver or the passenger. She further averred that defendant was not acting as her agent, servant or employee at the time of the accident and was using the vehicle for his own personal use.

6. On January 20, 2011, Scott was deposed but only one page of that deposition has been included in the record. In that excerpt, Scott stated that when defendant left her house with the car he said, "we're going to run up here to the gas station." Scott further stated that defendant normally borrowed her car to go places and was very dependable.

7. On March 17, 2011, after being granted leave by the court, plaintiffs filed their first amended complaint in which they essentially repeated the allegations in their prior complaint but named defendant as the driver of the vehicle who caused their injuries. Five days later, the circuit court granted summary judgment for Scott.

8. Plaintiffs subsequently served defendant, and when he failed to file an appearance or answer, plaintiffs moved for a default judgment. The circuit court ultimately granted that judgment, and then

on defendant's motion, vacated it on May 3, 2012.

9. From the pleadings, we glean that defendant subsequently filed a motion to dismiss, alleging that plaintiffs failed to meet the requirements of section 2-616(d) of the Code of Civil Procedure (Code) (735 ILCS 5/2-616(d) (West 2010)), and that their first amended complaint did not relate back to the filing date of their original complaint. Accordingly, defendant maintained the first amended complaint should be dismissed with prejudice as it is barred by the applicable statute of limitations.

10. In their response, plaintiffs alleged that they first learned that defendant was the driver on January 20, 2011, and that he was served on August 7, 2011, but "never filed an appearance, answer or other pleading." Plaintiffs further alleged that defendant allowed 10 months to pass before filing his motion to dismiss, that his motion was filed outside the time allowed by statute, and was thus untimely.

11. Plaintiffs further alleged that defendant was estopped from asserting the statute of limitations as a defense because he fled from the accident scene. Plaintiffs noted that they did not discover the identity of the driver until after the statute of limitations for personal injuries had elapsed, and alleged that there was a genuine issue of material fact as to whether defendant had actual notice of the lawsuit when Scott received notice. Plaintiffs maintained that defendant may have been getting gasoline for Scott or acting as her agent in other ways, and alleged there was evidence "lacking" as to whether defendant was "served in another capacity," thus requiring the case to proceed so that defendant's deposition could be taken and the fact questions resolved.

12. On September 18, 2012, the circuit court entered a written order granting defendant's motion to dismiss pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2010)). The court found that the motion to dismiss was not untimely, where defendant was given leave to file an appearance on May 2, 2012, and an extension to file on June 13, 2012, and plaintiffs failed to take any action to enforce service. The court also determined that equitable estoppel did not apply based

on the facts of this case where Scott filed her answer denying that she was the driver of the vehicle involved in the accident on July 12, 2010, putting plaintiffs on notice, but then plaintiffs never moved for expedited discovery to find out the identity of the driver, and, instead, waited until March 17, 2011, to file their first amended complaint. The court further found that there was no genuine issue of material fact as to whether the requirements of section 2-616(d) of the Code apply.

13. On October 16, 2012, plaintiffs filed a motion to reconsider that ruling. In addition to repeating the allegations in their response to defendant's motion to dismiss, plaintiffs alleged that when the default judgment was vacated, defendant had 21 days to respond but failed to timely file a responsive pleading. Plaintiffs further noted that when Scott filed her answer to their complaint on July 12, 2012, the statute of limitations had already expired, and they should not have had to explore every avenue to determine the identity of the driver in the accident when the driver has the responsibility to provide his identification under Illinois law. Plaintiffs maintained that defendant should not be allowed to rely on his wrongful conduct to avoid liability in this case.

14. The circuit court denied plaintiffs' motion to reconsider, finding no errors in its prior application of existing law. Plaintiffs now appeal that judgment, contending that the court erred in granting defendant's motion to dismiss.

15. As an initial matter, we observe that a copy of the motion to dismiss was not included in the record. We can, however, glean from the record the contents of that motion as the record contains a copy of the order granting defendant's motion, which detailed the arguments made by defendant in his motion to dismiss. *Allensworth v. First Galesburg National v. Bank & Trust Co.,* 7 Ill. App. 2d 1, 3 (1955).

16. In that written order, the circuit court indicated that the motion to dismiss was brought pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2010)). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external

submissions that act to defeat the claim. *Krilich v. American National Bank and Trust Co. of Chicago*, 334 Ill. App. 3d 563, 572 (2002). Section 2-619(a)(5) specifically allows for dismissal if the action was not commenced within the time limited by law. 735 ILCS 5/2-619(a)(5) (West 2010). In ruling on such a motion, the trial court must construe all the pleadings and supporting documents in the light most favorable to the nonmoving party. *In re County Treasurer*, 2013 IL App (3d) 120999, ¶16. The question on appeal is whether the existence of a genuine issue of material fact should have precluded the dismissal, or, absent such issue of fact, whether the dismissal is proper as a matter of law. *Burns v. Department of Insurance*, 2013 IL App (1st) 122449, ¶ 9. Our review of a dismissal under section 2-619 of the Code is *de novo. Id.* ¶ 9.

17. Plaintiffs first maintain that defendant's motion to dismiss was untimely since it was filed outside the period allowed by section 2-619(a)(5) (735 ILCS 5/2-619(a)(5) (West 2010)), which provides that defendant may, within the time for pleading, file a motion for dismissal of the action. Plaintiffs argue that under this premise defendant was required to file his motion to dismiss within 21 days of the vacature of the default judgment, as ordered by the trial court.

18. We note, however, that under Supreme Court Rule 183 (eff. Feb. 16, 2012), the circuit court may extend the time for filing any pleading or doing any act which is required by the rules to be done within a limited period, either before or after the expiration of that time. The court's decision to extend the time for filing a motion to dismiss is reviewed for an abuse of discretion. *Scoby v. Vulcan-Hart Corp.*, 188 Ill. App. 3d 89, 93 (1989).

19. The record here shows that on April 25, 2012, defendant filed a motion to vacate the default judgment entered against him and requested 21 days to answer or otherwise plead. On May 3, 2012, the court granted the motion and request. On June 13, 2012, the court allowed defendant two more weeks to file his motion to dismiss, which, according to plaintiffs, defendant filed on June 27, 2002. This filing fell within the extension granted to him, and to which there is no record indicating that plaintiffs objected. On these facts, we find no abuse of discretion by the court in granting defendant

an extension to file his motion (*Uretsky v. Baschen*, 47 Ill. App. 3d 169, 179 (1977)), and defendant's motion to dismiss was not untimely.

20. Plaintiffs next contend that equitable estoppel applies to this case, and that the trial court should not have allowed defendant to benefit from his wrongful conduct to avoid liability. Plaintiffs further maintain that the court should not have imposed excessive obligations on them to ascertain the identity of the driver where Illinois law provides that it is the driver's responsibility to provide his identification. In doing so, plaintiffs cite an Indiana case in support. We observe that the decisions of foreign jurisdictions are not binding on this court, and that there is ample Illinois case law to resolve the issue raised. *Carroll v. Curry*, 392 Ill. App. 3d 511, 517 (2009).

21. In order for plaintiffs to invoke estoppel against a statute of limitations defense, plaintiffs must have relied on the acts or representations by defendant which caused them to refrain from filing within the applicable statute of limitations. *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 182 (2011). The doctrine of equitable estoppel will not apply to a case if defendant's conduct terminated within ample time to allow plaintiff an opportunity to timely file a cause of action. *Kheirkhahvash*, 407 Ill. App. 3d at 182. However, where ample time does not remain under a statute of limitations, plaintiff will be allowed a reasonable period to bring suit. *Butler v. Mayer, Brown and Platt*, 301 Ill. App. 3d 919, 926 (1998).

22. Here, the record shows that the accident which led to the complaint took place on May 25, 2008. Plaintiffs filed their complaint on May 21, 2010, four days prior to the expiration of the statute of limitations, against the owner of the car, Scott, whom they believed was the driver. However, on July 12, 2010, they learned that Scott was not the driver; on October 4, 2010, they were apprised that defendant had knowledge of the incident; and, on December 1, 2010, they knew that defendant was the driver. Notwithstanding this notice, plaintiffs waited until February 23, 2011, seven months after first learning that Scott was not the driver, to request leave to file an amended complaint against the proper defendant, which they filed on March17, 2011. On these facts, we find that defendant should

not be estopped from asserting the statute of limitations as a defense to plaintiffs' first amended complaint.

23. Plaintiffs next contend that they raised genuine issues of material fact as to whether the requirements of section 2-616(d) of the Code (735 ILCS 5/2-616(d) (West 2010)) were met such that the amended complaint related back to the date of the filing of the original complaint. Plaintiffs maintain there is a genuine issue of material of fact as to whether defendant had actual notice of the lawsuit when Scott received notice.

24. In cases of misnomer, the relation-back doctrine applies and the amended complaint naming the proper defendant is considered filed upon the date of the original complaint. *Fassero v. Turigliatto*, 349 Ill. App. 3d 368, 370 (2004). However, in cases of mistaken identity, the relation-back doctrine does not apply unless the factors of section 2-616(d) (735 ILCS 5/2-616(d) (West 2010)) are met. *Fassero*, 349 Ill. App. 3d at 370.

25. In the instant case, plaintiffs believed that Scott, the owner of the vehicle that rear-ended them, was the driver, and filed a complaint against her, instead of defendant, who they subsequently learned was the actual driver. Accordingly, this case was not one of misnomer, but mistaken identity, requiring that we determine if there is a genuine issue of material fact as to whether the factors of section 2-616(d) of the Code were met such that the amended complaint related back to the date of the filing of the original complaint. *Fassero*, 349 Ill. App. 3d at 373-74

26. Section 2-616(d) of the Code requires that (1) the statute of limitations had not expired when the original action was commenced; (2) that the added party, within the time that the action might have been brought against him plus the time for service permitted under Supreme Court Rule 103(b) (eff. July 1, 2007), received such notice of the commencement of the action, and would not be prejudiced by defending the lawsuit, and knew or should have known that, but for the mistake concerning the identity of the proper party, plaintiff would have sued the person; and (3) that the cause of action grew out of the same occurrence. 735 ILCS 5/2-616(d) (West 2010). The relation-

back doctrine provides that all of the requirements of section 2-616(d) of the Code must be satisfied before plaintiff can add a defendant after the statute of limitations has expired. *Biggerstaff v. Moran*, 284 Ill. App. 3d 196, 201 (1996).

27. The record here shows that the statute of limitations had not expired when the original action was commenced on May 21, 2010, but was filed four days short of the expiration period in which they could seek compensation for the personal injuries allegedly sustained in the accident on May 25, 2008. As such, the requirement of subsection 2-616(d)(1) was satisfied. The record also shows that the amended pleading sets forth a cause of action that grew out of the same occurrence described in the original pleading, thus satisfying subsection 2-616(d)(3) of the statute. *Fassero*, 349 Ill. App. 3d at 376.

28. As for subsection 2-616(d)(2), the arguments made by plaintiffs and defendant appear to rely on the prior version of the statute, rather than the 2002 amended version, which applies to the instant case. Plaintiffs claim that there is a genuine issue of material fact as to whether defendant had actual notice when Scott received notice of the lawsuit and speculate that defendant could have been getting gasoline for Scott or acting as her agent in other ways, and claim that there is evidence lacking as to whether defendant was served in another capacity. Defendant responds that in their first amended complaint, plaintiffs did not allege an agency relationship between him and Scott at the time of the occurrence, that plaintiffs' argument that he was served in some other capacity is nonsensical as he is an individual and not an entity, and that plaintiffs admit that they failed to meet the service of summons requirements of subparagraph 2-616(d)(3).

29. Under the prior version of section 2-616(d) of the Code (735 ILCS 5/2-616(d)(3) (West 2000)), service of summons and knowledge of the original action were required; however, as amended, only notice of the commencement of the action is required (*Polites v. U.S. Bank National Ass'n,* 361 Ill. App. 3d 76, 84-85 (2005)).

30. Plaintiffs maintain that there is a genuine issue of material fact as to whether defendant had

actual notice of the commencement of the action when Scott was served. While there is some indication in the record that defendant was a family friend, the record is devoid of any evidence that Scott showed the complaint to defendant such that he would have actual notice of it (*Cf. Fassero*, 349 Ill. App. 3d at 376), nor actual knowledge as in *Maggi v. RAS Development Inc.*, 2011 IL App (1st) 091955, ¶¶ 34, 38. Plaintiffs, as the appellants, have the burden to present a sufficiently complete record on appeal, and in the absence of such a record on appeal, any doubts which may arise from the incompleteness of the record will be resolved against them. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

31. In addition, because service occurred after the statute of limitations had run, it must fall within the period of reasonably diligent service as allowed by Rule 103(b) to qualify as timely notice under section 2-616(d). *Polites*, 361 Ill. App. 3d at 85. The record in this case shows that plaintiffs did not serve defendant until August 7, 2011, more than a year after they learned that Scott was not the driver, and the statute of limitations had run. As noted in *Polites*, 361 Ill. App. 3d at 86, a lengthy delay in service nullifies any protection against stale claims that the statute of limitations may afford defendant. Under these circumstances, as in *Polites*, we conclude that the amended complaint cannot relate back to the original complaint. *Polites*, 361 Ill. App. 3d at 86-87.

32. In reaching this conclusion, we find *Maggi* distinguishable from the case at bar. In *Maggi*, this court considered amended section 2-616(d), in light of *Krupski v. Crociere*, 560 U.S. 538 (2010), where the supreme court addressed a relation-back argument under Federal Rule 15(c)(1)(c) (eff. Dec. 1, 2009), upon which our present section 2-616(d) is patterned (*Mann v. Thomas Place, L.P.*, 2012 IL App (1st) 110625, ¶ 25, n.3; *Compton v. Ubilluz*, 351 Ill. App. 3d 223, 233 (2004)). Under the specific language of the statute, this court found that the focus is on defendant's knowledge, rather than that of plaintiffs, and that it was evident in that case that defendant knew that it was the proper party and was thus not prejudiced in having to defend the lawsuit on the merits. *Maggi*, ¶¶ 37-38. Here, by contrast, defendant's knowledge was not evident, or shown, and we thus

find no error by the court in granting defendant's motion to dismiss plaintiffs' amended complaint.

33. We, therefore, affirm the order of the circuit court of Cook County, granting defendant's motion to dismiss plaintiffs' complaint with prejudice.

34. Affirmed.