WANDA CLINT, et al, Plaintiff-appellants v. R.M.I. COMPANY, et al, Defendant-appellees

Nos. 57187, 57258

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

December 13, 1990

PRIOR HISTORY: [*1]

Character of Proceeding: Civil appeal from Court of Common Pleas; Case No. 84-077,398.

DISPOSITION:

JUDGMENT: REVERSED AND REMANDED.

COUNSEL:

For plaintiff-appellants: THOMAS MESTER, JOEL LEVIN, DEAN NIEDING, Attorneys at Law, Cleveland, Ohio, TIM EBLY, Attorney at Law, Barnwell, S. Carolina.

For defendant-appellees RMI Co. and National Distillers Products Co.: HAROLD H. READER, III, Attorney at Law, Cleveland, Ohio, ALAN M. PETROV, Attorney at Law, Cleveland, Ohio.

For defendant-appellee USX: R. PATRICK BAUGHMAN, L. LEE BOATRIGHT, D. MICHAEL GRODHAUS, Attorneys at Law, Cleveland, Ohio.

For defendant-appellee Southern Textile Corp.: GARY D. SHARP, Attorney at Law, Farmington Hills, Michigan.

For defendant-appellee Owens-Corning Fiberglass Corp.: TERENCE J. CLARK, Attorney at Law, Cleveland, Ohio.

For defendant-appellee Pittsburgh Corning Corp.: GARY D. HERMANN, BRADFORD R. CARVER, TIMOTHY M. FOX, Attorneys at Law Cleveland, Ohio.

JUDGES:

Francis E. Sweeney, Judge. Patton, C.J. concurs. John F. Corrigan, J. concurs in part and dissents in part.

OPINION BY:

SWEENEY

OPINION:

JOURNAL ENTRY and OPINION

Plaintiff-appellant Wanda [*2] Clint, the wife of decedent Bernard Clint and administratrix of his estate, appeals, pursuant to Civ. R. 54(B), (1) the dismissal of her wrongful death action against two asbestos manufacturers based upon the expiration of the statute of limitations and (2) the granting of summary judgment on her Blankenship intentional tort claim in favor of her late husband's employer, R.M.I. Corporation "(RMI") and its two partners, USX Corporation ("USX") and National Distillers Products Company ("National Distillers"). n1 For the reasons adduced below, we reverse the decision of the trial court and remand this matter to the lower court for further proceedings.

n1 The two asbestos manufacturers are Owens-Corning Fiberglass Corporation and Pittsburgh-Corning Corporation.

A review of the record reveals that on July 10, 1984, the decedent and his wife filed a tort action based upon asbestos-related disease against RMI, USX, National Distillers and a number of named and unnamed asbestos manufacturers and distributors. Owens-Corning [*3] and Pittsburgh-Corning were not named, either actually or fictionally, in the original complaint.

On March 24, 1984, Mr. Clint died from his asbestos-related illnesses. On May 1, 1985, with leave of court, Mrs. Clint filed a first amended complaint on her own behalf and as administratrix for her late husband's estate. This first amended complaint reiterated the claims made in the first pleading and added a wrongful death cause of action. Among those listed as new-party defendants were six fictionally-named defendants, as follows:

JOHN KOE CO. AND/OR CORP. (Name and address unknown). Manufacturer, distributor, supplier, installer and/or seller of asbestos products to [the defendant

employer].

and

JOHN NOE CO. AND/OR CORP. (Name and address unknown). Manufacturer, distributor, supplier, installer and/or seller of asbestos products to [the defendant employer].

Plaintiff did state, in the body of the first amended complaint, that she did "not know the names of these companies, corporations and/or business entities and could not, in the exercise of due diligence, discover their names." The plaintiff failed to name or obtain service on any of these unnamed denfendants within the following [*4] year.

On September 16, 1986, with leave of court, the plaintiff filed a second amended complaint which included several more claims for relief and named several additional defendants. This pleading did not include any unnamed defendants.

On February 26, 1987, with leave of court, the plaintiff filed a third amended complaint. This pleading included the unnamed defendants "John Koe Co. and/or Corp." and "John Noe Co. and/or Corp." described in the caption as follows:

(Name and address unknown). Manufacturer, distributor, supplier, installer and/or seller of asbestos products to R.M.I. Company, Ashtabula, Ohio.

The plaintiff did not state in the body of the third amended complaint that she had been unable to discover the names of these unknown parties.

It is not contested that the two-year statute of limitations for her wrongful death cause of action expired on March 24, 1987, approximately one month after the filing of the third amended complaint. See R.C. 2125.02(D).

Plaintiff claims, and the record supports, that service of the third amended complaint on Pittsburgh-Corning and Owens-Corning was made on December 28, 1987 and January 5, 1988, respectively, which is within one year [*5] of the filing of that pleading. The summonses on both of these defendants described these defendants fictitiously, exactly as described in the caption of the third amended complaint. See Civ. R. 15(D).

On February 16, 1988, with leave of court and pursuant to Civ. R. 15(D), plaintiff filed her fourth amended complaint, in which she identified "John Koe Corp." and "John Noe Corp." as being Pittsburgh-Corning and Owens-Corning. These now-known defendants were again served by summons on February 18, 1988 and February 19, 1988, respectively.

Following the granting of the motions for summary judgment on the Blankenship causes of action and the granting of the motions to dismiss based on lack of commencement, plaintiff initiated these appeals, which were consolidated for purpose of appeal. Plaintiff raises two assignments of error for review.

ASSIGNMENT OF ERROR I.

THE TRIAL COURT ERRED IN RULING THAT PLAINTIFF'S WRONGFUL DEATH ACTIONS AGAINST "JOHN DOE" DEFENDANTS, OWENS-CORNING AND PITTSBURGH-CORNING, WERE BARRED BY THE STATUTE OF LIMITATIONS, WHERE, WITHIN ONE YEAR, AFTER THE FILING OF THE TIMELY-FILED THIRD AMENDED COMPLAINT NAMING SEVERAL DEFENDANTS BY FICTITIOUS NAMES, OWENS-CORNING [*6] AND PITTSBURGH-CORNING WERE SERVED AND IDENTIFIED AS TWO OF THE JOHN DOE DEFENDANTS NAMED THEREIN.

At issue in the assignment of error is (1) whether the dictates of Civ. R. 15(D) are available to appellant and (2) if that rule is available, whether appellant complied with the technical requirements of that rule. n2

n2 Civ. R. 15(D) provides:

> When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant.

In the first issue, the defendant/manufacturers argue that Civ. R. 15(D) applies only where a plaintiff, at the time of filing his action, knows the "identity" but not the name of a "John Doe" defendant. See, Varno v. Bally Mfg. [*7] Co. (1985), 19 Ohio St. 3d 21. Defendants contend that the plaintiff did not identify nor describe the defendant/manufacturers sufficiently to permit service of process pursuant to Civ. R. 15(D). Since a corporation has no separate existence, any knowledge of that corporation, its officers, products or facilities would imply knowledge of the name of the corporation.

To adopt the reasoning of defendants on this issue would preclude the application of Civ. R. 15(D) with

regard to a corporate defendant.

Specific identification of a "John Doe" defendant is not required. See Civ. R. 15(D). In the present case, plaintiff's designation of the "John Doe" defendants as manufacturers, distributors and installers of asbestos products to defendant/employer RMI, complied with the dictates of Civ. R. 15(D) as their having been designated "by any name and description."

Turning to the second issue of this assignment, whether plaintiff complied with the technical requirements of Civ. R. 15(D) in designating an unknown defendant with a fictitious name, we note that under the rule, a plaintiff must: (1) "aver in the complaint the fact that he could not discover the name"; (2) include in the summons [*8] the words "name unknown"; and (3) personally serve a copy of that summons on the defendant.

In the present case, the "John Doe" summonses contained the phrase "name and address unknown." Further, these summonses were personally served on the corporations' statutory agents. See Civ. R. 4.2(6) and R.C. 1707.07(A), (H). The only conceivable debate surrounds whether plaintiff averred in the complaint that she could not discover the names of the "John Doe" defendants. Research into this issue reveals that no case has ever defined the term "aver." Therefore, we shall apply the commonly accepted definition of "aver" as meaning to assert or declare. See Webster's Third New International Dictionary (1986), 150.

In addressing this second issue, we are mindful that the rules of civil procedure "shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice"; thus, a liberal construction is emphasized. Civ. R. 1(B); and Peterson v. Teodosio (1973), 34 Ohio St. 2d 161. Also, pleadings are to be construed liberally so as to do substantial justice. Civ. R. 8(F). The question remains whether [*9] plaintiff complied fully with Civ. R. 15(D). We find that she did fully comply under the circumstances, keeping in mind the construction and effect to be given the rules of procedure.

Plaintiff, in the caption of the third amended complaint, specifically used the assertion "(Name and address unknown)" when designating the "John Doe" defendants. The civil rules of procedure do not state, and appellees do not provide citation, that the averment in question must only be in a numbered paragraph contained in the body of the complaint. Civ. R. 15(D) only requires that the averment be made "in the complaint."

A complaint is a pleading. Civ. R. 7(A). Every pleading must maintain a certain form, which includes, in the case of a complaint, a caption, separate statement of claims for relief in separately numbered paragraphs, and a demand for judgment. Civ. R. 8(A), 10(A) and (B). Here, the averment was made in that part of the complaint known as the caption. Cf. Mark v. Mellott Mfg. Co. (Sep. 13, 1989), Ross App. No. 1494, unreported (the phrase "name unknown" not contained in the caption or in the complaint's body, thus Civ. R. 15(D) not complied with); also, see, Vocke v. Dayton [*10] (1973), 36 Ohio App. 2d 139 (The unnamed defendnts were named in the caption "John Doe, real name unknown, address unknown," yet the court ruled that Civ. R. 15(D) did not save the action because plaintiff had no clue as to the identity of the "John Doe" defendant. In the case sub judice, plaintiff identified the defendant/manufacturers.).

Additionally, every pleading of a party represented by counsel must be signed by at least one attorney of record. Civ. R. 11. That attorney's signature is a certification by that attorney that he has read that pleading and that, to the best of his knowledge, there is good ground to support it. Civ. R. 11. It is logical to assume that the attorney for plaintiff in this case had a good ground to support the language used in the description of the parties. That good ground is that the parties' names and addresses were unknown. To have the plaintiff reiterate his inability to discover the name of the "John Doe" defendant in the body of the complaint would be surplusage. Construing the pleadings in a liberal fashion so as to achieve the intent of the rules of civil procedure, we find that the language used herein in the caption and the presence of [*11] counsel's signature satisfy the averment requirement of Civ. R. 15(D). To hold otherwise would be to reward form over substance.

Assignment affirmed.

ASSIGNMENT OF ERROR II.

THE TRIAL COURT ERRED IN GRANTING THE MOTIONS FOR SUMMARY JUDGMENT OF DECEDENT'S EMPLOYER, R.M.I. COMPANY, AND ITS PARTNERS, NATIONAL DISTILLERS AND U.S.X. CORP., WHERE PLAINTIFF SUBMITTED EVIDENCE ON EACH OF THE ELEMENTS NECESSARY UNDER VAN FOSSEN TO ESTABLISH AN INTENTIONAL TORT CLAIM AGAINST THESE DEFENDANTS.

The supreme court had cause to address the standard for granting a motion for summary judgment in employer intentional tort cases thusly:

In deciding whether the trial court correctly granted summary judgment to Goodyear, we must follow Civ. R. 56 and view the record in the light most favorable to the party opposing the motion. * * * Further, the inferences to be drawn from the underlying facts contained in depositions, affidavits, and exhibits must be construed in

the opposing party's favor. When so construed, the motion must be overruled if reasonable minds could find for the party opposing the motion. * * *

Kunkler v. Goodyear Tire & Rubber Co. (1988), 36 Ohio St. 3d 135, 138, and:

[*12]

Upon motion for summary judgment pursuant to Civ. R. 56, the burden of establishing that the material facts are not in dispute, and that no genuine issue of fact exists, is on the party moving for summary judgment. Harless v. Willis Day Warehousing (1978), 54 Ohio St. 2d 64, 8 O.O.3d 73, 375 N.E.2d 46. However, in that Civ. R. 56(E) requires that a party set forth specific facts showing that there is a genuine issue for trial, such party must so perform if he is to avoid summary judgment. Accordingly, in an action by an employee against his employer alleging an intentional tort, upon motion for summary judgment by the defendant employer, the plaintiff employee must set forth specific facts which show that there is a genuine issue of whether the employer had committed an intentional tort against his employee.

Van Fossen v. Babcock & Wilcox Co. (1988), 16 Ohio St. 3d 100, paragraph seven of the syllabus.

In the present case, plaintiff's response to the motions for summary judgment set forth specific facts which, when construed most strongly in her favor, establish a genuine issue of material fact under the Van Fossen, supra, standard. That response contained the [*13] deposition of the deceased, where he testified that he came into frequent contact with asbestos dust in his duties as a pipefitter. That same deposition contained further testimony by the deceased regarding RMI's failure to institute an asbestos safety program until 1979, and the failure of RMI to implement asbestos safety measures or warn of asbestos health hazards prior to 1979. The deposition of the decedent's doctor was also in evidence. In that deposition, the doctor testified to diagnosing pulmonary asbestosis in the decedent in May of 1983, and that the decedent died as a result of that disease. Plaintiff's expert witness stated in his affidavit that the decedent's occupational exposure to asbestos was substantially certain to have caused the decedent's pulmonary asbestos is. Answers to interrogatories filed by one of the defendant/corporate partners and submitted by plaintiff showed that in 1977, that corporate partner began a comprehensive safety program at one of its factories, yet this same safety program was not begun in the partnership's factory. At the very least, we find that these facts raise a genuine issue of fact whether RMI had knowledge to a substantial certainty [*14] that the decedent's injury would occur. See, Pariseau v. Weder Products, Inc. (1988), 36 Ohio St. 3d 124, 129; Sanek v. Duracote Corp. (1989), 43 Ohio St. 3d 169; and Van Fossen, supra, paragraph five of the syllabus.

Assignment affirmed.

Judgment reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellees their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

CONCUR BY:

CORRIGAN (In Part)

DISSENT BY:

CORRIGAN (In Part)

DISSENT: J.F. CORRIGAN, J., CONCURRING IN PART AND DISSENTING IN PART:

I concur in the majority's [*15] reversal of the trial court's grant of summary judgment against the plaintiff on her intentional tort claim. However, I would affirm the trial court's dismissal of her wrongful death action against the defendant manufacturers based upon the expiration of the applicable statute of limitations. Precedent from the Supreme Court of Ohio and this court require strict application of Civ. R. 15(D).

In the instant action the plaintiff failed to comply with the technical requirements of the rule. Under Civ. R. 15(D), in order to designate an unknown defendant with a fictitious name, a plaintiff must: (1) aver in the complaint that the plaintiff could not discover the name; (2) include in the summons the words "name unknown"; and (3) personally serve the summons upon the defendant.

The plaintiff's third amended complaint fails to contain an averment that she was unable to discover the defendants' names. Thus, the plaintiff failed to satisfy the first requirement. The plaintiff's failure to fully comply with Civ. R. 15(D) precludes the application of that rule to toll

the statute of limitations. The Supreme Court of Ohio and this court have previously held that a party must strictly comply with [*16] the requirements of Civ. R. 15(D) in order to invoke its provisions. See Amerine v. Haughton Elevator Co. (1989), 42 Ohio St. 3d 57, 59; Franks v. Village of Newburgh Hts. (Oct. 1, 1987), Cuyahoga App. No. 52814, unreported. Moreover, the Fourth District Court of Appeals has specifically held that a party's failure to make the proper averments in a complaint precludes the operation of the rule. See Mark v. Mellott Mfg. Co. Inc. (Sept. 13, 1989), Ross App. No. 1494, unreported.

Accordingly, I would affirm the trial court's judgment in this respect.