[Cite as *Scaglione v. Saridakis*, 2009-Ohio-4702.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91490

BENEDETTO SCAGLIONE, ET AL.

PLAINTIFFS-APPELLANTS

vs.

GEORGE A. SARIDAKIS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-545171

BEFORE: Cooney, A.J., Rocco, J., and Stewart, J.

RELEASED: September 10, 2009

JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Plaintiff-appellant, Benedetto Scaglione ("Scaglione"), appeals the trial court's denial of his motion to correct the record. Finding no merit to the appeal, we affirm.

{¶ 2} This case arose in October 2004, when Scaglione sued several defendants after he was struck by a vehicle at an auto repair shop. In May 2007, a jury awarded Scaglione $333,000 in damages, finding American Family Insurance Company liable. In July 2007, the trial court entered a $333,000 judgment against American Family Insurance Company and the

defaulting defendants, including The Car Corner.[1] In November 2007, Scaglione moved to "correct the record," asking the court to modify this judgment entry nunc pro tunc by substituting Thomas McCutcheon ("McCutcheon"), the owner of The Car Corner, in place of The Car Corner. After a hearing on the issue, the trial court denied the motion.

{¶ 3} Scaglione now appeals. In his sole assignment of error, he claims that the trial court abused its discretion in failing to correct the record nunc pro tunc to substitute McCutcheon as the sole proprietor for The Car Corner. We disagree.

{¶ 4} Underlying this appeal are the following facts and procedural history. When Scaglione initially filed his lawsuit in October 2004, he named "ABC Automobile Dealership" as one of the defendants. He later amended the complaint, replacing ABC Automobile Dealership with "The Car Corner." Although the amended complaint did not reflect that The Car Corner was the fictitious name of a business entity and did not name McCutcheon as a defendant, McCutcheon was personally served with the amended complaint.

{¶ 5} In July 2005, the court held a case management conference, and The Car Corner failed to appear. At the second case management conference

[1]Several defendants settled with Scaglione and are not parties to the instant appeal.

in September 2005, McCutcheon appeared on behalf of The Car Corner. The trial court advised him that he could not represent The Car Corner because he was not an attorney licensed to practice law in Ohio. McCutcheon indicated that he would secure counsel and was granted 30 days to respond to the amended complaint. In November 2005, the trial court granted default judgment against The Car Corner. Scaglione proceeded to a jury trial in May 2007 against the defendant American Family Insurance Company and was awarded $333,000 in damages. In July 2007, the trial court entered final judgment reflecting the $333,000 award against American Family Insurance Company and the defendants that had not filed responsive pleadings, including The Car Corner.

{¶ 6} Scaglione subpoenaed McCutcheon in November 2007 and concluded that The Car Corner was an unregistered fictitious name for a sole proprietorship owned by McCutcheon. Scaglione claimed that he did not know the legal status of The Car Corner until after the trial court had entered judgment, because "The Car Corner" name was not registered with the Ohio Secretary of State. Then Scaglione moved to have the trial court "correct" its July 2007 judgment entry nunc pro tunc by substituting McCutcheon for The Car Corner. Following a hearing on the matter, the trial court denied the motion in a nine-page judgment entry and opinion.

Standard of Review

{¶ 7} Civ.R. 60(A) governs Scaglione's motion to correct the judgment entry. It provides:

> "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

{¶ 8} We review a trial court's decision to grant or deny a Civ.R. 60 motion for an abuse of discretion. See *Strack v. Pelton*, 70 Ohio St.3d 172, 1994-Ohio-107, 637 N.E.2d 914. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 9} The Ninth District explained the function of a nunc pro tunc entry in *State v. Greulich* (1988), 61 Ohio App.3d 22, 24-25, 572 N.E.2d 132:

> "A nunc pro tunc order may be issued by a trial court, as an exercise of its inherent power, to make its record speak the truth. It is used to record that which the trial court did, but which has not been recorded. It is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued. Thus, the office of a nunc pro tunc order is limited to memorializing what the trial court actually did at an earlier point in time. *State, ex rel. Phillips v. Indus. Comm.* (1927), 116 Ohio St. 261, 155 N.E. 798. It can be used to supply information which existed but

> was not recorded, to correct mathematical calculations, and to correct typographical or clerical errors. *Jacks v. Adamson* (1897), 56 Ohio St. 397, 47 N.E. 48.
>
> "A nunc pro tunc order cannot be used to supply omitted action, or to indicate what the court might or should have decided, or what the trial court intended to decide. Its proper use is limited to what the trial court actually did decide. *Webb v. Western Reserve Bond & Share Co.* (1926), 115 Ohio St. 247, 153 N.E. 289. That, of course, may include the addition of matters omitted from the record by inadvertence or mistake of action taken. See Black's Law Dictionary (5 Ed. 1979) 964. Therefore, a nunc pro tunc order is a vehicle used to correct an order previously issued which fails to reflect the trial court's true action."

{¶ 10} In the instant case, the trial court found that a nunc pro tunc entry would be improper for several reasons. First, The Car Corner had been known by no other name throughout the litigation, and Scaglione never amended his complaint to name McCutcheon as a party. Moreover, throughout the pendency of the suit, Scaglione had never described The Car Corner as a fictitious name for a sole proprietor. The court had not omitted McCutcheon's name simply because of an oversight, and the judgment entry accurately reflected what the court actually decided.[2]

{¶ 11} Nonetheless, Scaglione asserts that the trial court would not be modifying the judgment by substituting McCutcheon's name for the fictitious

[2]The trial court also found that Scaglione had not met his burden to show by clear and convincing evidence that the record contained mistakes. Scaglione did not attach any evidence that The Car Corner was a sole proprietorship owned by McCutcheon, or that Scaglione had consulted the Secretary of State's office to search for The Car Corner.

name of his business. He reaches this conclusion by observing that (1) Ohio law permits a party to commence an action against an entity with a fictitious name, and (2) a business that a sole proprietor operates under a fictitious name is not separate from the sole proprietor.

{¶ 12} Still, on the facts before us, we cannot conclude that the trial court abused its discretion. It did not act arbitrarily or unconscionably. To the contrary, it set forth detailed reasons for its conclusion.

{¶ 13} The trial court declared in its entry:

> "Plaintiff relies upon *Family Medicine Foundation, Inc.*, 96 Ohio St.3d 183, 2002-Ohio-4034[, 772 N.E.2d 1177] for the premise that there is no legal distinction between a sole proprietor and his fictitious name. However, *Family Medicine Foundation* is not apposite to the facts at hand. The Ohio Supreme Court simply held in *Family Medicine Foundation* that 'R.C. 1329.10(C) permits a plaintiff to bring suit against a party named only by its fictitious name.' Id. at 187. *Family Medicine Foundation* did not address the issue of whether a final judgment could be altered to add the name of the legal entity behind a fictitious name. Also, the facts of *Family Medicine Foundation* differ from the facts here because *Family Medicine Foundation* involved a lawsuit brought against a fictitious name used by a corporation while the Plaintiff in the case sub judice alleges that he brought suit against a fictitious name used by a sole proprietor. In making a distinction between the use of fictitious names by corporations as opposed to sole proprietors, the Supreme Court reviewed its prior decision in *Patterson v. V & M Auto Body* (1992), 63 Ohio St.3d 573, where it held that a plaintiff may not maintain an action against a defendant solely under a fictitious name where the plaintiff knows that the defendant does business as a sole proprietor. The Supreme Court noted that *Patterson* was not applicable to the facts of *Family Medicine Foundation* and did not overturn *Patterson* when holding that a plaintiff may bring suit against a party named only by its fictitious name. In distinguishing

> the facts in *Patterson* from the facts in *Family Medicine Foundation*, the Supreme Court noted the good faith efforts made by plaintiffs to identify the legal entity behind the fictitious name. This differs from the plaintiff in *Patterson* who, despite knowing the identity of the individual operating a business under a fictitious name, chose not to amend the complaint to properly identify him as a defendant.
>
> "The facts in the case sub judice, while not directly on point with either *Patterson* or *Family Medicine Foundation*, are, in this Court's opinion, more analogous to the scenario in *Patterson*. Under the holding in *Family Medicine Foundation*, Plaintiff's decision to name the fictitious entity, The Car Corner, as a defendant instead of naming the sole proprietor doing business as The Car Corner was permissible. However, following the holding in *Patterson*, Plaintiff's lawsuit against The Car Corner may not be maintained if Plaintiff knew the identity of the individual behind the fictitious name. The Court finds that the holding in *Patterson* and the dicta in *Family Medicine Foundation* requires * * * Plaintiff to make at least some effort to determine the individual or legal entity behind a fictitious name, especially in situations involving sole proprietorship. Assuming the case sub judice does in fact involve a sole proprietorship, which Plaintiff has failed to establish by either clear and convincing proof or a preponderance of the evidence, then Plaintiff was aware of the identity of the individual, Thomas McCutcheon, operating the sole proprietorship under a fictitious name. Plaintiff failed to amend his pleading accordingly to add Mr. McCutcheon. To allow the record to be amended post judgment would be prejudicial to Mr. McCutcheon and contrary to the holding of *Patterson*."

{¶ 14} We find the trial court's reasoning does not constitute an abuse of discretion. The sole assignment of error is overruled.

{¶ 15} Judgment is affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
MELODY J. STEWART, J., CONCUR