

COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

THOMAS J. WOZNIAK

Plaintiff-Appellant

-vs-

ROBERT POTTER, et al.

Defendants-Appellees

JUDGES:

Hon. Julie A. Edwards, P. J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 24956

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. CV 2008-05-3878

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 30, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee Estate

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Wise, J.

{¶1} Appellant Thomas J. Wozniak appeals the decision of the Court of Common Pleas, Summit County, which dismissed his complaint for defamation against Appellees Robert F. Linton (deceased) and the Estate of Robert F. Linton. The relevant facts leading to this appeal are as follows.

{¶2} On May 20, 2008, appellant filed a pro se civil action for defamation in the Summit County Court of Common Pleas against Appellees Robert F. Linton (deceased) and the Estate of Robert F. Linton, c/o Attorney Howard Calhoun. The complaint, which alleged that the acts of defamation had occurred on or about May 26 and 27, 2007, was facially filed within the pertinent one-year statute of limitations under R.C. 2305.11(A).

{¶3} On June 20, 2008, appellees filed a motion to dismiss under Civ.R. 12(B)(2) and 12(B)(4), asserting lack of personal jurisdiction over Linton and the estate.

{¶4} On July 3, 2008, appellant filed his first amended complaint, essentially substituting Attorney Philip Kaufmann for Attorney Howard Calhoun. On July 21, 2008, appellees filed a motion to strike appellant's attempt to amend the complaint, as well as a supplemental motion to dismiss on March 27, 2009.

{¶5} In the meantime, on May 4, 2009, Robert Potter entered the picture and filed an application in the Summit County Probate Court to administer the estate of Linton. The probate court judge apparently granted said application on the same day.

{¶6} On May 18, 2009, in the defamation action, appellant filed instructions with the Summit County Clerk of Courts for service on Potter. On the same day, the Summit County Sheriff served Potter with appellant's first amended complaint.

{¶17} On June 2, 2009, appellant again filed an amended complaint, this time adding Robert Potter, Administrator of the Estate of Robert F. Linton. On June 12, 2009, appellees filed a brief in opposition to appellant's attempt to amend the complaint.

{¶18} On August 7, 2009, the trial court granted dismissal as to "Defendant Robert F. Linton and Robert Potter, Administrator of the Estate of Robert F. Linton." Judgment Entry at 6. The court also therein found that "Plaintiff failed to properly name an executor or administrator prior to May 20, 2009 and thereby failed to timely obtain proper service." Id. The entry also includes Civ.R. 54(B) language stating there is no just cause for delay.

{¶19} On September 3, 2009, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

{¶10} "I. THE COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS-APPELLEES ROBERT F. LINTON AND THE ESTATE OF ROBERT F. LINTON TO DISMISS, INsofar AS THE DISMISSAL APPLIES TO ROBERT POTTER, THE DULY APPOINTED ADMINISTRATOR.

{¶11} "II. THE COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION TO AMEND THE COMPLAINT."

I.

{¶12} In his First Assignment of Error, appellant contends the trial court erred in granting appellees' motion to dismiss, as applied to Potter, the administrator, for failure to timely obtain proper service. We disagree.

{¶13} Civ.R. 3(A) addresses the "commencement" of an action in a civil case. The rule states:

{¶14} “A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).”

{¶15} In turn, Civ.R. 15(C) states in pertinent part as follows:

{¶16} “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. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) 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.

{¶17} “***”

{¶18} Generally, an estate itself cannot be sued; rather, the action must be against the executor or administrator in his or her representative capacity. *St. Clair v. Person*, Hamilton App.No. C-010094, 2002-Ohio-1129, citing *Bateman, Admr. v. Morris* (1898), 7 Ohio Dec. 287, 289.

{¶19} In the case sub judice, the original defamation complaint of May 20, 2008 lists appellant, a practicing attorney, as the sole plaintiff, and names the following defendants:

{¶20} “ROBERT E. (sic) LINTON (deceased)

{¶21} ESTATE OF ROBERT E. (sic) LINTON c/o Howard Calhoun (sic)

{¶22} Roderic (sic) and Linton Attorneys

{¶23} 1500 One Cascade Plaza

{¶24} Akron, Ohio 44310

{¶25} “JOHN DAILEY (sic)”¹

{¶26} Dailey (sic) and Haskins Attorneys

{¶27} 7 West Bower St.

{¶28} Akron, Ohio 44308”

{¶29} On July 3, 2008, as noted in our recitation of facts, appellant filed an amended complaint, essentially substituting Attorney Philip Kaufmann for Attorney Howard Calhoun. However, appellees provided uncontroverted affidavits to the trial court from Calhoun and Kaufmann averring that neither attorney had ever stood in any representative capacity for the estate of Robert F. Linton. (See attachments to appellees’ motions of June 20, 2008 and March 27, 2009).

{¶30} Upon review, we find the July 3, 2008 amended defamation complaint was the extant complaint on May 18, 2009, when appellant obtained service on Robert Potter, as the administrator of the estate of Robert F. Linton. However, on May 18, 2009, said amended complaint remained lacking in that it just named the deceased

¹ Attorney Daily’s alleged involvement in this matter is not relevant to this appeal.

defendant and his estate, and had not yet been amended to include Potter as the administrator. *St. Clair*, supra. Appellant did not attempt to correct the improper defendants under Civ.R. 3(A) and Civ.R. 15(C) until June 2, 2009, which was more than one year after the original complaint filing date of May 20, 2008. Despite appellant's arguments to the contrary, simply having Potter named by the probate court as the administrator of the estate within one year of the defamation complaint does not alone ensure compliance with Civ.R. 3(A) and Civ.R. 15(C).

{¶31} Accordingly, we hold the trial court did not err in granting the motion to dismiss as to Potter as the estate administrator, as well as Mr. Linton, deceased. Appellant's first Assignment of Error is overruled.

II.

{¶32} In his Second Assignment of Error, appellant contends the trial court erred in denying his motion of June 2, 2009 to amend the complaint to add Potter as a defendant. We disagree.

{¶33} Because a trial court maintains the discretion whether to deny leave to amend, an appellate court will not reverse a decision denying leave to amend a pleading absent an abuse of that discretion. *Brown v. FirstEnergy Corp.*, 159 Ohio App.3d 696, 699, 825 N.E.2d 206, 2005-Ohio-712, citing *Wilmington Steel Prod., Inc. v. Cleveland Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 122, 573 N.E.2d 622.

{¶34} Under the facts of the case sub judice, even if appellant's requested addition of Potter as a party-defendant constitutes an amendment of the defamation complaint under App.R. 15(C), appellant did not even request to so add Potter until nearly one month after Potter's appointment as the administrator by the Summit County

Probate Court and approximately two weeks after the one-year service requirement of Civ.R. 3(A).

{¶35} Therefore, even if the trial court was factually mistaken by concluding that no executor or administrator had been named for the Linton estate prior to May 20, 2009 (one year following appellant's complaint), we are unable to conclude the trial court abused its discretion in denying appellant's untimely motion to amend of June 2, 2009.

{¶36} Appellant's Second Assignment of Error is overruled.

{¶37} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Summit County, Ohio, is affirmed.

By: Wise, J.

Edwards, P. J., and

Delaney, J., concur.

JUDGES

JWW/d 0420

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

THOMAS J. WOZNIAK

Plaintiff-Appellant

-vs-

ROBERT POTTER, et al.

Defendants-Appellees

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JUDGMENT ENTRY

Case No. 24956

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Summit County, Ohio, is affirmed.

Costs assessed to appellant.

JUDGES