45325-8

No. ~~46138-2-II~~

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

BUSINESS SERVICES OF AMERICA II, INC.,

Appellant,

v.

WAFERTECH LLC,

Respondent.

APPELLANT'S OPENING BRIEF

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Business Service America II, Inc.

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A. Introduction

> What's in a name? that which we call a rose
> By any other name would smell as sweet
>
> — W. Shakespeare, *Romeo & Juliet* (1597)

The plaintiff in this action, Business Service America II, Inc., ("BSA"), was incorrectly identified in judgments by the name "Business Services of America II, Inc." Just as calling a rose by another name does not change its scent, the mistake in BSA's name does not change who the plaintiff was and is (Business Service America II, Inc.). When BSA attempted to correct the misnomer, as authorized by CR 60(a), the trial court denied the motion, without providing a reason. BSA is appealing that denial.

The trial court's denial of what should have been almost a formality has potentially significant consequences. BSA is seeking to recover over $1.1 million under its lien claim. Adding prejudgment interest for 16 years (12% per year for 16 years on $1.1 million is over $2.1 million), BSA's potential recovery is at least $3.2 million, plus attorney's fees. Consistent with CR 1, adjudication of this claim on its merits should not be jeopardized by a minor mistake in a name..

This is the fourth appeal in this matter. The first two appeals (in 2002 and 2009) resulted in reversals of trial court dismissals of BSA's lien

claim. The third appeal (in 2013) is pending. *BSA v. WaferTech*, No. 45325-8-II.

B. Assignments of Error

Assignment of Error

1. The trial court erred when it denied BSA's CR 60(a) motion to correct the name of the plaintiff in two judgments.

Issues Pertaining to Assignment of Error

1. Has BSA, as the assignee of the original plaintiff, Natkin/Scott, been the plaintiff in this action since 2001? (Assignment of Error No. 1)

2. Do mistakes in identifying BSA in the caption and judgments constitute "errors therein arising from oversight" that can be corrected under CR 60(a)? (Assignment of Error No. 1)

3. Does the correction of a party's name involve the substitution of a new party under CR 17(a)? (Assignment of Error No. 1)

C. Statement of the Case

WaferTech is the owner of a semiconductor plant constructed in Clark County. CP 2. Natkin/Scott was a subcontractor on the project who was terminated in 1998. *Id.* Natkin/Scott recorded a lien for amounts it claimed it was owed, and initiated this action to foreclose its lien against the WaferTech property. *Id.*

Scott Co. was one of the joint venture partners in Natkin/Scott. CP 122. Scott Co. owned the lien claim being asserted in this action. *Id.* Joe Guglielmo was the president of Scott Co. *Id.*

In 1999, Scott Co. assigned the lien claim to BSA. *Id.* BSA was a Delaware corporation from 1999-2006. *Id.* Joe Guglielmo was also president of BSA. *Id.* BSA is pursuing this action as part of the winding up of its affairs. *Id.*

The second amended complaint filed in 2001 substituted BSA for Natkin/Scott as the plaintiff. CP 37. BSA's counsel incorrectly identified BSA as "Business Services of America II, Inc." *Id.*[1]

In the second sentence of paragraph 1 of the second amended complaint, the plaintiff is identified as "the assignee of claims by Natkin/Scott arising out of the WaferTech project." *Id.* In its answer, "WaferTech admits the second sentence of paragraph 1." CP 45. The answer did not raise as an affirmative defense that the plaintiff was not the real party in interest. *Id.*

WaferTech obtained a judgment against BSA (identified as "Business Services of America II, Inc.") in 2002 for approximately $1 million in attorney's fees and costs. CP 58. BSA prevailed in overturning the trial court's dismissal of its lien claim, while the judgment for

[1] There is no record of a Delaware corporation named "Business Services of America II, Inc." ever existing.

attorney's fees was affirmed. *BSA II, Inc. v. WaferTech, LLC*, 2004 WL 444724 (Wn.App. Div. 2, March 9, 2004). That judgment was satisfied. CP 61.

WaferTech obtained another dismissal and judgment against BSA (still identified as "Business Services of America II, Inc.") in 2009. CP 64. BSA obtained a reversal of that judgment in this Court, and again in the Washington Supreme Court. *BSA II, Inc. v. WaferTech, LLC*, 159 Wn.App. 591, 245 P.3d 257 (2011), *aff'd* 174 Wn.2d. 304, 274 P.3d 1025 (2012).

In 2013, the trial court entered summary judgment in favor of WaferTech on its affirmative defense of setoff. CP 82. The trial court then entered a judgment for $430,000 in attorney's fees against BSA. CP 84. Both judgments were prepared by WaferTech's counsel, and identified BSA as "Business Services of America II, Inc." CP 82, 84. The appeal of the these judgments is pending in this Court. *BSA v. WaferTech*, No. 45325-8-II.

After the entry of judgments by the trial court in 2013 and subsequent appeal, WaferTech pointed out that it could find no record of a Delaware corporation named "Business Services of America II, Inc." CP 88. BSA promptly moved under CR 60(a) to amend the judgments to correct the name of the judgment debtor to "Business Service America II,

Inc." CP 105. WaferTech objected, asserting BSA had not explained the "mistake" in its name. CP 112. The trial court denied the motion without prejudice. CP 119.

BSA then filed a renewed CR 60(a) motion to correct its name in the judgments. CP 137. BSA's counsel explained that in the second amended complaint, filed thirteen years earlier, the new plaintiff was the assignee of Natkin/Scott's claim. CP 128. BSA's counsel "could not recall" how BSA came to be incorrectly named "Business Services of America II, Inc." *Id.* His "intent was to accurately name the assignee." *Id.* Joe Guglielmo, as BSA's former president, authorized the correction of BSA's name. CP 122.

WaferTech opposed the renewed CR 60(a) motion, but did not deny that it understood that the plaintiff was the assignee of Natkin/Scott and its judgment was against Natkin/Scott's assignee. CP 149. The trial court denied BSA's motion, without providing a reason or entering any findings or conclusions in support of its ruling. CP 158. This appeal timely followed. CP 161.

D. Summary of Argument

The motion to correct the name of the judgment debtor should have been a formality. There is no dispute that the correct name of the plaintiff since 2001 was Business Service America II, Inc., which was the

assignee of the lien claim by the original plaintiff, Natkin/Scott. There is no dispute that the trial court intended to enter judgment against Natkin/Scott's assignee.

There is unanimous authority that a mistake in a party's name in a judgment can be corrected under CR 60(a). The trial court's unexplained refusal to do so when requested is an error this Court can correct.

E. Argument

1. BSA, as the assignee of Natkin/Scott, has been the plaintiff since 2001.

BSA has been the plaintiff in this action since 2001. It was the assignee of Natkin/Scott, the original plaintiff. As the assignee, it stood in the shoes of Natkin/Scott. An assignee stands in the shoes of its assignor. *Mutual of Enumclaw v. USF*, 164 Wn.2d 411, 424, 191 P.3d 866 (1999).

Here, there is no dispute that the plaintiff in this action since 2001 has been "the assignee of claims by Natkin/Scott." CP 37. WaferTech admitted this in its answer to the second amended complaint in 2001. CP 45. Also not in dispute is that (1) BSA is the assignee of Natkin/Scott, and (2) BSA's correct name is "Business Service America II, Inc."

The erroneous identification of BSA as "Business Services of America II, Inc." was an oversight. There is no evidence that the error

was made for strategic reasons or that BSA gained an advantage from the error.

The mistake in naming BSA does not affect whether it has been the plaintiff. WaferTech, the trial court, and even this Court, have proceeded with the plaintiff being the assignee of Natkin/Scott. WaferTech has not been prejudiced. WaferTech obtained the benefit of a judgment in 2002 that resulted in the payment of over $1 million to WaferTech, when the judgment incorrectly identified the judgment debtor as "Business Services of America II, Inc."

BSA's dissolution in 2006 did not affect its status as plaintiff. Under Delaware law, a dissolved corporation may continue any action begun within three years of dissolution. Del. Code. Ann. Tit. 8 § 278. A dissolved corporation continues to exist and can wind up its affairs, including collecting assets. RCW 23B.14.050(1).

When the trial court entered judgment against the plaintiff in 2013, it intended to enter judgment against the assignee of Natkin/Scott. That assignee is BSA. BSA was and is the plaintiff.

2. An error in the name of a party, termed a "misnomer," is a mistake that can be corrected under CR 60(a).

The error in naming BSA arose out of an oversight which can be corrected. Errors arising out of oversight can be corrected, even after review is accepted, pursuant to RAP 7.2(e). CR 60(a).

The full text of the CR 60(a) is as follows:

> **CR 60. RELIEF FROM JUDGMENT OR ORDER**
>
> **(a) Clerical Mistakes**. *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* of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e). (italics added)

Here, the error in naming BSA in the judgments arose from the oversight by BSA's counsel in not accurately setting forth BSA's full name in the caption and papers submitted to the trial court, with WaferTech's counsel repeating the misnomer when it prepared the judgments. An error in the name of a party is a "misnomer" that can be corrected under CR 60(a). *Entranco Eng'rs v. Envirodyne, Inc.*, 34 Wn.App. 503, 507, 662 P.2d 73 (1983) (judgment against "Envirodyne, Inc." could be corrected to be against "Envirodyne Engineers, Inc.").[2]

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[2] Amendment is allowed when a plaintiff makes a mistake in its own name. In *California Central Airlines v. Fritz*, 337 P.2d 531 (Cal.App. 1959), the complaint identified the plaintiff as "California Central Airlines," which did not exist, which was amended to its

In *Entranco*, *supra*, the plaintiff was seeking to recover from Envirodyne Engineers, Inc., ("Engineers") a subsidiary corporation of Envirodyne Industries, Inc., formerly known as Envirodyne, Inc. The defendants' actions in the complaint described those of Engineers and the complaint was served upon Engineers. However, the named defendant was "Envirodyne, Inc." Plaintiff obtained a default judgment against "Envirodyne, Inc."

When the plaintiff moved to correct the judgment under CR 60(a) to substitute Engineers' name for that of Envirodyne, Inc., the trial court denied the motion. The Court of Appeals reversed. It ruled that the misnomer constituted an "error arising from oversight or omission" which could be corrected. 134 Wn.App. 507. Pursuant to its authority under RAP 12.2 and RCW 2.06.030, the Court of Appeals ordered that the judgment below be amended to substitute the proper name of the judgment defendant. 134 Wn.App. at 508.

The key in *Entranco* was that the trial court intended to enter the "judgment against the party whose activities were described in the complaint." 134 Wn.App. at 507. Similarly, the trial court here intended to enter a judgment against the assignee of Natkin/Scott's lien claim. That

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correct name, "California Coastal Airlines." In *Smith v. Combustion Resources Eng'g, Inc.*, 431 So.2d 1249 (Ala.1983), the plaintiff was permitted to correct its name from "Combustion Resources Energy, Inc." to "Combustion Resources Eng'g, Inc.").

assignee was BSA. Correcting the name of BSA in the judgments will carry out the trial court's intent.

FRCP 60(a) is similar to CR 60(a). The *Entranco* court cited FRCP 60(a) and federal decisions applying that rule to support its decision. *Id.* In *Fluoro Elec. Corp. v. Branford Ass.*, 489 F.2d 320 (2nd Cir. 1973), the plaintiff named as defendant "Branford Associates, a corporation" (which never existed), while the defendant answered as "Branford Developers, Inc." Judgment was entered against "Branford Associates, a corporation." The trial court granted a FRCP 60(a) motion to substitute "Branford Associates" as the judgment defendant. 489 F.2d at 323. This "was properly the correction of a misnomer under Rule 60(a)." 489 F.2d at 326.[3]

A limitation on the power to correct errors is that judicial errors may not be corrected. That limitation is not applicable here, as the error in naming BSA is not a judicial error. A judicial error involves a matter of substance. *Marchel v. Bunger*, 13 Wn.App. 81, 533 P.2d 406 (1975). It is an error involving judicial reasoning or determination. 46 Am.Jur.2d *Judgments* § 142 (2006). An error in a party's name is not a judicial error. *Id.* at § 144.

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[3] Massachusetts, applying a rule identical to FRCP 60(a), permitted a plaintiff to correct its name after judgment was entered. *Labor v. Sun Hill Industries, Inc.*, 720 N.E.2d 841 (Mass.App. 1999).

The trial court here did not make an erroneous determination or decision to enter judgment against "Business Services of America II, Inc." rather than "Business Service America II, Inc." That was not a choice presented to the trial court. The trial court merely relied upon the accuracy of the judgment prepared by WaferTech's counsel, who was relying upon plaintiff's counsel in naming BSA. An error by the trial court in signing a document in misplaced reliance on the counsel who prepared it may be corrected under CR 60(a). *In re Kramer's Estate*, 49 Wn.2d 829, 830-1, 307 P.2d 274 (1957).

The misnomer was an oversight that could be corrected under CR 60(a). There was no reason for the trial court to not correct the error. Just as the appellate court did in *Entranco*, *supra*, when the trial court failed to correct a misnomer, this Court can use its authority under RAP 12.2 and RCW 2.06.030 to correct the name of BSA in the judgments and caption in the trial court.

3. <u>Correcting a misnomer is not a substitution of a party</u>.

Correcting the name of BSA under CR 60(a) will not be a substitution of a party under CR 17(a). The correction of a misnomer does not change the party. C. Wright & A. Miller, *Fed. Prac. & Proc.* § 1498.2 (2008).

Here, BSA, as the assignee of Natkin/Scott, has been the plaintiff since 2001. BSA cannot be substituted into an action in which it is already the plaintiff. After correction, BSA will continue to be the plaintiff.

4. BSA seeks its attorney's fees.

BSA seeks its attorney's fees under RAP 18.1 when it prevails in this appeal. BSA is pursuing a mechanic's lien foreclosure claim. The prevailing party in a mechanic's lien foreclosure action is entitled to recover its reasonable attorney's fees, costs, and expenses. RCW 60.04.181(3)

F. Conclusion

BSA has been the plaintiff in this action since 2001. Just as an error in naming a flower does not change its scent, the error in naming BSA as "Business Services of America II, Inc." (a misnomer) does not affect BSA's status as plaintiff. BSA promptly attempted to correct the misnomer when WaferTech pointed it out. BSA's motion to correct its name was authorized by CR 60(a) and supported by case law. For reasons known only to the trial court, it refused to correct the misnomer.

BSA asks that this Court correct BSA's name in the judgments as part of the remand.

DATED this _4th_ day of June, 2014.

HULTMAN LAW OFFICE

By:_____
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Attorney for Appellant Business
Service America II, Inc.

Appendix

1. State of Delaware 2003 Annual Franchise Tax Report - Business Service America II, Inc. CP 127

2. Delaware Division of Corporations Report – Business Service America II, Inc. CP 147

3. Del. Code. Ann. Tit. 8 § 278

013201

STATE OF DELAWARE
2003 ANNUAL FRANCHISE TAX REPORT

DO NOT ALTER FILE NUMBER

PHONE NUMBER: 925-934-0827

FILE NUMBER	CORPORATION NAME		DATE OF INACTIVITY	
3073436	BUSINESS SERVICE AMERICA II, INC.	RENEWAL/REVOCATION DATE	FROM / /	TO / /

FEDERAL EMPLOYER'S NO.	INCORPORATION DATE						
58-2481535	JULY 23, 1999						
AUTHORIZED STOCK BEGIN DATE	ENDING DATE	DESIGNATION OR STOCK CLASS	NO. OF SHARES	PAR VALUE/SHARE	NO. SHARES ISSUED	TOTAL GROSS ASSETS	ASSET DATE
07-23-1999		COMMON	5,000	.010000	100	0	12/31/03

ASSETS FOR REGULATED INVESTMENT CORPS: JAN. 1st / DEC. 31st

FRANCHISE TAX	$100.00 PENALTY	1.5% MONTHLY INTEREST	ANN. FILING FEE	PREV CREDIT OR BALANCE	PREPAID QRTY. PAYMENTS	AMOUNT DUE
$ 35.00	$ —	$ —	$ 25.00	$ —	$ —	$ 60.00

MAKE CHECK PAYABLE TO:
DELAWARE SECRETARY OF STATE

CHECK NO.	AMOUNT ENCLOSED
1003	60.00

REGISTERED AGENT 9000010
THE CORPORATION TRUST COMPANY
CORPORATION TRUST CENTER
1209 ORANGE STREET
WILMINGTON, DE 19801

2 030104 3073436 000006000 0 9

$100.00 PENALTY if not Received on or before
MAR 1, 2004 Plus 1.5% interest per month.

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NATURE OF BUSINESS	PRINCIP. PLACE OF BUSINESS OUTSIDE OF DELAWARE
EQUIPMENT LEASING/FINANCE	CALIFORNIA

DIRECTORS	NAME	STREET/CITY/STATE/ZIP	DATE TERM EXPIRES
1.	J.A. GUGLIELMO	1500 PLEASANT HILL RD, LAFAYETTE, CA 94549	N/A
2.	K.T. NARRESO	" " " " "	N/A
3.	R.W. DAVIS	" " " " "	N/A
4.			
5.			
6.			

DO NOT WRITE IN THIS SPACE - FOR BANK USE ONLY

OFFICERS	NAME	STREET/CITY/STATE/ZIP	DATE TERM EXPIRES
1.	J.A. GUGLIELMO	1500 PLEASANT HILL RD, LAFAYETTE, CA 94549	N/A
2.	R.W. DAVIS	" " " " "	N/A

ORIGINAL SIGNATURE (OFFICER, DIRECTOR OR INCORPORATOR)	TITLE	DATE
X [signature]	CFO	1/25/04

APPENDIX – 1

Department of State: Division of Corporations

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Entity Details

File Number:	3073436	Incorporation Date / Formation Date:	07/23/1999 (mm/dd/yyyy)
Entity Name:	BUSINESS SERVICE AMERICA II, INC.		
Entity Kind:	CORPORATION	Entity Type:	GENERAL
Residency:	DOMESTIC	State:	DE
Status:	VOID	Status Date:	03/01/2006

REGISTERED AGENT INFORMATION

Name:	THE CORPORATION TRUST COMPANY		
Address:	CORPORATION TRUST CENTER 1209 ORANGE ST		
City:	WILMINGTON	County:	NEW CASTLE
State:	DE	Postal Code:	19801
Phone:	(302)658-7581		

Additional Information is available for a fee of $20.00. This information will include current franchise tax assessment, current filing history and more..

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APPENDIX – 2

§ 278. Continuation of corporation after dissolution for purposes of suit and winding up affairs.

Delaware Statutes

Title 8. Corporations

Chapter 1. GENERAL CORPORATION LAW

Subchapter X. Sale of Assets, Dissolution and Winding Up

Current through 2014 Legislative Session, Act Chapter 227

§ 278. Continuation of corporation after dissolution for purposes of suit and winding up affairs

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

Sections 279 through 282 of this title shall apply to any corporation that has expired by its own limitation, and when so applied, all references in those sections to a dissolved corporation or dissolution shall include a corporation that has expired by its own limitation and to such expiration, respectively.

Cite as 8 Del. C. § 278

History. 8 Del. C. 1953, § 278; 56 Del. Laws, c. 50; 66 Del. Laws, c. 136, §36; 77 Del. Laws, c. 290, §26.;

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by email, by agreement of counsel, on the _4th___ day of June, 2014, to:

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