

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

68512-1

DERRICK GALLARD,

Plaintiff/Appellant,

v.

JOHN ANDERSON, and DOLORES ANDERSON
and the Marital community thereof, RAYMOND
and ARDIS DUMETT, and the Marital community
thereof, THE RAYMOND-ARDIS DUMETT
TRUST, DOES 1-25,

Defendants/Appellees.

) CASE NO.: 11-2-01813-6
) APPELLANT'S OPENING
) BRIEF

) (revised)

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APPELLANT'S OPENING BRIEF
MAY 18 2011
LAWRENCE A. HILDES

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GALLARD v. ANDERSON, et al. - 11-2-01813-6 –
Plaintiff/Appellant's Opening Brief

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PLAINTIFF/APPELLANT HEREBY SUBMITs the following opening brief in this matter:

I. INTRODUCTION

Plaintiff-Appellant Derrick Gallard herein appeals the February 24, 2012 order of the Whatcom County Superior Court dismissing this matter pursuant to CR 15(c). At that time, the court below conceded that these were novel issues and strongly recommended an appeal so that the Appellate Court of this state could directly address and decide the issues present. Plaintiff-Appellant agrees and this case is thus presented herein.

II. STATEMENT OF JURISDICTION

This court has jurisdiction as this a direct appeal from a final judgment of Superior Court pursuant to RAP 2.2(a)(1) which was the Trial Court pursuant to RAP 4.1(a), and is therefore an appeal as a matter of right pursuant to RAP 6.1.

III. APPELLANT'S STATEMENT OF THE ISSUES PRESENTED

A. Whether RCW 4.16 time bars continuation of an action where Plaintiff filed within the three year statute of limitations for negligence actions, and then shortly after the three year date, amends to add necessary parties that were just discovered, and

serves the added parties within the 90 days allowed for initial service without serving the original named parties.

B. Whether CR 15(c) time bars continuation of an action where Plaintiff filed within the three year statute of limitations for negligence actions, and then shortly after the three year date, amends to add necessary parties that were just discovered, and serves the added parties within the 90 days allowed for initial service without serving the original named parties.

C. Whether the additional named Defendants' refusal to cooperate with Plaintiffs efforts to locate the original named parties is relevant.

IV. ASSIGNMENTS OF ERROR

1. The court erred in finding that the combination of timely filing the action and then, after amending, serving the added Defendants (who are the actual owners of the property) within 90 days of filing of the action did not properly commence the action under RCW 4.16.005 and RCW 4.16.170.

2) The court erred in not finding that the service upon the Dumett Defendants within 90 days of commencing the action did not meet the requirement for proper notice of the action under CR 15(c)

3) The court erred by not finding the Dumett Defendant's refusal to cooperate with Plaintiff in locating the Anderson Defendants, where the name is too common to

allow a timely search where serving the Andersons would have clearly meant that Plaintiff had fully commenced the action under 15(c).

4) The court erred for all of the above reasons in then granting judgment to Defendants.

V. STATEMENT OF THE CASE

On July 14, 2008, Plaintiff Derrick Gallard, who was a sub-tenant at a residence at 1442 Roy Road in Bellingham, a house owned by Defendants Raymond and Ardis Dumett and the Dumett family trust, and managed by defendants John and Dolores Anderson broke his back when he fell off the roof of the residence after being directed to rake leaves off the roof by the Andersons on behalf of the Dumett Defendants in return for a reduction in his rent. He had been given no safety equipment or instruction before or while undertaking the work. Plaintiff suffered great pain, significant medical bills and a long term disability as a result of the fall (P 15 of record).

Plaintiff who was a subtenant at the residence and paid his rent to the master tenant, had been told by the Andersons that the Andersons were the property owners and had no reason to disbelieve that. (P 15 of record).

On July 8, 2011 Plaintiff spoke with and entered a representation agreement with counsel and hired counsel to file the case. He had previously not been able to

afford to retain counsel or file the action. Plaintiff sent counsel his medical bills and such other information as he had. (PP 8, 15 of record)

On July 13, 2011, having received that information, counsel completed the complaint and filed it naming the Andersons as the owners and landlords of the property. (PP 8,15 of record).

Only after filing the action within the three year statute, and attempting to gather the information to serve the summons and complaint on the Andersons, did counsel for Plaintiff discover that Plaintiff was mistaken about the owners of the property. (PP 8, 9, 16 of record)

Counsel immediately called his client who began attempting to locate and contact his former housemate, who had been the master tenant. It took Plaintiff several weeks to locate the former master tenant who had enlisted in the Navy and was by then stationed in Japan. (P 9, 16 of record)

The master tenant verified that the master tenant had been sending his rent checks to the Dumetts even though the Andersons managed the property and were the face of the owners to the tenants. (P 9, 16 of record)

Plaintiff promptly notified counsel who immediately amended the complaint, and filed the amended complaint promptly on September 8, 2011 (55 days after the filing of the original complaint-54 days after the three years elapsed) and as Defendants state in their declarations, were able to serve Defendants at their home in Seattle one week

later on September 15, 2011 the 62nd day from the filing of the original complaint, 61st day after the three year anniversary of the incident. (PP 9, 12, 16 of record)

When counsel and his legal assistant served the Demits, Mrs. Dumett remarked, "Oh the Andersons. I haven't heard about them in a long time." She then declined to give contact information for the Andersons. (P 12, 16 of record).

To this day, Plaintiff and counsel have been unable to locate the Andersons. (PP 10, 16 of record).

One week later, counsel received a call from an insurance adjuster for the Dumett Defendants, asking them for a letter of representation and asking them to work with the adjuster to attempt to resolve the matter before any attorney was retained by the insurance company. (P 16 of record)

While negotiations were continuing, counsel received a call on November 1, 2011 from counsel for Defendants informing counsel that he was appearing in the action. Aside from filing a notice of appearance, Defendants did not file anything until long after their answer was due, filing the motion responded to herein on January 6, 2012. (P 16 of record)

During the February 24, 2012 hearing on Defendants' Dismissal Motion, the court below found that while Plaintiff had timely filed the case, and had properly amended before Defendants responded, failing to serve original Defendants within 90 days required the dismissal of the case pursuant to CR 15(c) based on the court's

perception that Plaintiff had thus failed to complete commencement of the action pursuant to RCW 4.16.005 and 4.16.170.

The court below held that timely serving of Defendants added in the amended complaint within 90 days of commencement of the action was insufficient and entered judgment for Defendants, dismissing the action (P 4-5).

At that time, the court orally opined that this appeared to be a unique and novel issue of law and that Plaintiff should seriously consider appealing so that the appellate courts of this state might rule on this issue (Transcript of Motion Hearing, page 14 lines, 11-17, page 16, lines 7-13-Note the hearing transcript is not included in the clerks' paper's Appellant has hereto appended it.)

Plaintiff filed his Notice of Appeal on March 20, 2012, and this appeal continues.

VI. LEGAL ARGUMENT

A. STANDARD OF REVIEW

Statutory constructions and constitutional challenges are both reviewed de novo City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). Here, this is especially true since the court below opined that this was and is a novel issue of first impression.

B. ARGUMENT

1. PLAINTIFF GAVE SUFFICIENT NOTICE BY SERVING THE DUMMETT DEFENDANTS WITHIN 90 DAYS OF COMMENCING THE ACTION, TO MEET THE REQUIREMENTS OF CD 15(c)

"In Washington, civil actions are time barred unless "commenced" within the applicable statute of limitations. RCW 4.16.005.

A lawsuit is commenced under Washington law when the requirements of RCW 4.16.170 are satisfied. That statute provides:

"For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. *If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint.* If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. *If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.*"

Here, Plaintiff filed the initial complaint within the three year statute, on July 13, 2011, just days after retaining counsel, amended the complaint and filed the amended complaint on September 8, 2011, 55 days after filing the initial complaint, long before the 90 day statutory deadline to serve a named Defendant had run, and then, by Defendants' admission in the declarations attached to their dismissal motion, had Defendants personally served 7 days later on September 15, 2011, only 62 days after the filing of the initial complaint, only 7 days after the filing of the amended complaint.

Even had the Dumett Defendants been named in the initial complaint, Plaintiff would still have had 28 days longer to serve them within the statute.

As the cases that Defendants cited below make clear, the purpose of the statute and the requirement that Defendants be timely served exists to ensure that

Defendants are not prejudiced by failing to receive proper timely notice of the lawsuit. Here, Defendants were served 62 days after the filing of the initial complaint and cannot possibly argue that they were prejudiced by any delay. Furthermore, by filing the initial complaint before the three year statute of limitations ran and serving a named Defendant within 90 days, Plaintiff has met the statutory requirements in general, and certainly as to these Defendants.

The cases that Defendants cite for the premise that Plaintiff cannot amend their complaint after the three year statute, all involved situations where the amended complaints were filed a year and more after the statute expired and where the Defendant in question was not timely served, but was served after that amended complaint was filed a year later, causing actual prejudice and lack of knowledge. Furthermore, none of them involve a situation where the statute was perfected and service affected by timely filing the actual party at issue within the 90 days specifically allotted under the RCW. So, the cases cited by Defendants are inapplicable and their motion to dismiss should have been denied.

Furthermore, as Defendants concede, if the amended complaint is held to relate back to the original complaint, then the filing is timely and the action should proceed.

As Defendants quoted their own case, Teller v. APM Terminals Pacific Ltd as saying, Plaintiffs Amended complaint can, in fact, relate back to the original complaint for purposes of tolling the statute of limitations under CR 15(c),1) When 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 (this element Defendants concede in their motion); 2) when “within the applicable statute of limitations, the part to be brought in by the Amendment has received notice such that it will not be prejudiced in maintaining a defense on the merits; and 3) Within the applicable statute of limitations Defendants knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the proper party.

Here, as discussed, the Plaintiff Derrick Gallard served the proper party, the Dumett Defendants within the time required by 15(c), within 90 days from the time of the filing of the original complaint and within 90 days of the three year statute both. Since, Defendants had the proper timely notice, and were not therefore in anyway prevented from timely responding, or raising any applicable Defense, they were not in any way prejudiced in maintaining a defense on the merits.

Furthermore, There is no question that but for a mistake by Plaintiff as to the actual owner of the property, the action would have initially been brought against the Dumett Defendants, and again, Defendants were properly on notice by being timely served with the complaint naming them. There could be no confusion on their part.

For all of those reasons, Plaintiff met the burden established by the Teller case, and the amended complaint should be held to relate back to the original complaint, thus making the filing against the Dumett Defendants timely under the statute of limitations and the action should be allowed to proceed.

Plaintiff notes that in a footnote on the bottom of page 7 of their motion, Defendants claim that the holding in Kiehn v. Nelson's Tire Co 45 Wn. App. 291, 298 (1986) bars the court from interpreting the law and caselaw to allow Plaintiff to have rectified the initial error by serving the correct party within 90 days of filing the original timely complaint. Aside from the fact that it is inappropriate to hide a key argument in a footnote, Defendants wrongly cite Kiehn. The Kiehn court actually said that perfecting within the 90 days is not sufficient to correct the failure to name the Defendants in question in the original complaint when the amended complaint does not relate back, and in fact, Kiehn only held even that in dicta, and not in the actual substance of the opinion. See Broad v. Mannesmann Anlagenbau, Washington Supreme Court En Banc Docket Number 68804-4, Argued June 15, 2000. Opinion issued September 21, 2000 throughout, as well as Broad v. Mannesmann Anlagenbau, A.G., 196 F.3d 1075, 1076 (9th Cir.1999), the original Federal case remanded to the Washington Supreme Court throughout.

Here, as previously discussed, the amended complaint does relate back, and therefore, Kiehn does not apply. The Kiehn case, furthermore mostly involved an argument as to whether a bankruptcy filing against Defendant tolled the statute of limitations for service.

For all of the reasons stated through this section of argument, Defendants' Motion should be denied and the action allowed to proceed.

2) Fundamental fairness requires that the court deny Defendants' Motion.

All parties conceded in pleadings and in the February 24, 2012 dispositive hearing below that Plaintiff was mistaken as to the actual owners of the property. By all accounts the Andersons, who still have not been located at this time, managed the property for the Dumett Defendants. Plaintiff was a subtenant on the property, and all of his dealings were with the master tenant, who has since enlisted in the military and is currently stationed in Japan, and with the Andersons. Plaintiff has stated that the Anderson's told him that it was their property and he had no reason to doubt them. Therefore, while the information as to the actual ownership of the property may have been publicly available, there was no reason for Plaintiff or counsel to have checked, especially in that bare few days that counsel had to file. When counsel then looked up the ownership of the property to obtain an address for service, he became aware that there was an ownership discrepancy, when he then brought to the attention of Plaintiff, who began trying to locate the master tenant to verify the information. When he finally located and managed to reach the former master tenant in Japan, only then was Plaintiff able to verify that the Andersons were merely the property managers and that the Dumett Defendants were, in fact the actual owners at the time.

Plaintiff, through counsel then immediately filed an amended complaint and served the Demits a week later on day 62 after the filing of the original complaint.

It was reasonable for Plaintiff to rely on the information he had and for counsel to rely accordingly, especially when the source of the information was the putative owners themselves and he should not be barred from recovery for his extreme injuries because he relied on the word of the property managers. Such a result would be fundamentally unjust.

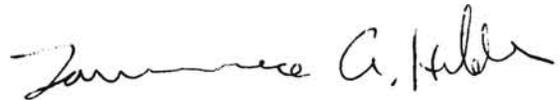
This is hardly the inexcusable neglect that Defendants insisted it was, with no basis in fact, rather it is an understandable and reasonable mistake created and aided by the Andersons for their own convenience and purposes.

VII. CONCLUSION

For all of the above reasons, the decision of the District Court below should be reversed and the case remanded for further proceedings.

RESPECTFULLY SUBMITTED:

DATED: November 21, 2012



_____/s/_____
LAWRENCE A. HILDES
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Attorney for Plaintiff -Appellant

PROOF OF SERVICE

Lawrence A. Hildes certifies as follows:

I am over the age of 18 years, and not a party to this action. I am a citizen of the United States. My business address is P.O. Box 5405, Bellingham, WA 98227

On November 21, 2012 I served the following document(s) described as follows:

Plaintiff'-Appellant's Opening Brief on the following persons(s) in this action at the following addresses:

Attorney Flavio Ortiz
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(BY MAIL) by placing a true copy of the above documents in a sealed envelope with postage fully prepaid in the mail at Bellingham, WA, addressed to the person(s) above at the above address

(BY PERSONAL SERVICE) by personal delivery to the addresses listed above.

(BY FACSIMILE) by causing such document(s) to be faxed to the person(s) listed above by transmitting said document(s) from facsimile machine no. (360) 714-1791 to facsimile machine no.

(STATE) I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Executed on November 21, 2012 at Bellingham, WA.



/s/ LAWRENCE A. HILDES
Lawrence A. Hildes