

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMA J. ARMSTRONG,
Appellant,
vs.
WINDSOR CAPITAL CORPORATION
AND/OR WINDSOR CAPITAL GROUP,
LLC, D/B/A HAWTHORNE SUITES,
Respondent.

No. 43245

FILED

APR 21 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dismissing appellant's personal injury action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant filed a negligence complaint in the district court, alleging that she was injured when a shower head struck her while she was a guest on respondent's property on June 24, 2001. Her original May 22, 2003 complaint named Hawthorne Suites Franchising, Inc., Headwind Property Company, LLC, Windsor Capital Corporation, and Roe Corporations as defendants. She filed an amended complaint on June 11, 2003, asserting the same claims for relief, but adding another defendant.

After researching corporate information filed with the Nevada Secretary of State, appellant filed a second amended complaint on June 12, 2003, revising the caption in accordance with the Secretary of State filing information to substitute Windsor Capital Group, Inc. d/b/a Hawthorne Suites in place of Windsor Capital Corporation. Appellant also contacted respondent's attorney, who advised her in writing that Hawthorne Suites Franchising, Inc. was not a properly named defendant. Respondent's attorney also wrote, "I have checked with my client, and the correct corporate name of the management company is Windsor Capital

Group, Inc., which is a party in your Second Amended Complaint. This is a Zurich insured, and I will therefore assume that you will only pursue that entity in this in this matter and that we will only need to file an answer to the second amended complaint.” Respondent’s attorney further advised that, “if you learn something different during discovery, of course, you can change that.”

On July 2, 2003, relying on the information respondent’s attorney provided, appellant voluntarily dismissed her complaint against Hawthorne Suites Franchising, Inc. and Windsor Capital Corporation, only. On August 5, 2005, Windsor Capital Group, LLC, d/b/a Hawthorne Suites, answered the second amended complaint. Appellant filed a third amended complaint on January 7, 2004, asserting the same claims for relief, but adjusting the caption to name Windsor Capital Group, LLC, d/b/a Hawthorne Suites as the defendant, in place of Windsor Capital Group, Inc., d/b/a Hawthorne Suites.

Respondent filed a motion to dismiss the third amended complaint, arguing that appellant had failed to name the correct party within the two-year statute of limitations period. Appellant opposed the motion, asserting that she had used due diligence to identify respondent, including consulting the Secretary of State filings and contacting respondent’s attorney to identify the proper entity. Appellant argued that, because respondent had answered the second amended complaint, it had waived its right to assert a statute of limitations defense. She asserted that she did not violate the letter or spirit of the statute of limitations law governing her case because she filed her action before the limitations period expired and respondent had notice of the action, as evidenced by its correspondence and answer to the second amended complaint, and none of

her amended complaints revised or added any claims so as to prejudice respondent. The district court granted the motion to dismiss. Because the district court considered matters outside of the pleadings in considering the motion to dismiss, we treat the motion as one for summary judgment.¹ Orders granting summary judgment are subject to de novo review on appeal.²

In Servatius v. United Resort Hotels, we explained that a mistakenly named, but nevertheless “proper defendant” could be brought into an action despite the fact that the statute of limitations had run, provided that the proper defendant (1) had actual notice that the action had been instituted, (2) knew that it was the proper defendant in the action, and (3) was not in any way misled to its prejudice.³ If those three factors are demonstrated, a plaintiff’s amended complaint—naming the proper defendant—relates back to the originally filed complaint, notwithstanding the statute of limitations. The reasoning behind the rule is that such a defendant is already before the court and, therefore, the amendment merely corrects the mistaken name rather than adds a new party.⁴ As later explained, the rule announced in Servatius was “crafted to supply a basis for achieving equity and justice” in cases where the true

¹NRCP 12(c).

²See Wood v. Safeway, Inc., 121 Nev. __, __, 121 P.3d 1026, 1029 (2005).

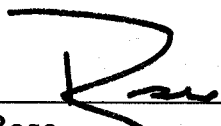
³Id. at 373, 455 P.2d at 622-23.

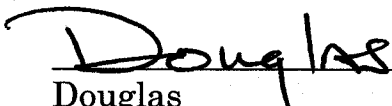
⁴Id. at 373-74, 455 P.2d at 623.

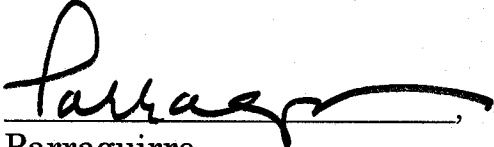
defendant, although unnamed, had actual knowledge of the action, knew that it was the proper defendant, and was not misled to its prejudice.⁵

Here, appellant's third amended complaint comports with the Servatius rule because respondent—as demonstrated by its ongoing correspondence with appellant and its answer to her second amended complaint—(1) had actual notice that the action had been instituted, (2) knew that it was the proper defendant in the action, and (3) was not in any way misled to its prejudice. Accordingly, we

ORDER the judgment of the district court REVERSED, AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C. J.
Rose


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Jessie Elizabeth Walsh, District Judge
Harris & Schwartz
Bennion Clayson & Marias
Clark County Clerk

⁵Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873, 878, 822 P.2d 1100, 1104 (1991).