IN THE SUPREME COURT OF THE STATE OF NEVADA

COACH USA, INC.,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MICHAEL L. DOUGLAS, DISTRICT JUDGE,
Respondents,
and
GINA POLOVINA,
Real Party in Interest.

No. 40470

FILED

MAY 0 6 2003

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

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying petitioner's motion to dismiss. Petitioner asserts that it was not properly substituted as a defendant under NRCP 10(a) and that the claims against it are time barred. We agree.

In Smith v. District Court,[1] we reaffirmed our policy of generally declining to consider writ petitions that challenge district court orders denying motions to dismiss. Acknowledging the few exceptions when considerations of sound judicial economy and administration militate in favor of granting such petitions, we retained the option of exercising our discretion to consider such petitions when no disputed factual issues exist and the district court is obligated to dismiss an action under clear authority. This is such a case.

[1]113 Nev. 1343, 950 P.2d 280 (1997).

03-07691

On February 26, 1997, a car driven by Gina Polovina and a bus driven by Ricky Wayne English collided while both were turning left into Lot Green 5 at UNLV's Thomas & Mack Center. The police accident report listed as the bus's owner: Gelco Corporation, 4020 Lone Mountain Rd., N. Las Vegas, NV 89031. The report also provided the bus's color, year, make, license number and vehicle identification number.

On January 25, 1999, Polovina filed a complaint for damages against Ricky Wayne English, individually, and Does I-X and Roe Corporations I-X, inclusive. She did not name Gelco as a defendant. On April 15, 1999, the district court closed the case for lack of due diligence and failure to serve English within 120 days. On June 22, 1999, Polovina filed a DMV summons for English, and on July 6, 1999, the district court clerk entered a default against English. The case was then inactive for two and one half years.

On January 14, 2002, Polovina moved to substitute Coach USA, Inc., for the Roe corporations as a defendant. On February 21, 2002, the district court granted the motion, and on March 6, 2002, Polovina filed an amended complaint for damages against English and Coach USA.

On April 8, 2002, Coach USA moved to dismiss. Coach USA asserted three grounds for dismissal: (1) Polovina sought substitution under the wrong rule, NRCP 15 instead of NRCP 10(a); (2) Polovina did not comply with NRCP 10(a), as construed by this court in Nurenberger Hercules-Werke v. Virostek,[2] because she did not exercise reasonable diligence in ascertaining its identity; and (3) Polovina's claims against it are barred by NRS 11.190's 2-year statute of limitation.

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[2]107 Nev. 873, 822 P.2d 1100 (1991).

Following briefing by the parties and two hearings, the district court denied the motion based on its findings that Polovina exercised due diligence and that Coach USA was not prejudiced. The court entered its written order in October 2002, and Coach USA filed this writ petition the following month. Polovina filed an answer at our direction, and Coach USA was granted leave to reply.[3]

We note as a preliminary matter that Polovina sought substitution under NRCP 15, which permits a party to amend her pleading and relates newly asserted claims or defenses back to the date of the original pleading under certain circumstances. That rule does not apply, however, when a party is substituting a named party for a fictitiously named party; NRCP 10(a) governs such substitutions.[4] NRCP 10(a) provides, in pertinent part: "In the complaint the title of the action shall include the names of all the parties . . . . A party whose name is not known may be designated by any name, and when his true name is discovered, the pleading may be amended accordingly."

In Nurenberger, this court clarified NRCP 10(a)'s effect on the substitution of accurately identified parties for defendants bearing fictitious names after the applicable statute of limitation has run. Nurenberger held that

> the effective utilization of Rule 10(a) requires: (1) pleading fictitious or doe defendants in the caption

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[3]We grant Coach USA's motion for an extension of time to file its reply and direct the clerk of this court to file the reply received on April 15, 2003. We deny as moot the request that we stay the district court action pending the writ petition's resolution.

[4]Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873, 822 P.2d 1100 (1991).

> of the complaint; (2) pleading the basis for naming defendants by other than their true identity, and clearly specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based; and (3) exercising reasonable diligence in ascertaining the true identity of the intended defendants and promptly moving to amend the complaint in order to substitute the actual for the fictional. Satisfaction of all three of the aforementioned elements is necessary to the granting of an amendment that relates back to the date of the filing of the original complaint.[5]

Nurenberger thus conditioned the rule's application on three factors. First, the plaintiff must have utilized the pleading latitude afforded by Rule 10(a).[6] Second, there must be clear correlation between the fictitious defendants and the pleaded factual basis for liability. A plaintiff cannot use fictitious defendants merely as a precautionary measure to permit subsequent addition of liability theories different from those set forth in the complaint. "This element of the rule supplies the basis for recognizing the intended defendants who, in legal contemplation, are parties to the cause of action."[7] Third, "[p]laintiffs utilizing the pleading latitude provided by Rule 10(a) must exercise reasonable diligence in pursuing discovery and other means of ascertaining the true identity of the intended defendants, and then promptly move to amend their complaints pursuant to Rule 10(a)."[8] The court warned "Rule 10(a)

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[5]Id. at 881, 822 P.2d at 1106.

[6]Id. at 881, 822 P.2d at 1105.

[7]Id.

[8]Id.

was not intended to reward indolence or lack of diligence by giving plaintiffs an automatic method of circumventing statutes of limitations."[9]

Accordingly, when a Rule 10(a) amendment is properly granted, it automatically relates back to the commencement of the action because the intended defendants, when properly identified as to activity, conduct or omission, but not by certainty of name, are "already parties in legal contemplation."[10]

Here, Polovina's original complaint named fictitious defendants and alleged: "That at all times pertinent hereto, Defendants were agents, servsnts [sic], employees or joint ventures of every other Defendants [sic] herein, and at all times mentioned herein were acting within the scope and course of said agency, employment or joint venture with knowledge and permission and consent of all other named Defendants." The parties agree that Polovina satisfied the first two conditions for Rule 10(a)'s application; the dispositive question is whether she satisfied the third condition. We agree with Coach USA that she did not.

Polovina argued that she exercised reasonable diligence, but provided no factual support for her argument.[11] According to the documents before us, including an affidavit that was not presented to the district court, her counsel

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[9]Id.

[10]Id. at 882, 822 P.2d at 1106 (quoting Hill v. Summa Corporation, 90 Nev. 79, 81, 518 P.2d 1094, 1095 (1974)).

[11]Although Polovina includes an affidavit from her attorney in support of her opposition to the writ petition, she did not provide the district court with any affidavits or other documentation demonstrating any attempt to identify the bus's owner.

- attempted to contact Gelco, but that attempt was unsuccessful;
- was led by the unsuccessful attempt to contact Gelco to Corporation Trust Company of Nevada, but was told that the corporation is resident agent for more than 25,000 companies and does not give out information about those companies;
- made numerous telephone calls in an effort to locate the bus's owner through the bus's insurance policy;
- submitted numerous demand packets and other correspondence to suspected insurance companies in an effort to locate the bus's owner, but received no responses;
- knew from correspondence from Polovina's first attorney that neither he nor Polovina's insurance company could locate Coach USA's claims administrator for an extended period; and
- believed that Coach USA's claims administrator changed during the litigation, making it unusually difficult to locate Coach USA through its policy.

The documents contain no details regarding these attempts at identification, and no dates. For example, though Polovina's counsel claims he tried to locate Gelco, he does not say when or how. Gelco's address was written on the accident report and counsel acknowledged that he never went there. And counsel never specifies how he finally learned that Coach USA owned the bus.

Without details and dates, the district court had no basis for deciding that Polovina, who failed to identify Coach USA for five years (two after the accident, and three more after the Doe complaint was filed), exercised reasonable diligence. The district court's findings that Polovina exercised "due diligence" and that Coach USA "is not prejudiced" are devoid of factual support; consequently, there is no foundation for its

conclusion that Coach USA was properly substituted as a defendant under Rule 10(a).

Because Coach USA was not properly substituted as a defendant and NRS 11.190's 2-year statute of limitation clearly barred Polovina's claims against it, the district court was compelled to grant Coach USA's motion to dismiss. Accordingly, we grant the petition.[12] The clerk of this court shall issue a writ of mandamus directing the district court to vacate its order and to enter an order granting the motion to dismiss.

It is so ORDERED.

_____, J.
Rose

_____, J.
Maupin

GIBBONS, J., dissenting:

I dissent. In my view, the court's intervention at this juncture is inappropriate.

_____, J.
Gibbons

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[12]When petitioner has no plain, speedy and adequate remedy in the ordinary course of law, a writ of mandamus is available to compel the district court to perform a required act, or to control an arbitrary or capricious exercise of discretion. NRS 34.160; NRS 34.170; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

cc: Hon. Michael L. Douglas, District Judge
Delanoy Schuetze & McGaha, P.C.
Bunin & Bunin
Clark County Clerk