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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Ex parte Marvin Gray

PETITION FOR WRIT OF MANDAMUS

(In re: Ruthie Thomas

v.

**Marco Trevino, State Farm Mutual Automobile Insurance
Company, and Marvin Gray)**

(Montgomery Circuit Court, CV-19-900114)

STEWART, Justice.

Marvin Gray petitions this Court for a writ of mandamus directing the Montgomery Circuit Court ("the trial court") to

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dismiss an amended complaint filed by Ruthie Thomas naming him as a defendant on the ground that the claims asserted against him in the amended complaint are barred by the applicable statute of limitations. Because we conclude that the amended complaint relates back to the filing of the original complaint under Rule 15, Ala. R. Civ. P., we deny the petition.

Facts and Procedural History

On January 19, 2017, Thomas was involved in two-vehicle automobile accident with Gray in a parking lot in Montgomery. On January 18, 2019, Thomas filed a complaint alleging negligence and wantonness and naming Marco Trevino as a defendant.¹ According to the parties, Trevino was not involved in the accident and was, instead, the law-enforcement officer who responded to and investigated the accident.

On April 17, 2019, 89 days after she filed the original complaint, Thomas filed a motion for leave to amend her complaint pursuant to Rule 15(a), Ala. R. Civ. P. In the motion, she asserted that she had made "scrivener's errors" resulting in the incorrect identification of one of the

¹Thomas also asserted a claim for uninsured-motorist coverage against State Farm Mutual Automobile Insurance Company and included fictitiously named defendants A, B, and C as defendants.

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defendants in the original complaint. That same day, Thomas filed an amended complaint naming Gray as the defendant in place of Trevino.² On April 29, 2019, the trial court granted Thomas's motion for leave to amend the complaint.

Gray filed a motion to dismiss the claims against him, asserting that he was not added as a defendant until after the statute of limitations had expired. Gray argued that the amended complaint did not relate back to the filing of the original complaint because, he argued, it did not satisfy the requirements of Rule 9(h), Ala. R. Civ. P., regarding fictitiously named defendants. In particular, Gray asserted that Thomas was aware of Gray's name 12 days following the accident and well before the expiration of the statute of limitations. In support of his motion, Gray attached as exhibits a January 2017 letter from Gray's insurance company addressed to Thomas that identified Gray as the policyholder and an envelope from Thomas addressed to Gray's insurance company postmarked January 31, 2017.

Thomas filed a response to Gray's motion to dismiss in which she asserted that "due to a mere clerical error,

²Gray does not dispute that he was served with the amended complaint.

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[Thomas] named an incorrect party in the style and body of the Complaint." Thomas argued that her amendment was timely under Rule 15 and that she was permitted to correct a clerical error under Rule 60(a), Ala. R. Civ. P. Thomas also asserted that the amended complaint related back to the filing of the original complaint under Rule 15(c)(3).

Gray filed a reply to Thomas's response in which he asserted, among other things, that Thomas had failed to establish an "identity of interests" between him and Trevino and that, accordingly, the amended complaint could not relate back to the original complaint. The trial court denied Gray's motion to dismiss, which we treat as a motion for a summary judgment.³ Gray timely filed a petition for a writ of mandamus to this Court.

Standard of Review

""A writ of mandamus is an extraordinary remedy, and it "will be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a

³Because the trial court had before it materials outside the pleadings that it did not expressly decline to consider, Gray's motion to dismiss was converted into a motion for a summary judgment. Ex parte Novus Utils., Inc., 85 So. 3d 988, 995 (Ala. 2011).

refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court."'" Ex parte Monsanto Co., 862 So. 2d 595, 604 (Ala. 2003) (quoting Ex parte Butts, 775 So. 2d 173, 176 (Ala. 2000), quoting in turn Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993)). ... A petition for a writ of mandamus ... is the proper means to seek review of an order denying a motion to dismiss or for a summary judgment filed by a defendant added after the statute of limitations has run, under Rule 15(c)(3), Ala. R. Civ. P., which governs the relation back of amended complaints when the defendant has received notice of the action so that the defendant will not be prejudiced in maintaining a defense on the merits and the defendant 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 defendant. See, e.g., Ex parte Empire Gas Corp., 559 So. 2d 1072 (Ala. 1990)'

"Ex parte Novus Utilities, Inc., 85 So. 3d 988, 995 (Ala. 2011)."

Ex parte Profit Boost Mktg., Inc., 254 So. 3d 862, 866 (Ala. 2017).

Discussion

Gray contends that Thomas's amended complaint naming him as a defendant in lieu of Trevino was barred by the two-year

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limitations period prescribed in § 6-2-38(1), Ala. Code 1975.⁴ Gray contends that the amended complaint did not relate back to the filing of the original complaint under Rule 15(c). Thus, he argues, the statute of limitations was not tolled and he is entitled to a writ of mandamus directing the trial court to dismiss the claims against him as being filed outside the statute of limitations. Thomas argues that the failure to name Gray in the original complaint was a clerical error, that the trial court was permitted to allow the correction pursuant to Rule 60(a), and that the amended complaint relates back to the original complaint under Rule 15(c)(3).⁵ Accordingly, Thomas contends, the filing of the original complaint tolled the statute of limitations for asserting claims against Gray.

⁴Section 6-2-38(1) provides that "[a]ll actions for an injury to the person or rights of another not arising from contract and not specifically enumerated in this section shall be brought within two years."

⁵Thomas also argues that Gray did not meet the burden required for a dismissal under Rule 12(b)(6), Ala. R. Civ. P. We note that, generally, "the denial of a motion to dismiss based upon Rule 12(b)(6) is not reviewable by a petition for a writ of mandamus." Ex parte Nautilus Ins. Co., 260 So. 3d 823, 831 (Ala. 2018) (citing Ex parte Kohlberg Kravis Roberts & Co., L.P., 78 So. 3d 959 (Ala. 2011)).

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We first examine the parties' contentions concerning the relation-back doctrine in Rule 15(c)(3). Generally, a party may amend a pleading pursuant to Rule 15 without leave of court "at any time more than forty-two (42) days before the first setting of the case for trial, and such amendment shall be freely allowed when justice so requires." Rule 15(a). Under Rule 15(c),

"[a]n amendment of a pleading relates back to the date of the original pleading when

"(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

"(2) 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, except as may be otherwise provided in Rule 13(c) for counterclaims maturing or acquired after pleading, or

"(3) the amendment, other than one naming a party under the party's true name after having been initially sued under a fictitious name, changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the applicable period of limitations or one hundred twenty (120) days of the commencement of the action, whichever comes later, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning

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the identity of the proper party, the action would have been brought against the party, or

"(4) relation back is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h)."

Rule 15(c)(3) "applies to a plaintiff's attempt to amend in order to correctly identify a defendant included in or contemplated by the plaintiffs' original complaint." Profit Boost Mktg., 254 So. 3d at 870. Because Thomas amended the complaint to correct the name of a defendant, we apply this subsection to our relation-back analysis.

Rule 15(c)(3) provides three criteria that must be met before an amended complaint can relate back to the original complaint. First, the claim asserted in the amended complaint must meet the criteria specified in Rule 15(c)(2), i.e., the claim in the amended complaint "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Second, "within the applicable period of limitations or one hundred twenty (120) days of the commencement of the action, whichever comes later, the party to be brought in by amendment" must have "received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the

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merits." Finally, within that same time frame, the party to be added must know or should have known "that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."

Gray does not dispute that Thomas's claims against Gray arose out of the conduct, transaction, or occurrence set forth in the original complaint, thus satisfying the first Rule 15(c)(3) criterion. Moreover, Gray does not assert that he did not know that, but for Thomas's mistake naming Trevino as the defendant, the action would have been brought against him. As a result, the third Rule 15(c)(3) criterion has also been satisfied. Gray's argument focuses on the second criterion of Rule 15(c)(3), and Gray contends that he did not receive notice within 120 days of its commencement that the action had been commenced, because, he argues, Thomas failed to establish an "identity of interest" between him and Trevino.

In support of his identity-of-interest argument, Gray relies on Bank of Red Bay v. King, 482 So. 2d 274, 280 (Ala. 1985), Ex parte Novus Utilities, Inc., 85 So. 3d 988, 995 (Ala. 2011), and Profit Boost Marketing, supra. However, although those cases address the application of the relation-

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back doctrine to amended complaints under Rule 15(c)(3), they are procedurally inapposite to the present case.

In Bank of Red Bay, the plaintiffs asserting fraud claims against a bank filed an amended complaint nearly one year after the filing of the initial complaint to add additional plaintiffs. The bank alleged that the added plaintiffs learned of the purported misrepresentations underlying the fraud claims 16 months before the filing of the amended complaint and that, therefore, the claims were barred by the statute of limitations. Citing Manning v. Zapata, 350 So. 2d 1045 (Ala. Civ. App. 1977), this Court examined three elements of a test established by the Court of Civil Appeals to determine whether the amended complaint related back:

"(1) [That] there was the requisite 'identity of interest,' (2) [that] the claim arose out of the same conduct, transaction, or occurrence as set forth in the original complaint, and (3) [that] the defendant was given notice when the initial complaint was filed"

Bank of Red Bay, 482 So. 2d at 280. In concluding that the amendment adding the additional plaintiffs satisfied those three elements, this Court held that there was an identity of interest between the initial plaintiffs and the added

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plaintiffs sufficient for the doctrine of relation back to apply. Id.

In his petition, Gray seeks to apply the three elements referenced in Bank of Red Bay to Thomas's amended complaint in the present case. Bank of Red Bay, however, is distinguishable. Bank of Red Bay addressed the addition of plaintiffs -- not defendants -- to an action, and this Court noted that "Rule 15(c) can be applied by analogy to amendments changing plaintiffs." Bank of Red Bay, 482 So. 2d at 279-80. In addition, the amended pleading in Bank of Red Bay was filed nearly a year after the original complaint and well outside the 120-day time frame in Rule 15(c) (3). An examination of the identity-of-interest between the initial plaintiffs and the new plaintiffs was necessary to determine whether the new plaintiffs had implicit notice of the proceedings within 120 days of the commencement of the action.

Gray's reliance on Novus Utilities, *supra*, and Profit Boost Marketing, *supra*, in support of his contention that there is no identity of interest between him and Trevino is equally misplaced. In Profit Boost, the amended complaint was filed, and the subsequent defendant served, more than 120 days

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after the action was commenced, and the issue was whether the notice of the suit had been imputed to the new defendant within 120 days of the commencement of the action. In Novus Utilities, the plaintiffs sought to amend their complaint almost three years after the commencement of the action to name Novus Utilities, a subsidiary of the original defendant, as a defendant. The question presented in that case was whether Novus Utilities received notice of the commencement of the action by virtue of the suit being brought, initially, against its parent company. This Court held that Novus Utilities had notice of the commencement of the action, that Novus Utilities would not be prejudiced in defending the action, and that the amended complaint related back to the original complaint naming the parent company as a defendant.

In the present case, an inquiry regarding an identity of interest between Trevino and Gray is not necessary. Gray, who, as the petitioner, has the burden to establish a clear legal right to the relief he seeks, does not dispute that he received notice of the commencement of the action within the 120-day period prescribed by Rule 15(c)(3). The identity-of-interest inquiry is relevant only to determine the

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relationship between the original defendant and the new defendant when the plaintiff is trying to establish, by virtue of that relationship, that notice of the action was imputed to the new defendant within 120 days of its commencement. As this Court stated in Novus Utilities:

"The party added must have received notice of the institution of the action within the applicable limitations period or within 120 days of the filing of the original complaint (whichever comes later) so that it is not prejudiced in maintaining a defense on the merits. Rule 15(c)(3). A court may impute notice of the institution of an action against the original defendant to a subsequently named defendant if there is an 'identity of interests.' See Bank of Red Bay v. King, 482 So. 2d 274, 280 (Ala. 1985)."

85 So. 3d at 1001.

It is evident from the materials presented to the trial court, and to this Court on mandamus review, that Thomas made a mistake concerning the identity of the defendant in the original complaint. Thomas filed the amended complaint naming Gray as a defendant 89 days after she filed the original complaint, which was within the 120-day period prescribed by Rule 15(c)(3). As explained above, Gray does not dispute that he was served with the amended complaint or that he otherwise received notice of the commencement of the action before the expiration of the 120-day period. In addition, Gray does not

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assert that he will suffer any prejudice from defending the action on the merits. Because Gray has failed to establish that he did not have proper notice of the complaint within 120 days of the commencement of the action and because Gray has not alleged the existence of any prejudice resulting from maintaining a defense on the merits, Gray has not demonstrated that Thomas's amendment should not relate back to the filing of the original complaint under Rule 15(c)(3).

Because we conclude that the amendment of the complaint to add Gray as a defendant was proper and because Gray has not satisfied his burden for mandamus relief, we need not address the parties' contentions concerning the purported application of Rule 60(a), Ala. R. Civ. P., to a plaintiff's mistake in identifying a defendant in an original complaint. Furthermore, it is undisputed that Thomas did not substitute Gray for a fictitiously named defendant and that she was aware of Gray's identity before she filed the original complaint; therefore, Rule 15(c)(4) is not applicable, despite the parties' discussion of that subsection in their arguments before this Court.

Conclusion

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A petitioner carries a heavy burden in securing mandamus relief. See Ex parte McWilliams, 812 So. 2d 318, 321 (Ala. 2001). Based on the materials before this Court, Gray has not demonstrated a clear legal right to have the claims against him dismissed, and the trial court correctly denied the motion for a summary judgment. Accordingly, his petition is denied.

PETITION DENIED.

Parker, C.J., and Shaw, Wise, Bryan, Mendheim, and Mitchell, JJ., concur.

Sellers, J., concurs in the result.