

IN THE COURT OF APPEALS OF TENNESSEE

BARBARA JUNE CLINE,
Plaintiff-Appellant,

v.

JDH, INC., which holds itself
out to be EMPLOYER'S SECURITY
COMPANY, INC., and EMPLOYER'S
SECURITY COMPANY, INC.,
Defendants-Appellees.

)C/A NO. 03A01-9508-CH-00258
)KNOX COUNTY CHANCERY COURT
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)HONORABLE FREDERICK D. McDONALD,
)CHANCELLOR

FILED

November 30, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

CONCURRING OPINION

I concur in the majority opinion. I write separately to address a requirement of Tenn. R. Civ. P. 15.03 not fully developed in the majority opinion.

The original complaint in this case named only one defendant--JDH, Inc. That defendant was granted summary judgment. The propriety of that grant is not before us since the appellant did not appeal the dismissal of its action against that defendant. Therefore, it is now final. We have reviewed the attempted service on JDH, Inc., for a limited purpose--to determine if it impacts whether Employer's Security Company, Inc. (ESCO), the defendant sought to be made a party to this action by the amended complaint, was timely sued. This inquiry, in turn, causes us to focus on Tenn. R. Civ. P. 15.03, the so-called "relation back of amendments" part of the Rules of Civil Procedure.

ESCO was also granted summary judgment. That judgment was based on the trial court's determination that the action against ESCO was barred by the various one-year statutes of limitations applicable to the appellant's multiple claims. The propriety of that grant is properly before us on this appeal.

Since ESCO was not named as a defendant in the original complaint, it is clear that service of that pleading, without more, is not sufficient to make it a party to this proceeding. This is true even if the process on the original complaint was served on an employee or agent of ESCO. The appellant recognized this fact--that is why she filed the amended complaint naming ESCO. It is also clear that the amended complaint was eventually served on ESCO. The question is whether the relation back doctrine can be applied to save a cause of action--the amended complaint--that was clearly filed beyond the applicable statutes of limitations.

The appellant argues that there are disputed material facts as to whether one or both of these defendants¹ was properly served with process in this case on July 8, 1993, the day after the original complaint was filed. The majority finds that the facts material to this determination are not in dispute. I agree. I also concur in the majority's holding that those facts show that neither JDH, Inc., nor ESCO, was properly served on July 8, 1993².

Assuming, however, purely for the purpose of argument, that one could reasonably conclude that JDH, Inc., was properly

¹It is not clear to me which of the defendants that the appellant claims was served on July 8, 1993.

²I would again point out that ESCO could not have been made a party by the service of process on July 8, 1993, because it was not then a named defendant.

served on July 8, 1993, such a finding would be of no benefit to the appellant in her suit against ESCO. This is true regardless of whether the purported service on JDH, Inc., was effected by handing the process to an agent of JDH, Inc., or an agent of ESCO. It is not enough that ESCO knew about the filing of the suit "within the period provided by law for commencing the action against [it]." Tenn. R. Civ. P. 15.03. The rule requires more. In addition to timely notice of the filing of suit, it must also appear that ESCO "knew or should have known that, but for a misnomer or other similar mistake concerning the identity of the proper party, the action would have been brought against [it]." Tenn. R. Civ. P. 15.03. While an agent of ESCO may or may not have had timely notice of the filing of the original action, there is absolutely nothing in the record to indicate that ESCO knew or should have known, within the relevant one year period, that the original complaint was really directed at ESCO, and not JDH, Inc. The appellant had never been employed by ESCO. Her cause of action was expressly related to her employment with JDH, Inc., a corporation that operated under the name of Employer's Security Company, Inc., at the time the appellant worked for it. JDH, Inc., was the defendant--and the only defendant--sued by the appellant in the original complaint. Therefore, even assuming that JDH, Inc., was properly served, and I do not believe it was, ESCO cannot be made a party pursuant to the relation back doctrine for the simple reason that all of the requirements of that doctrine were not satisfied.

Charles D. Susano, Jr., J.