

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 18, 2015 Session

MARTIN W. BRACEY, JR. v. OTIS N. McDONALD, ET AL.

**Appeal from the Circuit Court for Wilson County
No. 2013CV377 Clara W. Byrd, Judge**

No. M2014-01843-COA-R3-CV – Filed January 13, 2016

Plaintiff who was injured in a motor vehicle accident timely filed suit against the driver and the owner of the truck with which he collided. More than a year after the accident and seven months after suit was filed, Plaintiff amended the complaint to assert causes of action against additional parties. Upon motion, the court dismissed the claims against the additional defendants on the basis of the statute of limitations. Holding that the amended complaints do not contain factual allegations sufficient to relate the claims against the additional defendants back to the filing of the original complaint or to otherwise prevent the running of the statute of limitations, we affirm the judgment dismissing the additional defendants and remand to the trial court for further proceedings in accordance with the opinion herein.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT, and W. NEAL MCBRAYER, JJ., joined.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee; and D. Russell Thomas, Murfreesboro, Tennessee, for the appellant, Martin W. Bracey, Jr.

Janet Stevel Hayes, Knoxville, Tennessee; and Mary Beth Haltom White, Nashville, Tennessee, for the appellee, Employee Solutions, LLC d/b/a Lightning Transportation Services.

William B. Jakes, III, and William B. Jakes, IV, Nashville, Tennessee, for the appellees, Ingram Book Group and Ingram Transportation Company.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

This case arises from an accident which occurred on August 31, 2012, when a car being driven by Martin W. Bracey Jr. (“Plaintiff”) collided with a tractor trailer being driven by Otis McDonald on Murfreesboro Road in Wilson County; Plaintiff suffered injuries, including the loss of one arm. Plaintiff filed suit on July 10, 2013, naming Otis McDonald and Conard Transportation, Inc., a/k/a Conard Logistics, Inc., a/k/a Conard Transportation Drivers, Inc., (“Conard”) as defendants. The complaint alleged that Mr. McDonald’s negligence while driving caused his injuries and that Conard was liable for his injuries “pursuant to the doctrines of imputed negligence and vicarious liability, including but not limited to, respondent [sic] superior.”

Conard and Mr. McDonald, respectively, filed Answers on August 15 and 22, 2013. In its Answer, Conard admitted that Mr. McDonald was acting as its agent and was operating a trailer owned by it at the time of the accident; it denied that Mr. McDonald was its employee. In his answer, *inter alia*, Mr. McDonald denied that he was an employee of Conard.

On March 25, 2014, Plaintiff amended the complaint (the “First Amended Complaint”) to add Conard Warehousing and Distribution, Inc., Employee Solutions, LLC, d/b/a Lightning Transportation Services (“Employee Solutions”), Ingram Book Group, Inc., and Ingram Transportation Company (collectively, “the Ingram Defendants”) as defendants. Pertinent to the parties to this appeal, Plaintiff alleged:

16. The master bill of lading and/or bill of lading for the load being delivered by the tractor trailer driven by Defendant McDonald lists Defendant Ingram Transportation Co. and/or Conard Warehouse and Distribution as the shipper.

17. The master bill of lading and/or bill of lading for the load being delivered by the tractor trailer driven by Defendant McDonald lists the load as being shipped to Defendant Ingram Book Company.

18. Plaintiff is informed and believes, and based thereon alleges, that Defendant McDonald was driving the tractor trailer at all times relevant herein, including pursuant to an agreement between Defendant Employee Solutions, Defendant Conard Logistics, Conard Transportation, Conard Warehousing, Conard Transportation Drivers, Inc., Ingram Transportation and/or Ingram Book Group.

24. Plaintiff is informed and believes, and based thereon alleges, that Defendants Conard Transportation, Conard Logistics, Conard Warehousing, Conard Transportation Drivers, Inc., Employee Solutions, Ingram Book Group, and/or Ingram Transportation at all times relevant herein were engaged in a joint venture, with an equal right to control the venture and an agreement among them to participate in a common enterprise for the purpose of commercially transporting freight in interstate commerce, and were acting within the course and scope of said joint venture in furthering the business and duties of each other and are liable for the recklessness, negligence and negligence per se of each other.

25. Plaintiff is informed and believes, and based thereon alleges, that Defendants Conard Transportation, Conard Logistics, Conard Warehousing, Conard Transportation Drivers, Inc., Employee Solutions, Ingram Book Group, and/or Ingram Transportation at all times relevant herein were the agent, employer, and/or statutory employer of each other and of Defendant McDonald, and were acting within the course and scope of said joint venture, agency, and/or employment in furthering the business and duties of each other and are vicariously liable for the recklessness, negligence and negligence per se of each other.

On April 30, 2014, the Ingram Defendants moved to dismiss the claims against them based on the passing of the one-year statute of limitations for personal injury actions found at Tenn. Code. Ann. § 28-3-104; Employee Solutions moved to dismiss on May 6, asserting that “in neither Answer did any defendant allege comparative fault on the part of Employee Solutions” and that the claims of the Plaintiff in the Amended Complaint were time barred.

On May 9, 2014, Plaintiff moved to amend the First Amended Complaint; the proposed Second Amended Complaint added the following to the First Amended Complaint as paragraph 11:

Plaintiff did not discover, and did not have reasonable knowledge of the identity and wrongful conduct of, Defendants Conard Logistics, Conard Transportation Drivers, Inc., Conard Warehousing, Employee Solutions, Ingram Book Group, and/or Ingram Transportation until such was revealed in discovery in this matter subsequent to August 31, 2013. Plaintiff was further wrongfully misled with respect to the identity and involvement of the defendants, and/or said information was fraudulently concealed.

On May 16, the court heard both motions to dismiss and Plaintiff's motion to amend. The court orally granted both motions to dismiss, stating that motions were granted because "the statute of limitations had clearly passed as to those defendants." The court granted Plaintiff leave to "amend the complaint as to the remaining Conard Defendants because the complaint has been dismissed as to [the Ingram Defendants and] Employee Solutions." On May 28, the court entered separate orders that dismissed with prejudice the claims against the Ingram Defendants and Employee Solutions and on June 2, the court entered an order granting Plaintiff's motion to amend. On June 19, the proposed Second Amended Complaint which included the Conard defendants, Employee Solutions, and the Ingram Defendants as well as the above quoted language as paragraph 11, was filed.¹

The court entered a final judgment as to Employee Solutions and the Ingram Defendants, pursuant to Tenn. R. Civ. P. 54.02. Plaintiff appeals the court's dismissal of the Ingram Defendants and Employee Solutions from the suit.²

II. STANDARD OF REVIEW

The order granting the Ingram Defendant's motion to dismiss recited that the court reviewed "the record, considering the briefs and authorities submitted by the parties." Similarly, the order granting Employee Solutions' motion recited that the court reviewed "all pleadings, exhibits, and authority filed in support of [the motion]."³ Both orders, however, were entered on motions to dismiss pursuant to Tenn. R. Civ. P. Rule 12.02(6). As our Supreme Court explained in *Webb v. Nashville Area Habitat for Humanity, Inc.*:

A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings

¹ The trial court subsequently entered an order reciting, in part, that "to the extent this matter proceeds to trial, the second sentence of paragraph 11 of the Second Amended Complaint will be redacted in full and should not be discussed or introduced to the jury."

² Conard and Mr. McDonald are not parties to this appeal.

³ The record contained an affidavit of Plaintiff's counsel with attached exhibits, including a letter from Conard Transportation's attorney, a "Post Accident Memo" from Employee Solutions / Lightning Transportation, a "Customer Service Agreement" between Conard Logistics and Employee Solutions d/b/a/ Lightning Transportation Services, a "Schedule 'A' for Lease Drivers" executed by Conard Logistics and Valcom Driver Leasing Inc., Conard Transportation's Responses to Plaintiff's First Set of Interrogatories and for Production of Documents, a Consolidated Master Bill of Lading dated August 30, 2012, and a "Unit Transactions" log for diesel purchased for Conard Transportation. The order entered on the Ingram Defendants' motion does not state that it excluded these documents from its consideration.

alone. A defendant who files a motion to dismiss ““admits the truth of all of the relevant and material allegations contained in the complaint, but ... asserts that the allegations fail to establish a cause of action.””

In considering a motion to dismiss, courts ““must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.”” . . . We review the trial court’s legal conclusions regarding the adequacy of the complaint de novo.

To be sufficient and survive a motion to dismiss, a complaint must not be entirely devoid of factual allegations. Tennessee courts have long interpreted Tennessee Rule of Civil Procedure 8.01 to require a plaintiff to state ““the facts upon which a claim for relief is founded.”” A complaint “need not contain detailed allegations of all the facts giving rise to the claim,” but it “must contain sufficient factual allegations to articulate a claim for relief.” “The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader’s right to relief beyond the speculative level.” Thus, as we observed in *Leach [v. Taylor]*, 124 S.W.3d 87, 92 (Tenn. 2004):

“While a complaint in a tort action need not contain in minute detail the facts that give rise to the claim, *it must contain direct allegations on every material point* necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested . . . by the pleader, *or contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial.*”

Moreover, courts are not required to accept as true assertions that are merely legal arguments or “legal conclusions” couched as facts.

Webb, 346 S.W.3d 422, 426-27 (Tenn. 2011) (internal citations omitted) (emphasis in original). In considering a motion to dismiss pursuant to Rule 12.02(6) “[i]f . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Tenn. R. Civ. P. 12.02.

While the court stated in its orders that it considered matters other than the complaint in ruling on the motions, the record does not reflect that the court treated the motions as ones for summary judgment and allowed the parties the opportunity to present pertinent material. Since the trial court did not do so and, in any event, we review the court’s dismissal of the

action under either Tenn. R. Civ. P. 12.02(6) or Tenn. R. Civ. P. 56 *de novo*, we will proceed to resolve this appeal as an appeal of a dismissal pursuant to Tenn. R. Civ. P. 12.02(6).

III. ANALYSIS

The First Amended Complaint, which is the first pleading in which a claim was asserted against the Appellees herein, was filed more than one year after the accident which resulted in Plaintiff's injuries. Thus, the only way for the Plaintiff to escape the bar of the statute of limitations on the claims against Appellees is through the relation back provision of Tenn. R. Civ. P. 15.03:

Whenever the claim or defense asserted in amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing an action or within 120 days after commencement of the action, the party to be brought in by amendment (1) 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 (2) 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 party.

In his brief on appeal, Plaintiff asserts that the Appellees knew of the accident and had notice of the filing of the lawsuit within 120 days of the commencement of the action, but fails to cite to any allegation in the complaint to support this assertion, and our review of the First Amended Complaint and Second Amended Complaint reveals no such allegation. Furthermore, the First Amended Complaint was filed on March 25, 2014, nearly seven months after the applicable statute of limitations expired and more than 120 days after the commencement of the action on July 10, 2013. Neither complaint contains factual allegations which satisfy the requirement that the Appellees have notice of the institution of the lawsuit or that they knew or should have known that, but for a mistake concerning their identity, the action would have been brought against them, in order for the amendment adding them as parties to relate back to the date the original complaint was filed.

In the First and Second Amended Complaints, Plaintiff makes factual allegations upon which he seeks to impose liability on the Appellees for the alleged negligence of Mr. McDonald which caused the accident and Plaintiff's injuries, including that the Appellees were engaged in a joint venture with the Conard defendants; that the Conard defendants and Appellees "were the agent, employer, and/or statutory employer of each other and of Defendant McDonald, and were acting within the course and scope of said joint venture,

agency, and/or employment in furthering the business and duties of each other”; and that the Appellees are “interstate motor carriers subject to Federal Motor Carrier Safety Administration Regulations.” Upon our review that factual allegations, affording them the liberal reading and the benefit of reasonable inferences, we are of the firm conviction that they are insufficient to state a claim for relief against Appellees. Rather, they are conclusory allegations which do not “contain direct allegations on every material point necessary to sustain a recovery” on the legal theories asserted. *Leach*, 124 S.W.3d at 92.

Plaintiff also argues the motions to dismiss should have been denied, under the doctrines of equitable estoppel⁴ or fraudulent concealment,⁵ because of “misleading statements and late discovery” on the part of the Conard defendants. This argument is without merit.

The First Amended Complaint is devoid of any factual allegation which would estop Appellees from asserting the statute of limitations defense or to support a claim of fraudulent concealment. Similarly, the allegations contained in paragraph 11 of the Second Amended

⁴ Our Supreme Court has explained equitable estoppel as follows:

Thus, whenever a defendant has made out a prima facie statute of limitations defense, the plaintiff must demonstrate that the defendant induced him or her to put off filing suit by identifying specific promises, inducements, suggestions, representations, assurances, or other similar conduct by the defendant that the defendant knew, or reasonably should have known, would induce the plaintiff to delay filing suit. *Fahrner v. SW Mfg., Inc.*, 48 S.W.3d at 145; *Hardcastle v. Harris*, 170 S.W.3d at 85. The plaintiff “must also demonstrate that [his or her] delay in filing suit was not attributable to [his or her] own lack of diligence.” *Hardcastle v. Harris*, 170 S.W.3d at 85.

Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436, 460 (Tenn. 2012). Under the facts presented in this case, the doctrine of equitable estoppel is wholly inapplicable.

⁵ Our Supreme Court has held:

A claim of fraudulent concealment to toll the running of a statute of limitations contains four elements[:] . . . (1) that the defendant affirmatively concealed the plaintiff’s injury or the identity of the wrongdoer or failed to disclose material facts regarding the injury or the wrongdoer despite a duty to do so; (2) that the plaintiff could not have discovered the injury or the identity of the wrongdoer despite reasonable care and diligence; (3) that the defendant knew that the plaintiff had been injured and the identity of the wrongdoer; and (4) that the defendant concealed material information from the plaintiff by withholding information or making use of some device to mislead the plaintiff in order to exclude suspicion or prevent inquiry.

Redwing, 363 S.W.3d at 462-63 (footnotes and internal quotation marks omitted).

Complaint are conclusory and inadequate to establish a basis upon which to prevent the raising of the statute of the limitations defense or to constitute fraudulent concealment of any cause of action against Appellees.

V. CONCLUSION

For the foregoing reasons, the judgment of the trial court dismissing the claims against the Ingram defendants and Employee Solutions is affirmed. The case is remanded for further proceedings in accordance with this opinion.

RICHARD H. DINKINS, JUDGE