RENDERED: FEBRUARY 28, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001925-MR

MICHAEL G. GIDEON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 00-CI-03694

SAMARITAN HOSPITAL,
LEXINGTON, KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, Chief Judge; BARBER AND COMBS, Judges.

COMBS, JUDGE. Michael G. Gideon appeals from an order of the Fayette Circuit Court dismissing this medical negligence action. The appellee, Samaritan Hospital, contends that the trial court's order dismissing the action was proper since (among a variety of other reasons) Gideon failed to include the correct name of the hospital in his complaint. Based upon the results of our research, we are persuaded that Gideon's failure to

comply with the requirements of the civil rules is fatal to this action. Consequently, we affirm.

According to a *pro se* complaint filed March 16, 2001, Gideon received improper treatment for a dislocated elbow in the autumn of 1999. He alleged that he became aware of the malpractice only after he was seen months later by another physician. Numerous physicians, the Fayette County Detention Center, Ray Sabbitine (in his capacity as jailer), and "Samaritan Hospital (Lexington)" were among the named defendants. However, there is no legal entity known as "Samaritan Hospital (Lexington)." Counsel for C.H.C.K., Inc., d/b/a Samaritan Hospital, timely objected to the form of the complaint, the sufficiency of process, and the sufficiency of service of process. Following a hearing, the trial court granted the hospital's motion to dismiss. Gideon's motion filed pursuant to CR 59.05 was denied, and this appeal followed.

In McCoy v. Western Baptist Hosp., Ky. App., 628 S.W.2d 634 (1981), we held that the plaintiff's failure to state the correct name of the defendant hospital in the caption of the complaint in accordance with the provisions of CR[1] 10.01 required that the action be dismissed. "[W]e believe that the rule must be construed to mean exactly what it says and that a complaint

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[1] Kentucky Rules of Civil Procedure.

which does not include the names of all the parties in the caption . . . does not comply with the rule." Id. at 636.

We do not believe that any confusion existed concerning the identity of the intended defendant in this case nor that the hospital was misled or prejudiced by the plaintiff's failure to provide its correct name. Nevertheless, we are bound by precedent to affirm the trial court's dismissal of the action. While our holding in McCoy may seem rather rigid, its outcome could easily be avoided. Various avenues provide a remedy for the harshness of the McCoy mandate. The plaintiff=s use of an incorrect name to designate a party defendant would be simply and readily cured by amendment of the complaint. Moreover, in light of the rule with respect to the relation back of amendments, the misnomer could be remedied even after the statute of limitations has run.

Gideon was clearly entitled at all times to amend his complaint under the provisions of CR 15.01. Yet, despite the fact that the trial court carefully advised Gideon early on that the complaint he intended to file was Ainsufficient in that it fails to comply with CR 10.01" as to the inadequacy of the naming of the party defendants, Gideon failed to correct the complaint and service of process. The hospital objected. He was then provided yet another opportunity to remedy the error, but he either failed or refused once again to do so. Rather

than serve the hospital with an amended complaint, Gideon elected to argue in his response to the hospital=s objection that the hospital should be deemed to have been properly named and served since it failed to cooperate with his efforts to obtain the relevant information. The trial court had no recourse but to reject this argument, rendering the action ripe for dismissal.

There is some authority from other jurisdictions to support the proposition that a corporation may be sued under its assumed name or trade name. See Hutcheson Memorial Tri-County Hosp. v. Oliver, 120 Ga. App., 547, 171 S.E.2d 649 (1969); Tyson v. L=Eggs Products, Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987). However, there is no indication that Kentucky courts have accepted this procedure in lieu of its precedent in McCoy, supra. Indeed, McCoy appears tacitly to reject it. It does not appear that service was made upon any agent authorized to receive service on behalf of the hospital in this case – regardless of how that defendant was denominated in the complaint or process. The question of whether counsel unwittingly subjected its client to the jurisdiction of the court by failing to make a special or limited appearance to protest the service was not raised on appeal.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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