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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000429-MR

WILLIAM DAVIDSON; SHARON DAVIDSON; AND DERRICK WESTFALL — APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 00-CI-01097

CITY OF SOMERSET; SOMERSET GAS COMPANY; UNIDENTIFIED EMPLOYEES OF SOMERSET GAS COMPANY; CITY OF FERGUSON, KENTUCKY; FERGUSON GAS COMPANY; AND UNIDENTIFIED EMPLOYEES OF FERGUSON GAS COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, JUDGE: The Davidsons appeal the circuit court's grant of summary judgment to the cities of Somerset and Ferguson and their respective gas utilities. For the reasons herein, we affirm the circuit court's decision.

Background

After a natural gas explosion causing extensive property damage as well as personal injuries occurred in the basement of the Davidsons' house, they brought a tort action against their natural gas supplier, Somerset Gas, which is a public utility of the city of Somerset. In their complaint, the Davidsons allege that a leak in Somerset's gas line going into their house caused the explosion. Five years and ten months later, the Davidsons amended their complaint, alleging that the culpable leak actually occurred in a line owned by Ferguson Gas Company, a public utility of the city of Ferguson. Following extensive discovery, the circuit court granted summary judgment to both Somerset and Ferguson.

Legal Standards

Summary judgment is appropriate when the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to [favorable] judgment as a matter of law." *See* CR 56.03; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Although the burden of persuasion lies with the movant, the opposing party cannot defeat a summary judgment motion "without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* The party opposing summary judgment cannot rely merely on

their own claims or arguments but rather must point to significant supporting evidence. *See, e.g., Wymer v. JH Properties Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). In other words, the circuit court is not required to try a case of speculations and conjectures by the plaintiffs which have no evidentiary support. Rather, to avoid summary judgment, the plaintiff must demonstrate that there is a practical possibility that he can produce affirmative evidence at trial supporting his claims such that a jury could return a verdict in his favor. *See Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992) (requiring plaintiff to have "practical" chance of proving his case at trial).

Analysis

I.

The Davidsons' direct claim against Somerset is that a leak in Somerset's gas line into the Davidsons' house caused the explosion in the Davidsons' basement and not some other source. But, upon thorough review of the record, we find only speculation, conjecture, and mere accusation on the part of the Davidsons in support of their claim. Indeed, the sworn discovery testimony by Somerset employees, who personally inspected Somerset's gas line to the Davidsons' residence immediately following the explosion, indicates that there was no leak. Though the Davidsons assert that these Somerset employees are untruthful and that Somerset covered up all evidence of the purported leak immediately following the explosion, we note again that these assertions are merely that. They are not supported by any affirmative evidence. In sum, the Davidsons have not adduced any substantial evidence, nor explained how they would

do so at trial, indicating that a leak in Somerset's lines caused the explosion and resulting damages in this case. Consequently, we hold that the Davidsons have no practical possibility of proving their direct claim against Somerset.

II.

Alternatively, the Davidsons allege that the explosion in their residence was caused by a leak in their neighbors' natural gas line, owned by Ferguson, but maintained by Somerset. Based on this factual allegation, the Davidsons theorize that Somerset is vicariously liable for the explosion due to their purported agency relationship with Ferguson. Again, we have carefully reviewed the evidence adduced in discovery on this point. And while we note that it shows that Ferguson and Somerset have had a longstanding relationship in which Somerset repairs Ferguson lines on a case-by-case basis when requested by Ferguson or a Ferguson customer, we also note that the scope of the relationship between Somerset and Ferguson has always been strictly limited to contracted, spot repairs.

In other words, we have found no evidence in the record that Somerset has ever entered into a general agency relationship with Ferguson to *sua sponte* inspect and maintain the functionality or safety of Ferguson's gas lines. Nor have the Davidsons explained to us how, as a practical matter, they plan to prove that Somerset bore any preventative maintenance duty or obligation in relationship to Ferguson's gas lines. Instead, the Davidsons again rely on mere assertions. This is insufficient. In sum, on the record before us, we note that, while Ferguson might possibly be vicariously liable for

any shoddy work performed by Somerset on a Ferguson line, Somerset cannot be held generally liable for all leaks occurring in Ferguson's lines. Therefore, even assuming that a Ferguson leak caused the Davidsons' damages, we hold that the record indisputably shows that Somerset has no relationship with Ferguson sufficient to support a vicarious liability claim against Somerset.

III.

Assuming that the leak in Ferguson's neighboring lines caused the Davidsons' damages, even their direct claims against Ferguson must fail because they did not name Ferguson as a defendant until after the expiration of the statutes of limitations for property damage and personal injury. The Davidsons do not dispute the belatedness of their claim against Ferguson, but they do contend that they should escape the statutes of limitations under the discovery rule. Kentucky case law indicates that the applicable statutes of limitations should not begin to run until a cause of action accrues. *See McCollum v. Sisters of Charity*, 799 S.W.2d 15, 18 (Ky. 1990). But, in some cases, especially medical malpractice cases, a complainant may not become aware of an injury or its cause until well after the statute of limitations runs. Thus, under the discovery rule, the limitation period only begins to run upon the reasonable discovery of an injury and its cause. *See, e.g., Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1983).

But here, the Davidsons were immediately aware of their injuries and that they were caused by a natural gas explosion. Therefore, under the facts of this case, we cannot delay the running of the statute of limitations at all. Indeed, the entire point of the

limitations period is to force a complainant that is aware of his injuries and their cause to discover the identity of any tortfeasor and bring a legal action against him within the time constraint of the limitations period. *See, e.g., Combs v. Albert Kahn Associates, Inc.*, 183 S.W.3d 190, 199 (Ky.App.2006). Absent fraud, failure to discover a tortfeasor's identity within the limitations period requires dismissal of the claim. *See Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 151 (Ky. 2007.) Consequently, even applying the discovery rule, we hold that the Davidson's direct claim against Ferguson -- brought some five years and ten months after the explosion occurred -- is time barred. *See* KRS 413.120 & .140.

IV.

The Davidsons' final contention is that the amendment of their complaint to name Ferguson as a defendant should "relate back" to the time of the filing of the original complaint, thereby avoid the statute of limitations issue altogether. *See* CR 15.03 But, the relation-back doctrine "is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period." *Schwindel v. Meade County*, 113 S.W.3d 159, 169-70 (Ky. 2003). Here, the original complaint specifically indicates that the purported tortfeasor was the Davidsons'

natural gas supplier, i.e., Somerset. Since Somerset is in fact the Davidsons' natural gas supplier, not Ferguson, the original complaint contains no mistake of identity and the third *Schwindel* factor is thus not present here and, for that reason alone, we hold that CR 15.03's relation-back rule cannot apply.

Conclusion

For the foregoing reasons, we conclude that the circuit court did not err in granting adverse summary judgment on all of the plaintiffs' claims and accordingly, affirm the judgment of the Pulaski Circuit Court in this action.

ACREE, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT.

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