1998

Randi Hebertson, Plaintiff, vs. Bank One Utah, N.A., formerly known as VALLEY BANK & TRUST COMPANY, and DIME SAVINGS BANK OF NEW YORK, FSB, dba WILLOWCREEK PLAZA, WILLOWCREEK SHOPPING VILLAGE, LTD., and WILLOWCREEK PLAZA EXECUTIVE OFFICES, Defendants : Reply Brief

Utah Court of Appeals

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Jonh Clyde Hansen, Daniel L. Steele, Smith & Glauser, Attorneys for appellees.

IN THE UTAH COURT OF APPEALS

RANDI HEBERTSON, Plaintiff, vs. BANK ONE, UTAH, N.A., formerly known as VALLEY BANK & TRUST COMPANY, and DIME SAVINGS BANK OF NEW YORK, FSB, dba WILLOWCREEK PLAZA, WILLOWCREEK SHOPPING VILLAGE, LTD., and WILLOWCREEK PLAZA EXECUTIVE OFFICES, Defendants.	:	Priority 15 Appeal No. 98-0226

REPLY BRIEF OF APPELLANT

APPEAL FROM AN ORDER OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE JUDGE TIMOTHY R. HANSON PRESIDING
GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT

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The issues raised by the defendants can be briefly addressed.

First, the defendants do not deny or dispute that State Farm, the liability insurance carrier for the property where the plaintiff fell, had notice of the claim well before any period of limitations ran. Although in Utah there is no direct right of action against the insurer on a liability claim, no one can dispute that State Farm is the primary party in interest in defending this action.

Secondly, it is not accurate to describe the first action filed by the plaintiff in November, 1992, as "a nullity". The action was filed against "Willowcreek Plaza", which was both the name of the shopping plaza where the plaintiff's accident occurred, and also the name of the owner of the property at the time the lawsuit was filed. The property owner, Willowcreek Plaza, L.C., was served with the complaint. Although Judge Lewis dismissed the first action on the ground that Willowcreek Plaza, L.C. did not own the property at the time of the accident, this does not mean that the first action was a nullity, nor that it was filed against a non-existent entity. Likewise, although it was later determined that the actual owners of the property were not doing business in 1992 under the name Willowcreek Plaza, it is clear from the complaint that it was plaintiff's intention to bring the action against the owners of the property, and they appeared to be doing business under that name.

Therefore, the question is really whether under these peculiar circumstances the savings statute (assuming for the reasons set forth in the plaintiff's opening brief that it

allows for more than one refiling) permits the plaintiff to correct the name of the defendants in a subsequent refiling.

Much of the authority cited by defendants is not helpful. For example, the Utah cases of Dunn v. Kelly, 675 P.2d 571 (Utah 1983) and Estate of Haro v. Haro, 887 P.2d 878 (Utah Ct.App. 1994), along with several of the cases cited from other jurisdictions such as Brown v. Hartshorne Public Sch. Dist. No. 1, 926 F.2d 959 (10th Cir. 1981), involve cases in which an attempt was made to substitute one plaintiff for another in an action refiled under a savings statute. These cases hold that a party cannot take advantage of someone else's prior filing to invoke the savings statute. That issue is simply not presented by this case in which the plaintiff is the same, and the factual allegations and cause of action are identical.

While there are cases which hold that it is not permissible to name a new defendant in an action to be filed under a savings statute, there are also cases which allow for such a joinder, and the only Utah case in which the situation arose appears to have permitted such an addition of a new party, Madsen v. Borthick, 769 P.2d 245 (Utah 1989). (*See* discussion at pages 8 through 10 of appellant's opening brief). In addition to the authorities cited in the opening brief, it is of interest that it has been held that when in an initial action an insurer was directly named, and in a second saved action the insured was named, such a substitution of parties was permitted by the Eighth Circuit Court of Appeals applying Iowa law in Beilke v. Droz, 675 F.2d 194 (8th Cir. 1992). (The issue in Beilke was certified to the Supreme Court in Iowa which issued its opinion in Beilke v. Droz, 316 N.W.2d 912 (Iowa 1982) holding that if there is sufficient identity

of interest between the parties, or the change is merely nominal, one defendant may be substituted for another in a refiled action). It has also been held that when one defendant acquires the assets and liabilities of another, the purchaser can be substituted for the former owner mistakenly named pursuant to the Oklahoma saving statute, Clark v. Phillips Petroleum Co., 677 P.2d 1092 (Okla. App. 1984). *See also*, Producers Releasing Corp. v. Pithe Ind., Inc., 184 F.2d 1021 (2nd Cir. 1950).

The important point is that under certain circumstances a substitution of defendants has been permitted by other courts in a refiled action, and the peculiar circumstances of this case warrant a reversal of the district court's dismissal of the complaint. At a minimum, the judgment of dismissal should be reversed and the case remanded for additional evidentiary review of the question whether there is sufficient identity of interest between the original named defendant and the presently named defendants to allow the action to go forward.

CONCLUSION

The order dismissing plaintiff's complaint should be reversed and remanded with an order allowing the case to go forward, or at a minimum, with instructions to the district court to take further evidence on the identity of interest between the original and substituted defendants.

RESPECTFULLY SUBMITTED this 5th day of January, 1999.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
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