

ROY C. GUTSHALL and GWENDOLYN GUTSHALL,
his wife, Plaintiffs vs. EUGENE M. BUTLER,
Defendant, Franklin County Branch CIVIL ACTION - LAW A.D.
1997 - 224

Gutshall v. Butler

Amendment of complaint to substitute defendant after statute of limitations has run

1. Facts: plaintiff filed petition for leave to amend complaint to substitute defendant. Plaintiff sued owner of car after having been shown registration and insurance card at scene of accident with owner's name on it. After two years of negotiation with owner's insurance company, plaintiff files suit. Plaintiff finds out through discovery that someone else was driving the car. By this time, the statute of limitations had run.
2. Generally, a complaint may not be amended after the statute of limitations has run if it attempts to bring in a new and distinct party.
3. Where through fraud or concealment, defendant causes plaintiff to relax his vigilance or deviate from his right of inquiry, defendant is estopped from invoking bar of statute of limitations; unintentional fraud or concealment is sufficient.
4. Superior court has held that where neither the real driver, nor the original defendant nor the insurance company supplied defendant with the correct name until after the statute of limitations has run, the original defendant and his agents had actively misled plaintiff.
5. The original defendant and his agents actively misled plaintiff by the following acts: owner's insurance company knew one day after accident that the owner was not the driver; insurance company negotiated for almost two years with plaintiff without informing plaintiff that the owner was not the driver; instead of filing motion to dismiss, original defendant's attorney filed praecipe to compel plaintiff to file a complaint against original defendant; in his answer, the original defendant does not disclose true identity of driver but merely denied he was driving.
6. Outcome may be different where there is a police report of the accident containing the true identity of the driver, because plaintiff would have opportunity to discover that identity.

Bradley R. Bolinger, Esquire, Counsel for Plaintiff
Donald R. Dorer, Esquire, Counsel for Defendant

OPINION AND ORDER

Walker, P.J., May 26, 1998:

Factual and Procedural Background

This case is based on an incident involving two cars which occurred on June 1, 1995. Plaintiff Roy Gutshall was hit by a car while he was stopped on the berm to investigate a noise in his truck tire. They exchanged insurance information, and the driver of the truck that hit plaintiff showed him a registration and insurance card which designated Defendant Eugene Butler as the owner of the

vehicle. The Pennsylvania State Police were contacted, but they did not appear on the scene because both vehicles were drivable and there were no serious injuries. After the accident, an insurance adjuster for Nationwide Insurance Company, Eugene Butler's insurer, contacted plaintiff several times and attempted to negotiate a settlement over a period of almost two years, but this attempt failed.

Plaintiff subsequently served a writ of summons upon Defendant Eugene Butler on May 20, 1997. On June 17, 1997, Donald Dorer, Esquire, entered his appearance on behalf of Eugene Butler and filed a praecipe to enter a rule on plaintiff to file a complaint within twenty days. On June 27, 1997, plaintiff filed a complaint, alleging that Eugene Butler had negligently operated the truck which had struck plaintiff. Together with the complaint, plaintiff sent interrogatories and a request for production of documents to Nationwide Insurance. On July 8, 1997, defendant filed an answer in which he denied that he was driving the vehicle which struck plaintiff. Finally, in the response to plaintiff's discovery requests, Nationwide provided information indicating that the driver of the truck was not Eugene Butler but Rodney Shaffer. At this time the statute of limitations governing this action had run.

Subsequently, on October 16, 1997, plaintiff filed a petition for rule to show cause why plaintiff should not be granted leave to amend the complaint to reflect that the defendant is Rodney Shaffer and all references to Eugene Butler as the defendant be amended to reflect that the correct defendant is Rodney Shaffer. Defendant opposed the petition. Both parties filed briefs in support of their arguments. Argument was held on May 7, 1998.

Discussion

Generally, a complaint may not be amended after the statute of limitations has run if it attempts to bring in a new and distinct party. *Saracina v. Cotoia*, 417 Pa. 80, 208 A.2d 764 (1965). However, "[w]here 'through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry,' the defendant is estopped from invoking the bar of the statute of limitations." *Molineux v. Reed*, 516 Pa. 398, 402, 532 A.2d 792 (1987), citing *Schaffer v. Larzelere*, 410 Pa. 402, 189 A.2d 267 (1963). "Moreover, defendant's conduct need not rise to fraud or concealment in the strictest sense, that is, with an intent to deceive;

unintentional fraud or concealment is sufficient.” *Molineux*, 516 Pa. at 403. However, mere mistake, misunderstanding or lack of knowledge is not sufficient. *Id.* The burden of proving fraud or concealment is on the asserting party by clear, precise and convincing evidence. *Id.*

In a case factually similar to the underlying case, there had been a car accident and the drivers had exchanged insurance and identification information. *DeRugeriis v. Brener*, 237 Pa. Super. 177, 348 A.2d 139 (1976). That information provided the name of Herbert Brener. Communications took place between the plaintiff, Herbert Brener, and Herbert Brener’s insurance company. *DeRugeriis*, 348 A.2d at 140. Subsequently, plaintiff filed a complaint against Herbert Brener. Herbert Brener filed an answer averring that it was his son, Stephen Brener, who had been the driver of the car. *Id.* The court granted plaintiff leave to amend the complaint. However, in his answer to the amended complaint, Stephen Brener asserted that the statute of limitations had run before he was made a party to the action and argued he could therefore not be sued. *Id.* The court noted that neither the real driver, nor his father, nor the insurance company supplied the plaintiff with the correct name of the driver. The court held that, whether intentionally or not, the original defendant and his agents had “actively misled” the plaintiff as to who the real driver was until after the statute of limitations had run. *Id.* Because the true identity of the driver was withheld until the defendant answered the complaint, the court concluded that the statute of limitations was tolled. *Id.*

Similarly, in the underlying case, defendant did not notify plaintiff as to the identity of the real driver until after the statute of limitations had run. Nationwide Insurance Company knew as early as one day after the accident that Rodney Shaffer had been the driver of the car. A Nationwide Insurance claims adjuster called Rodney Shaffer on June 2, 1995, and made a memo of Rodney Shaffer’s statement that he was the actual driver. (Plaintiff’s exhibit 2 of hearing of May 7, 1998). On June 5, 1995, the same claims adjuster for Nationwide also took a recorded statement from Plaintiff Roy Gutshall, in which he stated his belief that Eugene Butler had been the driver. (Plaintiff’s exhibit 1 of hearing of May 7, 1998). However, the claims adjuster did not tell plaintiff that his belief was mistaken. Not only did Nationwide fail to inform plaintiff that Eugene Butler was

not the driver at that time, but, incredibly, it remained silent as to the true identity of the driver throughout two years of negotiation with plaintiff to settle this claim. When plaintiff finally commenced suit by filing a writ of summons, an attorney for defendant entered his appearance and, simultaneously, filed a praecipe to issue a rule on plaintiff to file a complaint. Defendant’s attorney did this without identifying the real driver, even though he knew that plaintiff would file a complaint against Eugene Butler and not the real driver. Even in its answer defendant does not identify the true identity of the driver but merely denies that he was the person driving. It was only after the documents plaintiff requested in discovery were provided, that plaintiff was able to discover the real driver.

It is clear to this court that the real driver, the defendant-owner, and his insurance company, similar to the situation in *DeRugeriis*, actively misled plaintiff about the true identity of the driver until after the statute of limitations had run. The name of the real driver was withheld until defendant had to comply with discovery, even though there had been a two-year negotiation on the claim with the insurance company. Even after a writ of summons was filed against Defendant Eugene Butler, his attorney did not move to dismiss Eugene Butler as a defendant, but instead filed a praecipe to compel plaintiff to file a complaint against Eugene Butler. This court finds the conduct of Nationwide Insurance to be unconscionable. In light of the ongoing negotiations of Nationwide with plaintiff while knowing that plaintiff believed Defendant Eugene Butler was the driver, this court finds it hard to believe that this was not done intentionally. However, whether intentional or unintentional, this court finds that plaintiff has shown by clear, precise and convincing evidence that at the very least, Defendant Eugene Butler and Nationwide Insurance actively misled plaintiff as to the identity of the actual driver. Therefore this court will permit the complaint to be amended to reflect that the defendant is Rodney Shaffer and all references to Eugene M. Butler as the defendant are amended to reflect that the correct defendant is Rodney Shaffer.

Defendant submitted a Dauphin County case in support of his argument that plaintiff should not be permitted to amend the complaint. *Hallock v. Brown*, No. 3294 S 1997. In that case, it involved a son, Jason Brown, who had driven the car involved in a car accident. Plaintiff sued the father and owner of the car, Joseph

Brown. There was some communication between the plaintiff and the insurer, Nationwide Insurance, but Nationwide never informed plaintiff that she was mistaken about the identity of the driver. The court found that there was no evidence of concealment by Nationwide in that case. *Hallock*, at p. 3. However, a major distinguishing factor between *Hallock* and the underlying case is that in *Hallock*, a police report of the accident had been made which contained the name of the real driver. Thus, plaintiff had the opportunity to inspect the report and discover the identity of the real driver. In the underlying case, however, no police report was made. Other than information from defendant, the real driver, or the insurance company, plaintiff had no means of discovering that identity. Because of defendant's failure to disclose the real identity of the driver, plaintiff relaxed his vigilance in determining who to sue. Therefore, plaintiff will be permitted to amend the complaint and Rodney Shaffer will be estopped from asserting the statute of limitations.

ORDER OF COURT

May 26, 1998, upon consideration of plaintiff's petition to amend the complaint, defendant's answer, the briefs submitted to this court and argument by both parties, this court grants plaintiff leave to amend the complaint to reflect that the defendant is Rodney Shaffer and all references to Eugene M. Butler as the defendant shall be amended to reflect that the correct defendant is Rodney Shaffer.

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