THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY **SUPERIOR COURT**
Docket No.: 08-C-794

Caroline McMullen

v.

Donald L. Lamoureux

ORDER

In this motor vehicle personal injury case, the plaintiff, Caroline McMullen ("McMullen") sued Donald L. Lamoureux ("Donald"), in connection with a motor vehicle incident that occurred in Portsmouth, New Hampshire, on December 20, 2005. McMullen instituted suit on September 4, 2008. The driver in the incident in question, however, was not Donald but his wife of many years, Amelia Lamoureux ("Amelia").

On January 6, 2009, after the passage of the three year period of limitations for personal injury actions (RSA 508:4,I), and after some discovery, Donald filed a Motion for Summary Judgment, contending that "[b]ecause Donald . . . was not driving the motor vehicle involved in the collision with . . . McMullen, he may not be held liable for this motor vehicle accident and he is entitled to judgment as a matter of law on the undisputed facts." See Mot. for Summ. J. at ¶4. McMullen interposed a limited Objection, asserting that while she did not object to judgment being entered in favor of Donald, she did "object to a final judgment being entered in this case." See Limited Obj. at ¶3. She contended that Amelia should be substituted for Donald and the case should be allowed to continue. McMullen filed a Motion to Amend to name Amelia as the defendant. See Pl.'s Mot. to Amend, dated February 2, 2009.

Donald has objected to McMullen's attempt to substitute Amelia, and Amelia has specially appeared through the same counsel that represents Donald to contest her addition to the case.

The Court held hearings regarding the issues in dispute on March 9, 2009 and October 19, 2009. It has allowed the parties some additional time to file supplemental submissions.

McMullen indisputably failed to name Amelia as the defendant in this matter when she first instituted suit a number of months before the expiration of the pertinent period of limitations. This reflects error on the part of McMullen and her attorney. They possessed the pertinent police report indicating that Amelia was the driver of the involved vehicle with Donald the owner.

It is also undisputed that Amelia, the claimed driver at fault, made her husband Donald aware of the motor vehicle accident shortly after it occurred; that she and/or Donald put their insurance company, Allstate Insurance Company ("Allstate"), on notice with regard to the incident; that an Allstate representative interviewed Amelia concerning the incident; that Amelia and Allstate came to be put on notice regarding McMullen's claims through McMullen's attorney; and that on September 10, 2008, the sheriff delivered McMullen's suit papers to Amelia at the residence and domicile she has shared with Donald for many years, and these papers set forth the date, location and certain other averments relating to the negligence claim and motor vehicle incident, but named Donald, and not her, as the alleged driver/tortfeasor.

Amelia concedes that while she did not, at the time of the service, pay real or much attention to the suit paperwork, and asserts that she did not know there was "an error at the time" with regard to Donald being sued, she knew "the paperwork had something to do with [the] motor vehicle accident," she did not believe Donald "had anything to do with the case;" and "the case had only to do with [her]." See Pl.'s Mot. to Amend, Ex. A (Deposition of Amelia at 18, 21-22) Donald admits that he learned of the service from Amelia almost immediately after it occurred, and, after quickly perusing the papers, manifested surprise and unhappiness in front of her that he was being sued. See Obj. to Mot. to Amend, Ex. B (Deposition of Donald at 12). He also immediately got in

touch with his Allstate insurance representative with Amelia aware of this. Id.; Pl.'s Mot. To Amend, Ex. A (Deposition of Amelia at 21).

It is also clear that, thereafter, Donald communicated, at least to some degree, with Amelia concerning the law suit; contacted his insurance company regarding same; came to be represented by the law firm of Wiggin & Nourie, P.A. and, in particular, Dennis T. Ducharme, Esquire; came to be served, in October, 2008, by McMullen, through her attorney, with interrogatories; had some discussion with Amelia regarding the answers to the interrogatories while he was preparing them; and answered the interrogatories, highlighting, in so doing, McMullen's error in naming him, and not Amelia, as the driver/claimed tortfeasor.

Donald's answers to interrogatories, though due in early November, 2008, and though signed by Donald in mid December 2008, were not actually submitted to McMullen's attorney until early January, 2009, after the statute of limitations had expired. At the same time, Donald submitted his Motion for Summary Judgment.

McMullen asserts that inasmuch as Amelia had obtained timely actual notice of the lawsuit and "has been intimately involved in the dispute from the date of the collision to the present," see Pl.'s Mot. To Amend at ¶ 12, the Court should allow the action to proceed against Amelia. In opposing McMullen's Motion, Donald and Amelia emphasize the expiration of the three year limitations period, and strongly aver that McMullen is not entitled to relief as she did not merely "misname a party" but sued "the wrong party," with the writ containing "no evidence of intent to sue Amelia. . . ." See Obj. to Mot. To Amend at ¶ 15.

The New Hampshire Supreme Court has shown willingness to allow the naming of a new defendant by amendment, though after the expiration of the applicable statute of limitations, in circumstances where the added, or substituted, defendant had actual timely notice of the action and understanding as well that the action was really oriented to being pursued against him/her. See Dupuis v. Smith Properties, Inc., 114 N.H. 625 (1974). In Dupuis, the Court reversed the trial

court's denial, on statute of limitations grounds, of the plaintiff's motion to substitute and name the really intended defendant. The Court observed that, irrespective of whether the plaintiff's initial naming of the defendant was deemed an instance of "misnomer" or "mistaken identity," the "crucial fact" was whether the really intended defendant had received actual notice before the expiration of the statute of limitations. Id. at 629. Since the defendant sought to be substituted, "R.H. Smith Corporation" (in place of "Smith Properties, Inc. d.b.a. R.H. Smith Company"), had received such actual notice, though "informal," the Court explained that, per RSA 514:9, "[the] plaintiff should have been permitted to amend . . . since [the] defendant would not be prejudiced by the amendment." Id.

The Supreme Court has, however, also manifested unwillingness to allow a substitution of a new defendant, after the passage of the pertinent period of limitations, where the initial writ contained no suggestion of any intent to sue the sought new defendant; "the doctrine of misnomer . . . [had] no application;" and the sought new defendant had not received any proper timely notification or service. See Lewis v. Hines, 81 N.H. 24, 27 (1923); see also Perez v. Pike Inds., 153 N.H. 158, 161-63 (2005).

To be sure, a statute of limitations is not some mere procedural technicality, but a bright line intended to "represent the legislature's attempt to achieve a balance among State's interests in protecting both forum courts and defendants generally against stale claims and in insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action." See Donnelly v. Eastman, 149 N.H. 631, 633-34 (2003) (quotation and citation omitted). Here, however, unlike Donnelly, the initial suit was timely instituted, and the dispute concerns whether McMullen's attempt to substitute Amelia for Donald may be allowed as timely presented.

The Court is persuaded that McMullen is entitled to the relief she seeks and may proceed against Amelia. The Dupuis case supports this conclusion. Amelia actually received the timely service of the lawsuit, and then knew that a suit had been instituted that concerned the motor vehicle incident in which she had been the driver. The content of the writ reflected an intent to sue

the driver of the Lamoureux motor vehicle, and Amelia certainly then had reasonable basis to understand, and the record reflects that she did have some understanding, that the suit had mistakenly named her husband even though he had not been the driver. Indeed, Donald evidenced to Amelia his surprise that he was in fact being sued when the timely service occurred. Thereafter, and before the expiration of the period of limitations, Amelia had awareness that Donald was moving along to, among other things, respond to interrogatories in the case, which suggested he was the driver, when they both knew he had not been the driver.

Furthermore, Amelia would not be prejudiced in maintaining a defense on the merits, particularly inasmuch as the case involves the same transactions or occurrences involved in the original pleading. The dictates of RSA 514:9 would not be really infringed in this case by the allowance of the amendment; rather the amendment works to prevent an injustice.

Cases cited by McMullen from other states, and the First Circuit Court of Appeals, generally support the Court's conclusion here. See Leonard v. Parry, 219 F.3d 25 (1st Cir. 2000); Fassero v. Turigliotto, 811 N.E. 2d 252, 256 (Ill. App. Ct. 4th Dist. 2004); Deal v. Hastings, 2003 WL 23100341 (Tenn. Ct. App.) (December 22, 2003); Solely v. Van Keppel, 656 N.E. 2d 508, 511 (Ind. Ct. App. 1995); White v. Haggerty, 117 Wash. App. 1067 (Wash. Ct. App. 2003). While these cases relied upon either a "relation back" statute or court rule to allow, or deal with, the substitution of a new defendant after the passage of the pertinent statute of limitations, and New Hampshire has no such statute or rule (but see RSA 514:9), the Dupuis case, in deemphasizing, at least to some degree, distinctions based on "misnomer" or mistaken identity," recognized the propriety of allowing a new defendant to be named, where, as here, the really intended defendant had received actual notice before the statute of limitations had expired, and it would be fair to allow the case to proceed to be determined on its merits.

McMullen and/or her attorney clearly erred in initially proceeding against Donald. Yet the record also reflects that both Donald and his counsel (who also came to be counsel for Amelia)

delayed without permission in answering the interrogatories that McMullen had promptly served. If Donald had timely provided his responses, McMullen would have had time, upon being alerted as to her error, to institute suit against Amelia within the period of limitations. These circumstances do not dispose the Court to apply the statute of limitations as Donald and Amelia suggest.

For the reasons described above, the Court **GRANTS** Donald's Motion for Summary Judgment insofar as it enters judgment in his favor, but also **GRANTS** McMullen's Motion to Amend and deems suit against Amelia to be timely presented.

So ordered.

11/17/2009
Date

John M. Lewis
Presiding Justice