BENCHMEMO: LESLIE B. LINDENMUTH v. ERIKA BLANTON, M.D., et al., 87-0589-R

ATTORNEYS: Plaintiff: James Minor (Minor & Smith)
Defendants: Jack Russell & Carol Russek (Browder, Russell)

Judge, this matter is before you on defendants' Thomas, Fiedler, Foere, and Brawner's motion for summary judgment pursuant to Rule 56(b), Fed. R. Civ. P.

The plaintiff is suing several doctors and Chippenham Hospital for medical malpractice for failure to diagnose cancer. Drs. Thomas, Fiedler, Foere and Brawner were named as defendants on the assumption that they were partners in a partnership with Dr. Blanton, the plaintiff's treating physician. Apparently Drs. Thomas, Fiedler, and Foere are principals in the professional corporation known as "Drs. Thomas, Blanton, Fiedler and Foere, Inc." Dr. Brawner was an employee of the corporation. The plaintiff contends that the professional corporation violated Va. Code §§59.1-69 and 70 by trading under an unregistered fictitious name. Consequently, she argues that she should be allowed to amend her complaint to name the professional corporation as a defendant and drop the individual doctors. She also claims the amendment should relate back to the date of the original complaint.

I believe you should grant the defendant's motion for summary judgment and dismiss the doctors as parties. If and when the plaintiff makes a motion to amend her complaint to include the professional corporation, I believe you should grant that as well. To date she has raised the remedy in a her brief in

opposition to the motion for summary judgment but did not file a separate written motion or brief in support as required by Local Rule 11.

Virginia's Fictitious Name Statute

It is undisputed that the doctors were doing business as a professional corporation entitled "Drs. Thomas, Blanton, Fiedler and Foere, Inc." and registered it with the S.C.C. Since Drs. Thomas, Fiedler and Foere are not partners, they are not liable. The corporation is, and they should be dismissed as defendants. Dr. Brawner was an employee of the corporation. She too should be dismissed as a defendant.

I believe it is also undisputed that the professional corporation has not used its registered name anywhere on its stationery, medical records, signs, or telephone directory listing. Instead the corporation used such names as "Obstetrics & Gynecology" and "Thomas, Blanton, Fiedler and Foere, doctors," and did not register these names. Therefore, the corporation failed to comply with either Va. Code §59.1-69 which requires the registration of an assumed name certificate with the Clerk of the city or county court where the corporation does business or with §59.1-70 which requires a similar filing with the Clerk of the S.C.C.

Remedy

The remedy the plaintiff seeks is governed by Fed. R. Civ. P. 15(c). Rule 15(c) provides that an amendment changing parties to an action relates back to the date of the original complaint if: (1) the claim against the new party arose out of the same

occurrence set forth in the original pleading; (2) the new party had received notice of the institution of the action and will not be prejudiced in his defense, and (3) the new party knew or should have known that, but for the mistake concerning the identity of the proper party, the action would have been brought against the party. Here, it is important that the amendment relate back since the statute of limitations has run.

Undeniably the claim against the doctors' professional corporation arose out of the same events as alleged in the complaint. Secondly, the corporation had notice of the claim and has not been prejudiced in any way by the delay in naming it as a party. Dr. Thomas is the Registered Agent for the corporation. He was served with notice of the plaintiff's malpractice action and a copy of the complaint.

Finally, I think the third criteria is satisfied as well. The plaintiff attempted to sue Dr. Blanton's business association by suing those doctors who she believed to be his partners. Because she was unable to find a certificate with the S.C.C. attesting to the corporate status of an association of the doctors, she assumed they formed a partnership. This is precisely the type of mistake and deception that the Virginia fictitious name statute attempts to prevent and protect against.

The remedy provided by the Virginia code is that "the failure of any person or corporation to comply with the provisions of this chapter shall not prevent a recovery by or against such person or corporation in any of the Courts of the Commonwealth or any cause of action heretofore or hereafter

arising..." Although not a court of the Commonwealth, the court has diversity jurisdiction in this matter and Virginia law should control. On these grounds, the plaintiff should be permitted to amend her complaint to include Drs. Thomas, Blanton, Fiedler and Foere, Inc.

The plaintiff also cites the court to Bryant Electrical Company, Inc. v. Joe Rainero Tile Company, 84 F.R.D. 120 (W.D. Va. 1979) In that case, the defendant filed a Assumed Named Certificate after the filing of the complaint. The court permitted the plaintiff to substitute the corporate defendant for the named individual defendant: "[T]o allow the defendant to profit from its failure to comply with Virginia's registration provisions would be a gross miscarriage of justice... The important point, however, is that plaintiff had in mind the proper entity in its original caption." 84 F.R.D. at 123. I believe the plaintiff here did have in mind the proper party and should be granted the remedy she seeks.

Conclusion

I believe you should GRANT the defendants' Thomas, Fiedler, Foere and Brawner motions for summary judgment. If you want to allow the plaintiff to make an oral motion for leave to amend her complaint to name the corporate defendant, I believe you should GRANT that motion as well.

JLW

UPDATED BENCHMEMO: LINDENMUTH v. BLANTON, 87-0589-R

ATTORNEYS: Plaintiff: James Minor (Minor & Smith)

Defendants: Jack Russell & Carol Russek (Browder, Russell)

Judge, in my earlier benchmemo, I suggested that if the plaintiff moved to amend her complaint to include the professional corporation, her motion should be granted. I have changed my opinion slightly after reading the defendants' reply brief submitted late yesterday afternoon. Defendants Thomas, Fiedler, and Foere present evidence that Ms. Lindenmuth should have been on notice that she was being treated by a professional corporation. Moreover, the defendants challenge the propriety of allowing a Rule 15(c) amendment. They cite a recently decided Virginia Supreme Court case which holds that notice to a doctor of a malpractice claim was not sufficient notice to his private corporation under Virginia's Medical Malpractice Act. Va. Code §8.01-581.2. The defendants also claim that adding the corporation at this late date without prior notice would prejudice it in its defense of the action. I withdraw my earlier reccomendation that you allow the plaintiff to make an oral motion to amend her complaint. I believe the issues raised by the defendants need to be more fully briefed in a motion to amend.

Evidence that Lindenmuth was on notice that doctors were a professional corporation

The billing statements presented to patients in the doctor's office and mailed to their homes indicate that the defendants conducted business as a professional corporation. Patients are instructed to make checks payable to "Drs. Thomas, Blanton, Fiedler, and Foere, Inc." The return address on the bill and the mailing address for payment also contains the corporation's name. (See Def. Exs. B, C, D)

Additionally, the name of the professional corporation appears on a pamphlet made available in the doctors' waiting room. The pamphlet is apparently in full view. (Def. Ex. E.)

Although I think this evidence is probative, the defendants have not demonstrated that Lindenmuth received a billing statement and envelopes which give clear notice of the corporation's name. The billing statement that says "make checks payable to Drs. Thomas, Blanton, Fiedler, and Foere, Inc." (Def. Ex. C) is from 1987. The Lindenmuth's bill (Def. Ex. B) is from 1985 and the corporation's name appears only in fairly small print at the botton right hand corner.

Lindenmuth has presented evidence that all noticeable signs--the sign to the doctors' office, telephone listings, the letterhead on stationery--create the impression that the doctors operate as a partnership. I am reluctant to deny her claim against the corporation soley because the corporation's name appears in small print on one bill. If the defendants can demonstrate that she received other notice that she was dealing with a corporation (for example that she actually made her check payable to Drs. Thomas, Blanton, Fiedler, and Foere, Inc.), then

the merits of her claim against the corporation are substantially weakened.

Inapplicability of Virginia's Fictious Name Statute

The defendants also distinguish Bryant Electrical Company, Inc. v. Joe Rainero Tile Company, 84 F.R.D. 120 (W.D. Va. 1979). They note that Va. Code §59.1-69 does not apply where the designation under which a business is being conducted consists of the surname of the proprietors with the addition of the word "Inc." Tate v. Atlanta Oak Flooring Co., 179 Va. 365, 18 S.E.2d 903 (1942) (omitted the words "& Co."). The defendants assert that since they did not violate §59.1-69 as interpreted by prior case law, the plaintiff should not receive the benefit of Rule 15(c)'s relationship back. The defendants fail to note that the sign to their office ("Obstetrics and Gynecology") and their letterhead don't comply with the holding in Tate.

I don't think the available of a remedy under Rule 15(c) turns on a violation of state law. Rule 15(c) provides that an amendment changing parties to an action relates back to the date of the original complaint if: (1) the claim against the new party arose out of the same occurrence set forth in the original pleading; (2) the new party had received notice of the institution of the action and will not be prejudiced in his defense, and (3) the new party knew or should have known that, but for the mistake concerning the identity of the proper party, the action would have been brought against the party. The defendants claim that the second element has not been met.

They note that the case is governed by the Virginia Medical Malpractice Act. Va. Code §8.01-581. The act provides for certain notice requirements and permits any health providers, which includes corporations, who receive notice of a claim, to request a review by the Medical Malpractice Review Panel. The defendants argue that both the individual doctor and the professional corporation, as two different health care providers, are each entitled to separate notices of the claim. The defendants cite Comstock v. Schuler (Va. Sup. Ct. Record No. 860643, Jan. 12, 1987) in which the Supreme Court of Virginia refused a petition for appeal from a decision by the Circuit Court of the City of Hampton. (A denial by the Supreme Court of a petition for appeal is considered a judgment on the merits and has precedential effect so long as the denial was not based on procedural grounds. Saunders v. Reynolds, 214 Va. 697, 700, 204 S.E.2d 421 (1974).) The circuit court held that notice to Frank A. Schuler, III, M.D. did not constitute sufficient notice to Frank A. Schuler, III, M.D., P.C. for purposes of §8.01-581.2. Consequently, argue the defendants, notice to Dr. Thomas, agent for the corporation, as an individual did not constitute notice to the corporation. The defendants did not supply the factual background to the decision in Schuler. It is possible that the outcome would be different where there are allegations that, because of acts by the individual, it was impossible to know that he was conducting business also as a private corporation.

The defendants also claim that the corporation will be prejudiced in its defense if added as a party because it did not

have the opportunity to request a Medical Malpractice Review Panel. Dr. Thomas claims that the considerations for deciding whether to request a panel review are different for a corporation then for an individual. Nonetheless, there appears to be an easy remedy for this alleged prejudice--grant the corporation leave to request a Panel review if they want one.

Conclusion

The defendant's reply does not really change my earlier reccomendations.

The individual doctors should be dismissed. Their motion for summary judgment should be granted.

I withdraw my reccomendation that you allow the plaintiffs to make an oral motion to amend their complaint to include the doctors' corporation. The defendants' reply has a raised a number of issues:

(1) What evidence to date shows that Lindenmuth had actual knowledge that the doctors operated as a corporation? Who did she make her checks payable to or what did her insurance statements say?

(2) What exactly is the holding in Schuler and do acts by the defendants which work to conceal the fact that they are a corporation provide relief from the stringent notification requirements of Virginia's Medical Malpractice Act?

(3) Is the prejudicial effect of naming the corporation as a defendant alleviated if it is granted leave to seek a Panel review?

These appear to me to be appropriate issues to be addressed in a brief accompanying a motion to amend the complaint pursuant to Rule 15(c).