

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AN FOR NEW CASTLE COUNTY

LAURENE DEFRANCESCO and)
JOHN DEFRANCESCO)
Plaintiffs,)
)
5.) C.A. No. 01C-01-182 CHT
)
ESTATE OF V. TERRELL DAVIS,)
DECEASED,)
Defendant.)

OPINION AND ORDER

On the Defendant's Motion to Dismiss

Submitted: October 9, 2001

Decided: January 11, 2002

Douglas A. Shachtman, Esquire, DOUGLAS A. SHACHTMAN &
ASSOCIATES, 1200 Pennsylvania Avenue, Suite 302, Wilmington,
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Toliver, Judge

FACTS AND PROCEDURAL POSTURE

This action arises from personal injuries suffered by Laurene DeFrancesco in a motor vehicle accident with V. Terrell Davis, on January 23, 1998. Six months after the accident, on July 20, 1998, Mr. Davis died due to causes unrelated to the accident.

The Plaintiffs, Mrs. DeFrancesco and her husband, John DeFrancesco, originally filed their complaint on January 21, 2000. The praecipe directed the Prothonotary to effect service upon Mr. Davis. This direction was given without notice that Mr. Davis was deceased. On April 3, 2000, the Plaintiffs were notified for the first time that Mr. Davis had passed away.¹ Despite knowledge of Mr. Davis' death, the Plaintiffs failed to amend their complaint.

On September 18, 2000, defense counsel filed two motions to dismiss in lieu of an answer for failure of service under Superior Court Rule 4(j) and for failure to state a claim under Rule 12(b)(6). The basis of these motions was that Mr. Davis was deceased. On January 18, 2001, Judge Herlihy

¹ The Plaintiffs were notified by the postal service that Mr. Davis had passed away following their efforts to locate a change of address for him.

dismissed the action without prejudice for failure to serve. He further held that any prospective amendment to the complaint to add the correct party in interest would not relate back under Rule 15(c). The following day, January 19, 2001, a new complaint was filed, naming the Estate of V. Terrell Davis as the Defendant. However, that entity did not exist at that time because the estate had yet to be opened. That event did not take place until March 5, 2001, when Letters of Administration were issued by the Register of Wills.

The Defendant contends that the complaint as filed, was legally deficient in two ways. The first claimed deficiency is that the estate was not in existence at the time of the filing of the complaint. As a result, that filing was a nullity. Secondly, the complaint was defective because it was not accompanied by properly signed Form 30 Interrogatory responses. The Plaintiffs were notified of the latter deficiency by the Prothonotary at the time of filing as well as on February 1, 2001 and on March 7, 2001. The effect was not cured until May 2, 2001, when the proper responses were filed.

The Defendant now moves to dismiss the complaint pursuant

to Rule 12(b)(6) because the suit was brought against the estate more than two years after the incident giving rise to the injury as is required by 10 Del. C. §8119 for personal injury actions. The Plaintiffs respond that their action is not barred due to the savings statute provided for in 10 Del. C. §8118(a). According to this statute, a plaintiff has a one-year supplemental period, beginning upon the termination of the prior action, in which to file their subsequent complaint. In this case the Plaintiffs argue that the prior action was not terminated until Judge Herlihy dismissed the case on January 18, 2001, and that the action was filed within one year of that date.

DISCUSSION

Because affidavits and exhibits were submitted by the Defendant in support of its position, the motion will be considered as one seeking summary judgment. A motion for summary judgment is correctly granted where the moving party establishes that there is no genuine issue of material fact in dispute and that the movant is entitled to judgment as a

matter of law. Merrill v. Crothall-American, Del. Supr., 606 A.2d 96, 99-100 (1992); and Martin v. Nealis Motors, Inc., Del. Supr., 247 A.2d 831 (1968); and Burish v. Graham, Del. Super., 655 A.2d 831 (1994). The facts must be viewed in the light which is most favorable to the nonmoving party, Pullman, Inc. v. Phoenix Steel Corp., Del. Super., 304 A.2d 334 (1973); and the motion will not be granted, even in the absence of any dispute of material fact, where it seems desirable to inquire further into the facts to clarify the application of the law to the facts. Guy v. Judicial Nominating Comm'n., Del. Super., 659 A.2d 777 (1995). However, the role of the Court is not to weigh evidence, and uncontroverted statements are to be accepted as true. Battista v. Chrysler Corp., Del. Super., 454 A.2d 286 (1982). It is in light of these standards that the Defendant's motion must be addressed.

Personal injury actions must be commenced within two years of the date upon which the injury occurred. 10 Del. C. §8119. However, §8118(a) provides relief for plaintiffs in situations where their claim would normally be technically barred by the statute of limitations if, among other reasons, the reason for the delay is the death of any party. Upon the happening of such an event, the plaintiff is given an

additional year to bring a new action. Id.

The Defendant contends that even if the Plaintiffs are allowed an additional year to bring this action, they nevertheless failed to file in a timely fashion. It points to the thirteen-month time period between the Plaintiff's notice of Mr. Davis' death, April 3, 2000, and the date upon which the complaint became effective, May 3, 2001.

It is well established that §8118 should be liberally construed so that disputes may be decided upon the merits rather than on procedural technicalities. Howmet Corp. v. City of Wilmington, Del. Super., 285 A.2d 423 (1971). Delaware Courts have held that weight should be given in favor of allowing the litigation to continue where the defendant has timely notice of the plaintiff's intent to litigate the matter. Empire Fin. Serv. Inc. v. Bank of New York, Del. Super., C. A. No. 00C-09-235 SCD, Del Pesco, J. (Jan. 12, 2001); Viars v. Surbaugh, Del. Super., 335 A.2d 285 (1975); and Vari v. Food Fair Stores, Del. Super., 199 A.2d 116 (1964) aff'd Del. Supr., 205 A.2d 529 (1964). Section 8118 is only applicable when a suit is filed within the statutory time period, but something interferes with the maintenance of the suit. O'Leary v. Strucker, Del. Super., 209 A.2d 755 (1965).

Here, the Plaintiffs filed the original complaint within the two-year statutory period provided by §8119, albeit by only one day. At some point during the existence of the prior action, the Defendant was put on notice that the Plaintiffs intended to litigate this matter. That this notice had been received is evidenced by the Defendant's prior motions to dismiss the action before Judge Herlihy.

Judge Herlihy's order dismissing the prior action without prejudice was issued on January 18, 2001. This date is significant because this is the date upon which the additional one-year period begins to run, Leavy v. Saunders, Del. Super., 319 A.2d 44 (1974); *not* as is asserted by the Defendants upon learning of the death of the party. Gosnell v. Whetsel, Del. Supr., 198 A.2d 924, 926 (1964). "[T]he statute is designed to allow a plaintiff, within prescribed limitations, one year to file a second cause of action following a *final judgment adverse to his position* if such judgment was not upon the merits of the cause of action." Id, (emphasis added).

Based upon the date of dismissal, January 18, 2001, the relevant time period within which the Plaintiffs could have made a timely refiling is one year from that date, January 17, 2002. The Plaintiffs did, in fact, refile against the estate

on May 3, 2001, well within the one year supplemental limitations period provided for by §8118. Therefore, such filing was indeed timely.

In making this decision, this Court is mindful of prior Superior Court cases wherein the Courts held that the supplementary statute of limitations period did not apply because the decedent died prior to the commencement of the original action. Lockwood v. Leninson, Del. Super., C.A. Nos. 85C-AV-11, 86C-DE-178, Poppitti, J. (Sept. 30, 1987)(Mem. Op.); and O'Lear v. Strucker, Del. Super., 209 A.2d 755 (1965). The Courts opined that for the supplemental limitations period to be applicable, a *valid* action must have been filed within the original limitations period. Because the plaintiffs named the decedent as the defendant in these actions, the filing was not a valid action.

Lockwood and O'Lear are distinguishable from the case sub judice. In those cases, the estates of the decedents had been opened and were in existence at the time of the filing of the original complaints. As a result, there were existing parties to name as defendants. Here, there was no such existing party. Mr. Davis's estate was not opened until over three months after Judge Herlihy's dismissal of the original action

and Mr. Davis had passed away prior to the filing of the complaint. It would be inequitable to deny the Plaintiffs the benefit of §8118 due to the unavailability of a party against whom they could file a valid complaint within the limitations period set forth in §8119. Indeed, if the Court were to grant the Defendant's motion, the heirs of any decedent could defeat any potential lawsuit against the estate by simply waiting until the limitations period passed before opening the estate.

Therefore, the Court finds that this situation is one where the liberal construction called for by §8188 is appropriate.

CONCLUSION

Based upon the foregoing, the Defendant's Motion to Dismiss must be, and hereby is, **denied**.

IT IS SO ORDERED.

Toliver, Judge