



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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4110 Chain Bridge Road
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703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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October 31, 2017

David L. Marks, Esq.
10513 Judicial Drive, Suite 204
Fairfax, VA 22030
Counsel for Plaintiff Michelle Hendrix

Mark C. Whittington, Esq.
5285 Shawnee Road, Suite 110
Alexandria, VA 22312
Counsel for Defendant Arianna Legovini

Re: Michelle Hendrix v. Arianna Legovini
CL-2017-7592

Dear Counsel:

This case came before the Court on October 5, 2017 for a hearing on the Defendants' Plea in Bar and Plaintiff's Opposition. Having taken the Plea in Bar under advisement and after reviewing the memoranda of law and arguments submitted by Counsel, the Court issues the following opinion sustaining Defendants' Plea in Bar.

BACKGROUND

This matter arises out of a motor vehicle accident that occurred on October 15, 2013. Michelle Hendrix ("Plaintiff") was involved in the accident with Ms. Arianna Legovini ("Defendant Legovini") on Reston Parkway in Fairfax County, Virginia. Plaintiff retained counsel on September 11, 2015 and provided her attorney the name of Makhtar Diop, the person

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with whom the vehicle was insured through State Farm Insurance and the estranged ex-husband of Defendant Legovini, as the driver of the vehicle. Based upon that information, Plaintiff filed her first Complaint on September 23, 2015, initially naming Makhtar Diop as the defendant. Makhtar Diop was served by posting on August 12, 2016. The style of that case was *Michelle Hendrix v. Makhtar Diop*, CL-2015-12610.

Upon being served, Mr. Diop informed Plaintiff's attorney he was not the driver and his estranged wife was driving the vehicle at the time of the accident. Plaintiff filed a motion to amend the complaint on August 16, 2016, seeking leave to substitute Defendant Legovini as the named defendant in place of Mr. Diop; this was done without notice to either Mr. Diop or Ms. Legovini. On August 26, 2016, the Court entered an order allowing leave to amend, and the Amended Complaint was thereafter served upon Defendant Legovini on August 26, 2016.

Defendant Legovini filed a Plea in Bar in that case on September 16, 2016, asserting that Plaintiff's claims were barred by the statute of limitations. This issue was fully briefed by the parties and scheduled for an evidentiary hearing on March 23, 2017. Prior to the scheduled Plea in Bar hearing, the Plaintiff nonsuited the case and refilled the case on May 30, 2017 as *Michelle Hendrix v. Arianna Legovini*. On June 23, 2017, Defendant Legovini filed a Plea in Bar to the new case again asserting that Plaintiff's claims are barred by the statute of limitations.

In support of her Plea in Bar, Defendant argues that the order allowing the amended complaint in the prior case was improper and entry of the nonsuit order in the prior case does not cure the statute of limitations bar for the Plaintiff. The current case was filed more than two years after the motor vehicle accident and because the two year statute of limitations on personal injuries ran, the Plaintiff is now barred from pursuing it under Va. Code Ann. §8.01-243(A).

Plaintiff argues the mistake in naming the defendant as Mr. Makhtar Diop instead of Ms. Arianna Legovini, was a misnomer, not a misjoinder and thus under Va. Code § 8.01-6, the amended complaint, with Ms. Legovini as the named defendant, relates back to the date of the original pleading as ordered by the Court on August 26, 2016 in the prior nonsuited case. Plaintiff argues it is a misnomer due to the fact the mistake was in the name, not in the identification of the party because the original complaint used the pronoun 'she' and described an accident that could only have involved Ms. Legovini; thus the party was not changed, just the name was corrected.

ANALYSIS

A plea in bar is a defensive pleading that reduces the litigation to a single issue, which, if proven, creates a bar to the plaintiff's right of recovery. *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594, 537 S.E.2d 580, 590 (2000) (internal citations omitted). It may be used "to present a single issue which may result in ending the proceedings." Leigh B. Middleditch, Jr. & Kent Sinclair, *Virginia Civil Procedure* § 9.8 (2d ed., Michie 1992).

I. Misnomer & Misjoinder

Where a complaint incorrectly names a party, the error is either a misnomer or a misjoinder. *Richmond v. Volk*, 291 Va. 60, 64 (2016). A misnomer is a mistake in the name, not the identification, of a party. *Id.* (citing *Rockwell v. Allman*, 211 Va. 560, 561, 179 S.E.2d 471, 472 (1971)). The Supreme Court of Virginia refined the term "misnomer" when it held that a "[m]isnomer arises when the right person is incorrectly named, not where the wrong defendant is

named.” *Swann v. Marks*, 252 Va. 181, 184, 476 S.E.2d 170, 172 (1996). Misjoinder, on the other hand, arises when “the person or entity identified by the pleading was not the person by or against whom the action could, or was intended to be, brought.” *Volk*, 291 Va. At 64 (citing *Estate of James v. Peyton*, 277 Va. 443, 452, 674 S.E.2d 864, 869 (2009)).

The Court, in its discretion, may permit a party to correct a misnomer or misjoinder as to the name of the defendant and amend the previously filed complaint pursuant to Va. Code § 8.01-6 which reads:

A misnomer in any pleading may, on the motion of any party, and on affidavit of the right name, be amended by inserting the right name. An amendment changing the party against whom a claim is asserted, whether to correct a misnomer or otherwise, relates back to the date of the original pleading if (i) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, (ii) within the limitations period prescribed for commencing the action against the party to be brought in by the amendment, that party or its agent received notice of the institution of the action, (iii) that party will not be prejudiced in maintaining a defense on the merits, and (iv) that party knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against that party.

II. APPLICATION

Virginia Courts have interpreted a misnomer to exist in those cases that “involve misspelling, inverting, or use of a popular trade name instead of a real name.”¹ “In contrast, when a named defendant exists, is served and is the wrong party, courts have not allowed refuge in the misnomer statute.”²

The Plaintiff cites to *Volk*, for the proposition that the mistake in the case at hand is a misnomer instead of a misjoinder. The facts of the case at bar can clearly be distinguished. In *Volk*, the parties were involved in a motor vehicle accident. *Id.* at 62. The vehicle that Katherine Volk was driving at the time was owned by Jeannie Cornett. *Id.* at 62-3. When Linda Richmond filed her Complaint against Volk, the Plaintiff mistakenly listed the Defendant as Katherine Cornett – a combination of the correct first name of the actual driver, but the last name of the car owner. *Id.* at 63. Richmond served the Summons and Complaint at Cornett’s residence. *Id.* The Supreme Court of Virginia found that the mistake was a misnomer instead of a misjoinder. *Id.* at 65.

Here, when the Plaintiff named Makhtar Diop as the defendant, this was not a mistake in the spelling or an inversion of Defendant Legovini’s name; it simply was not her name. Makhtar

¹ *Bryant v. Rorer*, 66 Va. Cir. 226, 228 (Cir. Ct. 2004) (referencing *Baldwin v. Norton Hotel, Inc.* 163 Va. 76, 82, 175 S.E. 751, 753 (1934).

² *Id.* (referencing *Myers v. Faison*, 4 Va. Cir. 468, 469 (Arlington County 1978) (finding that a mistake in the named Defendant was not a misnomer where the owner of the car was named and served as opposed to the driver of a vehicle in a motor vehicle accident lawsuit) (parenthetical added), *Payne v. Smith*, 26 Va. Cir. 340, 343 (Culpeper County 1992) (where the plaintiff sought to interchange one corporate defendant for another, the court found that where two corporations were vaguely related in the corporate chain, the plaintiff’s mistake was more than a misnomer because a wholly wrong party had been sued) (parenthetical added),

Diop is a named defendant that exists, was served and is inarguably the wrong party to this suit. Mr. Diop was never the intended party to be sued. This case can be distinguished from *Volk*, where the party being served “Katherine Cornett” was not a named defendant that existed; it was just an error in the combining of two names. The Plaintiff’s motion to amend the name of the defendant in her pleading from Makhtar Diop to Arianna Legovini does not correct a misnomer; Makhtar Diop and Arianna Legovini are complete and separate individuals.

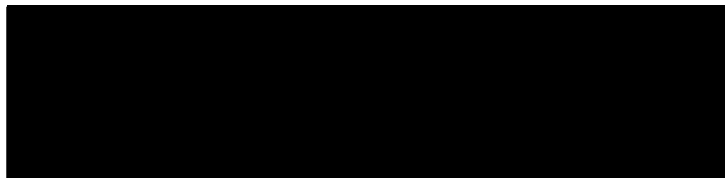
Here, the Plaintiff is requesting this Court to substitute a different party defendant altogether. The Plaintiff pled the proper allegations but named and served the wrong person. Thus, the Plaintiff’s failure to name the correct defendant was a mistake in identification and is not a misnomer, but a misjoinder. To find otherwise would expound the definition of misnomer allowing ripples to continue to unknown and unintended size.

Consequently upon a finding of misjoinder, the Plaintiff could only change the parties and have the amended pleading relate back to the original pleading’s date if the relation back provision of Virginia Code §8.01-6 was met. The four requirements of this provision are: (i) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, (ii) within the limitations period prescribed for commencing the action against the party to be brought in by the amendment, that party or its agent received notice of the institution of the action, (iii) that party will not be prejudiced in maintaining a defense on the merits, and (iv) that party knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against that party.

Although the other three prongs are met, the Parties agree that Plaintiff has not and cannot now fulfill the second prong of the requirement. The amended Complaint changed the party to be sued from Mr. Makhtar Diop to Ms. Arianna Legovini. Ms. Legivini was not served nor named a party until after the applicable two-year statute of limitation period had expired. Therefore, the Plaintiff is barred from bringing her claim.

Conclusion

Defendant’s Plea in Bar is sustained and the case is dismissed with prejudice. To the extent necessary, the Court’s August 26, 2016 Order is vacated. The Court requests Defendant’s Counsel to prepare an order reflecting the Court’s ruling.



Penney S. Azcarate
Fairfax County Circuit Court

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