SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2759-15T3

MERVIN ALLEN,

Plaintiff-Appellant,

v.

HAGEN CONSTRUCTION/MBA ENTERPRISES JOINT VENTURE LLC,

Defendants-Respondents,

and

RICH JACOBS, and L.F. DRISCOLL COMPANY, LLC,

Defendants.

Submitted October 12, 2017 – Decided November 29, 2017

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8048-13.

Eldridge Hawkins, attorney for appellant.

Cohen Seglias Pallas Greenhall & Furman, PC, attorneys for respondents (Edward Seglias, of counsel; Allie J. Hallmark, on the brief).

PER CURIAM

A Law Division judge on January 22, 2016, denied plaintiff Mervin Allen's post-trial motion to amend the pleadings to name additional defendants. The underlying proceeding, Allen's successful claim under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, resulted in a $300,000 judgment. We affirm.

In her oral decision, the trial judge recalled that the complaint, originally filed against Hagen Construction, Inc., was subsequently amended before trial to name the current defendant, "Hagen Construction/MBA Enterprises Joint Venture, L.L.C."[1] She opined that Allen had ample opportunity to address the issue before trial and in fact did so.

Allen's post-trial application sought to substitute as defendants Hagen Construction, Inc. and Alfred Hagen personally. The trial judge further opined that "the evidence adduced at trial did not demonstrate that Hagen Construction, Inc., and Alfred Hagen should have been named as defendants . . . ."

The corporate defendant had filed an unopposed pre-trial motion to amend the name of the corporate entity to "Hagen

[1] The jury rendered a no cause of action verdict against the other defendant Richard Jacobs. The other named defendants were dismissed prior to trial.

Construction/MBA Enterprises Joint Venture, L.L.C." Allen filed a second amended complaint accordingly. That designation was actually based on an error by defendant's counsel — the correct corporate name was "MBA Enterprises/Hagen Construction L.L.C." without the use of the phrase "joint venture." Regardless of the omission, the corporate defendant was not Hagen Construction. Alfred Hagen was never sued individually.

During the trial, Allen's attorney told the jury that when Allen was originally hired, he believed his employer was Hagen Construction, but he later learned it was "Hagen Construction Joint Venture, MBA, Joint Venture or something like that." Additionally, the documentary evidence regarding the corporate entities' subcontract on the government project at which Allen had worked used the name "MBA Enterprises/Hagen Construction, L.L.C." The steward's weekly reports, also introduced into evidence, abbreviated the name to "Hagen Const., Inc., MBA Joint Venture" or "Hagen Const." Allen's paychecks were issued by "Hagen Construction, Inc., MBA Joint Venture[,]" while the corporate entity's check register states "MBA/Hagen Construction, L.L.C." The daughter of the deceased president of MBA testified at trial that her father was a sixty percent owner of the joint venture, created by decedent and Alfred Hagen.

On the last day of trial, Allen's attorney showed the judge a copy of the 2009 State of Pennsylvania corporate certificate changing the corporate name from "Hagen Construction/MBA Enterprises Joint Venture, L.L.C." to "MBA Enterprises, Hagen Construction, L.L.C." Defendant's attorney argued that any verdict found by the jury against the employer should reflect the company's correct name. Accepting defendant's attorney's representation, Allen's counsel informally requested this relief.

The judge agreed to allow the amendment, however, she stated that for purposes of closing argument and the verdict sheet, in order to avoid confusion, the corporate entity would be referred to as Hagen Corporation. More confusion was created by the fact that the jury verdict sheet incorrectly stated defendant's name was "Hagen Construction." The record contains no explanation for the discrepancy, likely due to some clerical mistake. Thus, although the verdict sheet referred to Hagen Construction, the intended party was MBA Enterprises/Hagen Construction, LLC.

Virtually simultaneous with the trial judge's denial of Allen's post-judgment application to amend the named defendants to Hagen Construction, Inc. and Alfred Hagen, the same motion was inexplicably made before a different judge on an unopposed basis and was granted. That judge later vacated the order noting that it was "signed by mistake. Issue already decided."

Allen now appeals, raising the following points for our consideration:

> POINT ONE — THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY NOT ALLOWING THE AMENDMENT OF THE ORIGINALLY NAMED DEFENDANT TO BE PLACED BACK INTO THE COMPLAINT AND BE SUBSTITUTED AS A PARTY AGAINST WHOM JUDGMENT MAY BE ENTERED, AS WELL AS MR[.] HAGEN, THE PRINCIPAL IN ALL OF THE ENTITIES AND THE SIGNATORY ON PLAINTIFF'S PAY CHECK
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> POINT TWO — DEFENDANT MISLED BOTH THE COURT AND THE PLAINTIFF'S ATTORNEY IN ITS MOTION TO AMEND
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> POINT THREE — DEFENDANT'S ADMISSION THAT THE LABELING OF DEFENDANT'S COMPANY AS A "JOINT VENTURE", WAS MISSLEADING [sic], ESTOPS DEFENDANTS FROM ESCAPING LIABILITY BECAUSE PLAINTIFF RELIED UPON SAME TO HIS DETRIMENT

A trial court's decision to grant or deny a motion to amend under Rule 4:9-3 is "best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made." Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994) (citing Rule 4:9-1; Du-Wel Products v. U.S. Fire Ins., 236 N.J. Super. 349, 364 (App. Div. 1989), certif. denied, 121 N.J. 617 (1990); Keller v. Pastuch, 94 N.J. Super. 499 (App. Div. 1967)). "It is well settled that an exercise of that discretion will be sustained where the trial court refuses to permit new claims . . . to be added late in the litigation and at a point at which the rights of other parties to a modicum of

expedition will be prejudicially affected." Du-Wel Products, supra, 236 N.J. Super. at 364.

The doctrine of invited error operates to bar a disappointed litigant from challenging an adverse decision on appeal when that party urged the trial court to adopt the proposition now alleged to be error. N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010); Donofry v. Autotote Sys., Inc., 350 N.J. Super. 276, 296 (App. Div. 2001); Brett v. Great Am. Recreation, 144 N.J. 479, 503 (1996).

This trial judge's decision to deny the post-judgment motion was well within her sound discretion and was supported by the record. The proofs at trial did not demonstrate that the employer was Hagen Construction, Inc., and did not address Alfred Hagen's liability. To suggest that a company other than the employer should be substituted because of some unspecified connection between the entities is unwarranted. To suggest an individual who had an ownership interest in a corporation, but no other known involvement in the wrongful conduct, should be liable for a substantial judgment when the application is made post-trial, is also unwarranted.

The relation back doctrine requires a party to have had notice of the litigation such that no prejudice ensues, and that he or she knew or should have known that, but for a mistake in the

identity, the action would have been brought against him or her. See R. 4:9-3. In this case, however, Hagen Construction, Inc. and Alfred Hagen would be prejudiced. Hagen Construction, Inc. was not the employer. Neither was Alfred Hagen. They had no opportunity to defend themselves during the trial. Even if, for the sake of argument, we assume defense counsel also represented Hagen Construction, Inc., that fact alone is not a basis for a post-trial amendment and a relation back.

Allen's argument that Bussell v. DeWalt Products Corp., 259 N.J. Super. 499 (App. Div. 1992), supports his position is not correct. In Bussell, many years prior to plaintiff's personal injury, Black & Decker acquired DeWalt, Inc., the manufacturer of the saw that caused plaintiff's injury. Id. at 508. Black & Decker was involved in the litigation from the outset, and referred the matter to its insurance carrier, who handled the defense. Ibid. Black & Decker "was well aware that it actually was the real party in interest from the outset . . . ." Id. at 570. Black & Decker "clearly had notice and an opportunity to be heard." Ibid. Allen has not even alleged facts that would establish some improper corporate shell game intended to protect corporate assets from a legitimate judgment.

Furthermore, if we assume for the sake of argument that error was committed by the court, it was invited by Allen himself. He

did not oppose the motion to amend the name of the corporate defendant. Allen amended his complaint to reflect that name. The last day of trial, when the issue arose, he specifically clarified that the name of the correct corporate entity was MBA Enterprises/Hagen Construction, LLC. Allen cannot now be heard to complain about the action he requested the judge take in his behalf. See M.C. III, supra, 201 N.J. at 340.

Nor do we agree with Allen that he is entitled to relief because the corporation misled either the court or Allen's attorney by virtue of application of the doctrine of res ipsa loquitor. That doctrine does not apply in this context. It is an evidentiary exception to the basic proposition that negligence must be proved and never presumed. The argument is so lacking in merit as to not warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Allen also contends that the status of the corporation as an "L.L.C." is newly discovered evidence, which justified the amendment. The record does not support this argument. Although defendant's attorney readily acknowledges the mistake as to the use of joint venture in the company name, the "L.L.C." designation was included in the pre-trial motion to amend the corporate name.

The proofs establish that the employer in the case was MBA Enterprises/Hagen Construction, LLC. The proofs did not establish

either that Hagen Construction or Alfred Hagen was Allen's employer. To allow the amendment would foist unwarranted liability on an entity and individual against whom nothing was proven at trial. Thus, the judge's decision denying the motion to amend under Rule 4:9-3 was a reasonable exercise of discretion.

Affirm.