

STATE OF VERMONT
WINDSOR COUNTY, SS.

DENNIS GUIMOND,

Plaintiff

v.

PAUL A. PINDERS and RUBY PINDERS,
d/b/a CROWN POINT CAMPING AREA, and
NORMAN WESSELL,

Defendants

WINDSOR SUPERIOR COURT

DOCKET NO. 400-9-01 Wrcv

DECISION RE: NORMAN WESSELL'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Dennis Guimond alleges an assault and battery, causing personal injury, on September 6, 1998. Defendant Norman Wessell has filed a Motion for Summary Judgment, claiming that plaintiff's claim against him is barred by the three-year statute of limitations. Plaintiff first named Mr. Wessell in an Amended Complaint filed more than four years after the incident, and served him with process approximately seven weeks later. Plaintiff argues for tolling the limitation period, or for relating the amendment back to the time of his original filing. The court agrees with Mr. Wessell that the limitation period has expired, and therefore GRANTS summary judgment.

UNDISPUTED FACTS

This action arises from an alleged assault and battery occurring at the Crown Point Camping Area on or about September 6, 1998. Both Stuart Smith and Norman Wessell were there at the time. Mr. Wessell left the campground immediately after the plaintiff was injured. He never disclosed to the Vermont State Police investigating the incident that he had personal knowledge of what happened. He has resided in Massachusetts, and has been absent from Vermont. He does not own property within the state which could be attached by common process of law.

Plaintiff filed his complaint on September 4, 2001, alleging that Mr. Smith committed the assault and battery, and also naming Paul and Ruby Pinders as defendants. Mr. Smith was served with process on November 2, 2001. However, the court dismissed the action against Mr. Smith on August 1, 2002, based on a stipulation. Mr. Smith had told plaintiff that Mr. Wessell had been involved in the incident on September 6, 1998.

Plaintiff filed an Amended Complaint on October 2, 2002, alleging that Mr. Wessell committed the assault and battery. Plaintiff served Mr. Wessell with the Amended Complaint on November 23, 2002. Mr. Wessell did not have notice of this action until after November 3, 2001.

CONCLUSIONS OF LAW

At issue is whether plaintiff's claim against Mr. Wessell is barred by the statute of limitation. The limitation period is three years under 12 V.S.A. § 512. Under a straightforward application of the statute, the limitation period expired on September 6, 2001. Plaintiff did not name Mr. Wessell as a defendant until October 2, 2002. Under these circumstances, the burden is on the plaintiff to show why his claim is not barred by the statute. Fortier v. Byrnes, 165 Vt. 189 (1996).

Plaintiff suggests that Mr. Wessell's motion is procedurally barred because defendant did not properly assert the affirmative defense of insufficiency of process, and because in granting his motion to amend the complaint, the court allowed him sixty days to serve the summons and complaint. However, the effect of the statutory limitation period is different from the issue of whether plaintiff complied with V.R.C.P. 3 by serving the summons and the amended complaint within 60 days after filing. Compliance with Rule 3 may be relevant to whether the service of process relates back to the initial filing, but it does not preclude the defendant from invoking the statute of limitation.

Plaintiff also maintains that Mr. Wessell's absence from the state, under 12 V.S.A. § 552, tolled the running of the limitation period under § 512. The Vermont Supreme Court has clarified the effect of § 552 in Thayer v. Herdt, 155 Vt. 448 (1990), and in Fortier v. Byrnes, 165 Vt. 189 (1996). "The purpose of the tolling provision is to preserve the plaintiff's right of action during the time when it is impossible to serve process personally on a defendant or attach his property within this state." Thayer at 451. "The question . . . is whether defendant is amenable to process, not whether there is a person within the state that can be served." Id. at 453. The limitation period is tolled when service on the defendant is impossible, not when it is merely difficult. Fortier at 192-94. In this case, the plaintiff claims that Mr. Wessell lived in another state, not that service on him was impossible. The running of the limitation period was not tolled by § 552.

Also, plaintiff's amendment to the complaint does not "relate back" to the date of the original pleading, because the circumstances do not meet the requirements of V.R.C.P. 15(c)(3). There is no evidence that Mr. Wessell received timely notice of this action, either within the limitation period or within a subsequent period for service under Rule 3. Numerous cases, both federal and state, have focused on the requirement of notice within the limitation period. See Schiavone v. Fortune, 477 U.S. 21, 31 (1986); Bashara v. Corliss, 161 Vt. 1, 4 (1993). Rule 15(c) has been amended, but the requirement of timely notice has not been eliminated.

Under the circumstances of this case, the lack of timely notice to Mr. Wessell is a controlling factor. The limitations period was not tolled, and the amendment does not "relate back" to the time of the original filing. Mr. Wessell is entitled to a judgment as a matter of law. V.R.C.P. 56(c)(3).

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Dated at Woodstock, Vermont, this 24th day of November, 2003.

Mary Miles Teachout
Hon. Mary Miles Teachout,
Presiding Judge

FILED
NOV 24 2003

Windsor County Clerk