

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DELFENIA RAINY,

Appellant,

Vs.

NO. 2009-CA-01577

**GRAND CASINOS, INC.,
CAESARS ENTERTAINMENT and
HARRAH'S OPERATING COMPANY**

Appellee.

BRIEF OF APPELLEE

**APPEALED FROM THE CIRCUIT COURT
OF TUNICA COUNTY, MISSISSIPPI
CIVIL ACTION 2007-201**

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ORAL ARGUMENT REQUESTED

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Appellee.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal/recusal.

- | | |
|---|---|
| 1. Trial Judge | Honorable Albert B. Smith |
| 2. Appellant | Delfenia Rainey |
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| 5. Appellee | Caesars Entertainment |
| 6. Appellee | Harrah's Operating Company |
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STATEMENT ON ORAL ARGUMENT

The Appellee respectfully requests oral argument. This appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The Appellee, therefore, respectfully submits that oral argument would be appropriate in this case.

I.

STATEMENT OF THE ISSUES

1. Whether the trial court's dismissal of the defendants on summary judgment was proper.
2. Whether the trial court should have permitted the plaintiff to file an Amended Complaint.

II.

STATEMENT OF THE CASE

This case arises out of an incident that occurred on or about July 30, 2004, when the plaintiff alleges she sustained injuries when she slipped and fell to the floor while in the dining room of the Grand Casino Tunica. (Record at 7). In her Complaint, filed on July 30, 2007, the plaintiff alleged that “at all times pertinent to this incident, the aforementioned vessel [Grand Casino in Tunica, Mississippi] was owned, operated and in the care, custody and control of the Defendants, Grand Casinos, Inc., Caesars Entertainment and Harrah’s Operating Company.” (Record at 7).

On September 13, 2007, the defendants, Grand Casinos, Inc., Caesars Entertainment, Inc., and Harrah’s Operating Company, Inc., filed an Answer to the Complaint, denying the material allegations and pleading by way of affirmative defense that defendants, Grand Casinos, Inc., Caesars Entertainment, Inc., and Harrah’s Operating Company, Inc., are foreign corporations licensed to do business within the State of Mississippi but that they do not and never have done business as The Grand Casino and Hotel in Tunica, Mississippi. (Record at 29).

On April 1, 2009, the defendants filed their Motion for Summary Judgment, arguing that none of the defendants owned or operated the Grand Casino-Tunica at the time of the incident described in the Complaint and that because the plaintiff sued the wrong entity, the defendants cannot have liability for the events described within the Complaint. (Record at 40-51). The defendants’ Motion for Summary Judgment was argued in front of the Honorable Albert B. Smith on July 8, 2009. (Record at 115). The trial court held ruling on the Motion in abeyance to allow both the plaintiff and defendants to supplement their arguments with additional research. (Record at 115). On July 22, 2009, and without leave of court, the plaintiff filed an Amended

Complaint which omitted the previously named defendants and for the first time made claims against BL Development, Corp. (Record at 92-95). After reviewing the supplementation provided by the defendants, and the lack of evidence produced by the plaintiff showing that the defendants had any interest in the Grand Casino-Tunica on July 30, 2004, the trial court granted the defendants' Motion for Summary Judgment on August 19, 2009. (Record at 115). On September 10, 2009, the trial court issued a Supplemental Order which denied the plaintiff's Motion to Amend or Vacate Order Granting Summary Judgment and affirmed its prior granting of summary judgment in favor of the defendants. (Record at 123-24).

The Appellant, Delfenia Rainey, promptly filed her Notice of Appeal on September 28, 2009. (Record at 126). This Honorable Court docketed and assigned a case number, as well as, provided a briefing schedule on November 17, 2009.

III.

STATEMENT OF THE FACTS

On July 30, 2004, the plaintiff Delfenia Rainey alleges that she slipped and fell while in the dining room of the Grand Casino in Tunica, Mississippi. (Record at 7). At no time, however, have Grand Casinos, Inc., Caesars Entertainment, Inc., or Harrah's Operating Co., Inc., owned, operated or leased the property known as the Grand Casino Tunica in Robinsonville, Mississippi, upon which the subject of this cause of action is alleged to have occurred. (Record at 50-51). On July 30, 2004, neither Grand Casinos, Inc., Caesars Entertainment, Inc., nor Harrah's Operating Company, Inc., had any interest, whether legal or equitable, in the property nor had any right, duty or obligation imposed by contract, law or otherwise for the maintenance or upkeep of the property. (Record at 50-51).

As evidenced by Warranty Deed, BL Development Corp., has been the owner of the property where the Grand Casino-Tunica is located since August 30, 1993. (Record at 79-87). BL Development Corp.'s ownership and operation of the Grand Casino-Tunica is further evidenced by the Gaming Licenses issued to BL Development Corp., to operate the Grand Casino-Tunica. (Record at 88-90).

IV.

STANDARD OF REVIEW

The standard of review of a trial court's determination to grant or deny a motion for summary judgment is de novo. *Leffler v. Sharp*, 891 So.2d 152, 156 (¶ 9) (Miss. 2004). Under Mississippi Rule of Civil Procedure 56 (c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, showed that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The evidence is considered in the light most favorable to the nonmoving party. *Russell v. Orr*, 700 So.2d 619, 622 (¶ 8) (Miss. 1997).

The standard of review of a trial court's denial of a motion to amend a complaint is an abuse of discretion standard. *Church v. Massey*, 697 So.2d 407, 413 (Miss.1997). See also *Broadhead v. Terpening*, 611 So.2d 949, 953 (Miss.1992).

V.

STATEMENT OF THE ARGUMENT

The trial court correctly granted summary judgment in favor of the defendants/appellees. Precisely three years after the incident complained of, the plaintiff filed suit against the defendants/appellees. In their Answer, the defendants/appellees denied the allegations in the complaint by pleading by way of affirmative defense that neither defendant Grand Casinos, Inc., Caesars Entertainment, Inc., or Harrah's Operating Company, Inc., have ever done business as The Grand Casino and Hotel in Tunica, Mississippi. The trial court's dismissal of the defendants/appellees was proper because neither they, nor their agents or employees, took part in the events alleged to have caused the plaintiff's injuries and are not proper parties to this suit. BL Development Corp. is and always has been and remains the owner of the ground and the operator of the casino formerly known as the Grand Casino-Tunica and now known as Harrah's Casino-Tunica.

Further, with due respect to counsel for the appellant, the trial court's dismissal was not based on a failure of service of process over BL Development, Corp., because BL Development, Corp., *was never* a party to the lawsuit.

Lastly, the trial court's refusal to permit the plaintiff to file an Amended Complaint was proper and not an abuse of discretion in light of the plaintiff's failure to use diligence in ascertaining the identity of the proper defendant and because such an amendment would have been futile if permitted.

VI.

ARGUMENT

Summary judgment is mandated, where the respondent has failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1214 (Miss. 1996); quoting *Galloway v. Traveler's Insurance Co.*, 515 So.2d 678, 683 (Miss. 1987). When a party opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law. *Galloway*, 515 So.2d at 684.

A. THE DEFENDANTS WERE NOT RESPONSIBLE FOR THE PLAINTIFF'S INJURIES

As the Mississippi Supreme Court recently reaffirmed:

"This Court has long recognized the legal integrity of the corporate entity and the concomitant limited liability of shareholders. A corollary principle is that an individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets. Even when a parent corporation owns all of the stock of a subsidiary corporation, the parent does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Penn National Gaming Inc. v. Ratliff*, 954 So. 2d 427, 431 ¶7 (Miss. 2007).

The *Penn National Gaming Inc. v. Ratliff*, was a dram shop case, in which a retail alcohol permit had been granted by the State of Mississippi to the subsidiary and which therefore was incapable of being transferred to the parent. In the case now before the Court, the right to operate the Grand Casino is based upon a gaming license issued by State of Mississippi to BL Development Corporation which likewise is incapable of being transferred or assigned to any other entity. MCA 75-76-55.

The record is devoid of any fact for the proposition that agents or employees of Grand Casinos, Inc., Caesars Entertainment, Inc., or Harrah's Operating Co., Inc., were guilty of the acts of wrongdoing alleged by the plaintiff in her Complaint. The affidavit of Mr. Clinton establishes that neither Grand Casinos, Inc., Caesars Entertainment, Inc., nor Harrah's Operating Co., Inc., have any interest, whether legal or equitable, in Grand Casino Tunica. Pursuant to the license issued by the State of Mississippi, BL Development Corporation - and only BL Development Corporation - was the operator of the Grand Casino. Because there is no relationship which would make any of these three corporations liable for any actions or omissions occurring on the property known as Grand Casino Tunica the trial court was correct in granting the defendants' Motion for Summary Judgment.

B. THE DEFENDANTS' ANSWER ADVISED THE PLAINTIFF THAT SHE HAD FILED SUIT AGAINST THE WRONG ENTITIES

In her brief, the plaintiff argues that because the defendants' Motion for Summary Judgment was not filed until almost two years after the filing of the Complaint, they cannot assert certain affirmative defenses – namely that service of process was insufficient. This argument is not only without merit, it is wholly improper because at no time have the defendants Grand Casinos, Inc., Caesars Entertainment, Inc., or Harrah's Operating Company, Inc., argued or alleged insufficiency of service of process. As set forth in both the trial court's Order and Supplemental Order, insufficient or incorrect service of process was not addressed by the trial court and was not the basis of the court's grant of Summary Judgment. (Record at pp. 115 and 123-24).

The case law cited by the plaintiff dealt only with insufficiency of service of process. None of the cases cited by the defendants address the issues raised in the present case, i.e.,

failure to name the proper defendant. The defendants do not deny that a failure to assert certain affirmative defenses, namely insufficient and inadequate service of process, may result in a waiver of those defenses. *East Mississippi State Hosp. v. Adams*, 947 So.2d 887, 891 ¶10 (Miss. 2007). It is also notable, however, that although participation in the litigation is an important factor to be considered, more is required to constitute a waiver of insufficiency of service of process. *Lucas v. Baptist Memorial Hosp.-North Mississippi, Inc.*, 997 So.2d 226, 233(¶19)(Miss. Ct. App. 2008); citing *MS Credit Ctr., Inc. v. Horton*, 926 So.2d 167, 180 (Miss. 2006).

Certainly in this case, where the only discovery conducted involved the serving and answering of written discovery on the plaintiff, the Motion for Summary Judgment was timely filed less than 18 months following the defendants' Answer. Further, because this defense was not argued to the trial court, it is wholly inapplicable to this case and the plaintiff's legal analysis and argument that the defense was waived is improper and without merit.

The plaintiff also seems to overlook the defendants' initial denial of liability and the affirmative defense set forth within their Answer wherein the defendants each denied that any one of them had ever done business as the Grand Casino and Hotel in Tunica, Mississippi. (Record at 29). For this reason the plaintiff is estopped from arguing that the defendants waived certain defenses – namely, denial of ownership, duty or liability – by failing to assert that defense in their Answer. Despite the fact that the Answer filed by the defendants clearly stated that the plaintiff had filed suit against the wrong entities, the plaintiff took no action to try to remedy this deficiency until the defendants' Motion for Summary Judgment was filed.

C. THE PLAINTIFF'S MOTION TO AMEND COMPLAINT WAS PROPERLY DENIED BY THE TRIAL COURT

The plaintiff appeals the trial court's denial of her Motion to Amend Complaint as well. The trial court's denial of a motion to amend a complaint is subject to an abuse of discretion and, unless convinced that the trial court abused its discretion, this Court is without authority to reverse. *Church v. Massey*, 697 So.2d 407, 413 (Miss.1997). See also *Broadhead v. Terpening*, 611 So.2d 949, 953 (Miss.1992). Amendments are to be denied if allowing the amendment would prejudice the defendant. *Hester v. Bandy*, 627 So.2d 833, 839 (Miss.1993). Applications to amend the pleadings should be prompt and not the result of lack of diligence. *Harris v. Mississippi Valley State University*, 873 So.2d 970, 991 ¶64 (Miss. 2004); citing *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So.2d 991, 1011 ¶57 (Miss.1997). "Amendments which are permitted in the latter stages of litigation may deny the important policy favoring finality of judgments and the expeditious termination of litigation. Thus, the policy to freely grant amendments is not allowed to encourage delay, laches and negligence." *Wal-Mart Super Ctr. v. Long*, 852 So.2d 568, 571 ¶13 (Miss.2003).

In the present case, the plaintiff was put on notice at the time that the defendants filed their Answer that she had filed suit against the wrong defendants. Notably, the plaintiff did not seek leave to amend her Complaint after receiving the defendants' Motion for Summary Judgment. She did not seek to amend her Complaint after the hearing on the defendants' Motion for Summary Judgment. In fact, it was not until two years after the Answer of the defendants had been filed and after the defendants filed their supplemental brief as requested by the trial court that the plaintiff not only filed a Motion to Amend Complaint but also an Amended Complaint. Because the plaintiff's Motion was not timely filed it was properly denied.

D. THE AMENDED COMPLAINT, EVEN IF PERMITTED, WOULD NOT HAVE RELATED BACK TO THE ORIGINAL PLEADINGS

Although BL Development Corp., was never served or made a party to this suit prior to dismissal or at any time, it is still important to note that the plaintiff's lawsuit against BL Development Corp., would not have related back to the original pleadings. Amendments to pleadings and the manner in which they may be made are governed by Rule 15 of the Mississippi Rules of Civil Procedure. In order for an amendment to relate back to the original filing of a pleading it must meet the requirements of Rule 15(c), which sets forth as follows:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

Rule 15(c) of the Mississippi Rules of Civil Procedure.

The facts of the present case are somewhat analogous to those presented in a previous case, *Wilner v. White*. In the *Wilner* case, the plaintiff filed a Motion to Amend Complaint and sought to add the defendant White as a defendant months after she was aware that she had a possible claim against Dr. White and after the statute of limitations had run. *Wilner v. White*, 929 So.2d 315, 324 ¶9 (Miss. 2006). According to the *Wilner* Court, the purpose of Rule 15(c) is "to allow some leeway to a party who made a mistake, so long as the party does what is required

within the time period under the rule.” *Wilner*, 929 So.2d at 323 ¶9. Although the Court found that the plaintiff’s request for amendment met all the requirements of Rule 15(c) of the Mississippi Rules of Civil Procedure, the Court ruled that the amended complaint was still improper and would not relate back to the original complaint because the plaintiff failed to use reasonable diligence in adding Dr. White as a defendant. *Wilner*, 929 So.2d at 324 ¶¶9-10. It is also notable that in *Wilner*, as in the present case, neither leave of court nor written consent of the adverse party was obtained prior to filing the plaintiff’s amended complaint as required by Rule 15(a) of the Mississippi Rules of Civil Procedure. *Wilner*, 929 So.2d at 317-318 ¶2.

As set forth *supra*, the plaintiff was made aware that she had filed suit against improper entities well before she filed her Motion to Amend Complaint or Amended Complaint. For this reason it is not necessary to address whether BL Development, Corp., had notice of the filing of the lawsuit or knew that a mistake as to identity had been made. The plaintiff’s own lack of diligence would have prevented the relation back of the Amended Complaint against BL Development, Corp. If the plaintiff ever had a right to file an amended complaint, naming BL Development Corp. as a defendant, then that right has long since expired, given the fact that the defendants’ Answer was on file for nearly two years with no action being taken on it whatsoever. Because the trial court’s denial of the plaintiff’s Motion to Amend was proper in light of the fact that the plaintiff failed to obtain leave of court prior to filing her Amended Complaint and because the amendment did not relate back to the original pleading, the judgment of the trial court should be affirmed.

E. THE PLAINTIFF DID NOT PROPERLY SUBSITUTE A PARTY BECAUSE SHE DID NOT UTILIZE A FICTITIOUS NAME IN FILING HER COMPLAINT

Any attempt for the plaintiff to claim that she utilized a “fictitious” name by making an allegation against “such corporation” in her original Complaint must also fail. According to Rule 9(h) of the Mississippi Rules of Civil Procedure:

(h) Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party. Rule 9(h) of Miss. R. Civ. Proc.

In order for Rule 9(h) to apply, there must be a substitution of a true party name for a fictitious one. *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 896 ¶10 (Miss. 2006). “Rule 9(h) exists for the benefit of a party who is ‘ignorant of the name of an opposing party and so alleges in his pleadings.’ ” *Wilner*, 929 So.2d at 322.

The Supreme Court also addressed this issue in the *Wilner* case which is more thoroughly discussed *supra*. *Wilner*, 929 So.2d at 317. In that case, Wilner simply added Dr. White's name to the amended complaint and failed to substitute White's name for one of four “John Doe” defendants listed in the original complaint. *Id.* at 323. The four “John Does” originally named in the complaint remained as defendants in the amended complaint. *Id.* The Supreme Court found that Wilner improperly substituted White as a party pursuant to M.R.C.P. 9(h). *Id.*

Further, similar to the case law cited above with regards to due diligence, the Supreme Court has also held that “The purpose of Rule 9(h) is to provide a mechanism to bring in responsible parties, known, but unidentified, who can only be ascertained through the use of judicial mechanisms such as discovery. It is not designed to allow tardy plaintiffs to sleep on

their rights.” *Bedford Health Properties, LLC v. Estate of Williams ex rel. Hawthorne*, 946 So.2d 335, 341 ¶12 (Miss. 2006).

The plaintiff in the present case did not utilize any “fictitious” names with which to substitute BL Development Corp. As the case law demonstrates, any substitution of parties in the present case is improper because the plaintiff did not use diligence and did not substitute a true party name for a fictitious one.

VII.

CONCLUSION

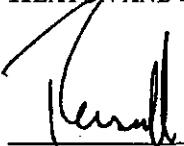
Because no evidence exists that Grand Casinos, Inc., Caesars Entertainment, Inc., or Harrah's Operating Co., Inc., nor their agents or employees, took part in the events alleged to have caused the plaintiff's injuries they are not proper parties to this suit. Likewise, because none of these defendants own or control the property upon which the plaintiff is alleged to have sustained her injuries, the judgment of the trial court should be affirmed.

The trial court's denial of the plaintiff's Motion to Amend should also be affirmed. The denial of the Motion to Amend was proper in light of the fact that the plaintiff failed to obtain leave of court prior to filing her Amended Complaint and because the amendment did not relate back to the original pleading.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of the Brief of the Appellee has been mailed, by United States Express Mail, postage prepaid, to the following:

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This the 16th day of February, 2010.


Robert L. Moore