

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FAYE R. WILBOURN,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellant,)	
)	
v.)	No. 04--LK--049
)	
FRANCIS P. BUNCH,)	Honorable
)	F. Keith Brown,
Defendant-Appellee.)	Judge, Presiding.

RULE 23 ORDER

Plaintiff Faye Wilbourn timely appeals the trial court's dismissal of her first amended complaint seeking damages against defendant Francis Bunch for personal injuries suffered in an automobile accident. On appeal, plaintiff argues that the trial court erred in dismissing her first amended complaint for lack of standing and in denying her leave to substitute her bankruptcy trustee as plaintiff in the suit to remedy the standing problem. For the reasons that follow, we reverse and remand.

The parties do not contest the relevant facts. On May 3, 2002, plaintiff allegedly sustained injuries as a result of an automobile accident in Dundee, Illinois, and, on July 30, 2003, she filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code (11 U.S.C. § 101 et seq.) (2004)) in Alabama, where she resides. She filed the current personal injury lawsuit against defendant on January 30, 2004. On March 8, 2004, defendant moved to strike the complaint on the basis that the bankruptcy trustee was the real party in interest and "plaintiff" should be required to file a

complaint disclosing the real party in interest." On July 1, 2004, the trial court granted defendant's motion to strike and gave plaintiff leave to file an amended complaint. On September 3, 2004, plaintiff filed her first amended complaint, which disclosed that the bankruptcy trustee was the real party in interest. On October 22, 2004, defendant moved to dismiss the cause for plaintiff's lack of standing. Plaintiff filed a response to the motion to dismiss on December 7, 2004, and, after defendant filed a reply, plaintiff filed a supplemental response on February 25, 2005. The supplemental response urged that, if plaintiff lacked standing, the court had the authority to allow a substitution of plaintiff. On April 21, 2005, the trial court issued a written order granting the motion to dismiss. The court denied her request (contained in a response to defendant's motion to dismiss) to amend the complaint to substitute the bankruptcy trustee as plaintiff, because the statute of limitations for the personal injury claim had lapsed and "it [was] not possible to relate back in this matter because [plaintiff] did not have standing to sue at the time the Complaint was originally filed."

We first consider plaintiff's argument that the trial court erred in denying her leave to amend her complaint to substitute the bankruptcy trustee as plaintiff. Before we address the propriety of the trial court's ruling in that regard, we must address defendant's argument that plaintiff never sought leave to amend the complaint. We disagree with defendant's argument. In her supplemental response to defendant's motion to dismiss, plaintiff included the following language:

"3. If this court determines the case should be re-captioned to reflect the trustee as the named plaintiff, Section 2--616 of the Illinois Code of Civil Procedure allows amended pleadings to relate back to the original complaint filed within the statute of limitations. * * *

If this Court determines plaintiff did not have standing, the Code allows the amended complaint to relate back to the original complaint.

4. If this court determines that the formal substitution of the trustee as the named plaintiff is necessary, *** the Illinois Civil code of Procedure allows a party substitution in bankruptcy cases. *** If this Court determines substitution of the trustee for the plaintiff is the proper mechanism in this case[,] [t]he Code allows for the substitution to relate back to the original complaint.

5. *** This Court in its discretion can accept the title of the cause as originally filed or it may order the caption to reflect the trustee's interests. No practical or legal implications follow a change in the title of the cause."

This language is sufficient to stand as a request to amend the complaint and substitute the plaintiff. In fact, we note that the trial court apparently understood that language as a request for leave to amend, as it addressed the issue in its written ruling. Accordingly, we conclude that plaintiff did request leave to amend her complaint.

A challenge to a trial court's denial of leave to amend a pleading generally receives abuse of discretion review based on the four-factor test for evaluating motions to amend pleadings. Loyola Academy v. S & S Roof Maintenance, Inc., 146 Ill. 2d 263, 273-74 (1992) (stating standard of review and applying the four factors). However, as noted above, the trial court based its denial solely on the legal proposition that plaintiff was barred from amending her complaint to substitute a new plaintiff because the statute of limitations had passed, and not on any application of its discretion or of the Loyola Academy factors. Therefore, our review of the propriety of the trial court's decision presents a question of law, which we consider de novo. Hines v. Department of Public Aid, 221 Ill. 2d 222, 226 (2006) (questions of law are reviewed de novo). See also Najas Cortes v. Orion Securities, Inc., 362 Ill. App. 3d 1043, 1047 (2005), quoting Koon v. United States, 518 U.S. 81,

100, 135 L. Ed. 2d 392, 414, 116 S. Ct. 2035, 2047 (1996) (" 'A [trial] court *** abuses its discretion when it makes an error of law. *** The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions' ").

Section 2--616 of the Code of Civil Procedure (735 ILCS 5/2--616 (West 2004)) provides as follows, in pertinent part:

"(a) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant *** and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought ***.

(b) The cause of action *** set up in any amended pleading shall not be barred by lapse of time under any statute *** prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted *** grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery ***, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action *** set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." 735 ILCS 5/2--616 (West 2004).

Neither the parties nor the trial court dispute that plaintiff's proposed amendment sought to substitute the bankruptcy trustee as the plaintiff for a claim arising out of the same transaction or occurrence identified in the original complaint. Thus, the question becomes whether, under the above statute, an amendment to substitute the bankruptcy trustee as plaintiff could relate back to the filing of the original complaint.

As plaintiff points out, our supreme court addressed a similar issue in Simmons v. Hendricks, 32 Ill. 2d 489 (1965). There, several plaintiffs sued a tavern owner under a Dram Shop Act (Ill. Rev. Stat. 1959, chap. 43, par. 135) because Leroy Simmons (the father and husband of the plaintiffs) became intoxicated at the defendant's tavern and subsequently shot and killed another patron, which lead to his conviction for murder and a resulting deprivation of the plaintiffs' means for support. Simmons, 32 Ill. 2d at 491. The complaint was filed within the statutory one-year limitations period (Simmons, 32 Ill. 2d at 491), but it did not name Leroy Simmons as a plaintiff, as required under the relevant statute (Simmons v. Hendricks, 47 Ill. App. 2d 195, 196-97 (1964)). An amended complaint, based on the same occurrence and naming Leroy Simmons as plaintiff for the first time, was filed after the expiration of the one-year period. Simmons, 32 Ill. 2d at 491. The trial court granted the defendant's motion to dismiss the complaint "on the ground that the action had not been instituted by a person entitled to maintain it [i.e., Leroy Simmons] within one year after it had accrued, as required by the statute, and that the amendment ***, which for the first time introduced Leroy Simmons as plaintiff, did not relate back to the date of the filing of the original complaint." Simmons, 32 Ill. 2d at 491. The supreme court relied on a previous version of the above-quoted statute (see Ill. Rev. Stat. 1959, chap. 110, par. 46; Simmons, 32 Ill. 2d at 493-94) in holding that the trial court erred in dismissing the complaint, because the amended complaint related back to the

original complaint under the statute. Simmons, 32 Ill. 2d at 494-96. It quoted with approval its previous holding that "[b]riefly summarized, section 46 [now section 2--616] permits any amendment of a pleading, filed in apt time, after the time limited for commencing suit to set up a cause of action on any claim which was intended to be brought by the original pleading, provided, only, that it grew out of the same transaction or occurrence, and it is not necessary that the original pleading technically state a cause of action ***.'" Simmons, 32 Ill. 2d at 495, quoting Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222, 229 (1938). The supreme court thus affirmed the appellate court ruling reversing the trial court's dismissal of the plaintiff's complaint and remanding the cause for further proceedings.

Defendant does not address the holding in Simmons as it relates to the amendment issue, but instead directs his argument toward the Loyola Academy factors, which, as noted above, did not enter into the trial court's decision. Based on the supreme court's holding in Simmons, plaintiff is correct that the trial court erred as a matter of law in denying plaintiff's amendment on the ground that "it [was] not possible to relate back in this matter because the plaintiff did not have standing to sue at the time the Complaint was originally filed."

We further note that, though the trial court did not pass on the issue, based on our own review of the record, we cannot conclude that plaintiff's proposed amendment ran afoul of the factors stated in Loyola Academy, and thus we have no basis to affirm the trial court's decision on that separate ground. The supreme court announced four factors to be considered in evaluating a ruling on a motion to amend a pleading: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities

to amend the pleading could be identified." Loyola Academy, 146 Ill. 2d at 273. As discussed above, to the extent plaintiff's original pleading was defective, the proposed amendment could have cured the defect. Regarding the second factor, as plaintiff points out, the record shows that defendant was at all times aware of the nature of plaintiff's complaint and of the identity of the real party in interest. Thus, defendant can claim no surprise or unfair prejudice as a result of the proposed amendment.

Regarding the third factor, defendant argues that plaintiff had ample time before defendant's motion to dismiss the complaint but chose not to do so. However, defendant's motion to dismiss was the first time the standing issue was raised. Indeed, prior to the motion to dismiss, plaintiff points out, defendant "moved to strike Plaintiff's initial complaint and to require her to replead so as to disclose that her bankruptcy trustee *** [was] the real party in interest. That motion was granted, and Plaintiff was given leave to file an amended complaint. [Citation]. Plaintiff duly filed her First Amended Complaint." Defendant only then moved to dismiss on the basis of standing, and the trial court granted the motion. In light of this procedural history, plaintiff's proposed amendment, which came as a part of its response to the motion to dismiss, was not unduly delayed, and, indeed, came before the trial court dismissed the action.

Finally, regarding the fourth factor, standing based on the complaint was not challenged until defendant filed a motion to dismiss, and plaintiff sought leave to substitute a new plaintiff in response to the motion to dismiss. Therefore, plaintiff did not fail to avail herself of previous opportunities to cure the pleading.

Based on the above discussion, we hold that the trial court erred in denying plaintiff leave to substitute the bankruptcy trustee as plaintiff, and, under the Loyola Academy factors, we find no independent basis to uphold the trial court's rejection of the proposed amendment. Accordingly, we

No. 2--05--1281

must reverse the trial court's ruling. Our holding on this issue moots plaintiff's contention that the trial court erred in dismissing her first amended complaint for lack of standing on the basis that the complaint was not brought in the name of the bankruptcy trustee.

For the reasons given, we reverse the judgment of the circuit court of Kane County and remand the cause for proceedings in accordance with the views expressed herein.

Reversed and remanded with directions.

O'MALLEY, J., with HUTCHINSON and KAPALA, JJ., concurring.