**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, LAW DIVISION**

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| Ashley Douglas, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 21 L 8228 |
| | ) | |
| Wanchun Mei, and D&W Express, LLC, | ) | |
| | ) | |
| Defendants. | ) | |

## MEMORANDUM OPINION AND ORDER

A timely filed complaint may be amended under certain conditions to add a defendant after the statute of limitations has expired. The plaintiff in this case failed to name the defendant-driver's employer as a defendant in the original complaint despite knowing its identity, and filed an amended complaint after the statute had expired that also failed to name the truck's owner as a defendant. For those reasons, the defendant's motion to dismiss must be granted.

Facts

On August 22, 2019, Ashley Douglas and Wanchun Mei were involved in a two-vehicle collision on Interstate 94. The Illinois State Police ticketed Mei for failing to reduce speed and for improper lane usage. The traffic crash report identified D&W Express as the owner of the Kenworth truck Mei had been driving.

On August 16, 2021, Douglas, *pro se*, filed a complaint against Mei as the only defendant. On January 31, 2022, Douglas, by then represented by counsel, filed her first amended complaint. Once again, Douglas named Mei as the only defendant.

On March 14, 2022, Douglas filed her second amended complaint. In addition to repeating her past causes of action against Mei, Douglas, for the first time, brought three causes of action—counts two, three, and four—against D&W Express.

Analysis

D&W brings a motion to dismiss based on Douglas's failure to name D&W as a defendant "within the time limited by law." 735 ILCS 5/2-619(a)(5). A motion to dismiss based on a statute of limitations defense always implicates the limitations provision, in this instance, section 13-202. Section 13-202 requires that any cause of action for personal injury be filed within two years after the cause of action accrued. 735 ILCS 5/13-202. To avoid the harsh result of the statute of limitations, the Code of Civil Procedure provides a limited exception for amending complaints past the statute of limitations. Under this section,

> A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute . . . prescribing or limiting the time within which an action may be brought or right asserted, if all the following terms and conditions are met: (1) the time prescribed or limited had not expired when the original action was commenced; (2) the person, within the time that the action might have been brought or the right asserted against him or her plus the time for service permitted under Supreme Court Rule 103(b), received such notice of the commencement of the action that the person will not be prejudiced in maintaining a defense on the merits and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him or her; and (3) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading 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 when the condition precedent has in fact been performed, and even though the person was not named originally as a defendant. For the purpose of preserving the cause of action under those conditions, an amendment adding the person as a defendant relates back to the date of the filing of the original pleading so amended.

735 ILCS 5/2-616(d). D&W's sole argument focuses on the second element—that the amendment is untimely because there was no mistake concerning D&W's identity at the time Douglas filed the original and first amended complaints.

Section 2-616(d) is substantially similar to Federal of Civil Procedure 15(c), Fed. R. Civ. Pro. 15(c), and opens the door for Illinois courts to rely on

federal decisions. *See Zlatev v. Millette*, 2015 IL App (1st) 143173, ¶ 24. The availability of federal precedent is particularly useful as to the mistake-of-identity element. *Cf.* 735 ILCS 5/2-616(d)(2) (newly added defendant "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him or her"), with Fed. R. Civ. P. 15(c)(1)(C)(ii) (defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity"). Under both provisions, the focal issue is not whether the plaintiff made a mistake but whether, from the defendant's perspective, the defendant understood that the plaintiff "made a mistake regarding the proper party's identity." *Krupski v. Costa Crociere S.P.A.*, 560 U.S. 538, 548 (2010); *see Zlatev*, 2015 IL App (1st) 143173, ¶ 37. As *Krupski* explains:

> A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity.

560 U.S. at 550. Courts look principally to the original complaint to determine the defendant's understanding of the plaintiff's intent, *Maggi v. RAS Dev., Inc.*, 2011 IL App (1st) 91955, ¶ 24, but may also refer to the plaintiff's post-filing conduct. *Krupski*, 560 U.S. at 554; *Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000).

A mistake concerning the proper party's identity may take more than one form. One possibility is a case of literal mistaken identity, "in which party A commits the alleged misconduct, but the plaintiff sues party B, not realizing that party A (the proper defendant) is a different person or entity, and does not discover the mistake until later." *Borchers v. Franciscan Tertiary Province of the Sacred Heart, Inc.*, 2011 IL App (2d) 101257, ¶ 43. That is not the scenario presented in this case. There is no suggestion that Douglas meant to sue D&W but inadvertently sued Mei instead. Douglas plainly knew the difference between the driver and the truck owner given the notice provided by the traffic crash report.

A second example of a legitimate mistake is if a plaintiff knows of the existence of one person but confuses that person's status with that of a second person. As *Krupski* explains: "[a] plaintiff may know that a prospective defendant—call him party A—exists, while erroneously believing him to have the status of party B." 560 U.S. at 549. Once again, that is not the situation

here. The original complaint named Mei as the sole defendant. Even if D&W had received notice of the complaint against Mei, D&W could not have reasonably believed that Douglas failed to understand its role as a potential defendant given D&W's ownership of the Kenworth truck.

A third example of a mistake is the situation in which the plaintiff knows both the identity and the status or position of the would-be defendant but not necessarily the role the would-be defendant played in the events underlying the lawsuit. Again, from *Krupski*:

> [A] plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the 'conduct, transaction, or occurrence' giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a 'mistake concerning the proper party's identity' notwithstanding her knowledge of the existence of both parties.

Douglas's argument falls within this scenario. Douglas explicitly argues that, despite the traffic crash report identifying D&W as the truck's owner, Douglas was unaware until after discovery had been taken that Mei was D&W's agent or employee, thereby making D&W a proper defendant. That argument fails for at least two reasons. First, Douglas conflates the discrete issues of mistaken identity and mistaken pleading. From the traffic crash report, there was no mistaking that D&W owned the truck Mei was driving. Douglas's mistake came in failing to name D&W in the complaint she filed only six days before the two-year statute of limitations expired. Second, Douglas's argument implicitly seeks to shift the focus of a section 2-616(d) analysis to what she knew and when she knew it. As noted above, *Krupski* and *Zlatev* make plain that the proper focus is on what the later-named defendant understood to be the plaintiff's intention when filing the original complaint. In this case, the original complaint properly alleged Mei's negligence in driving his truck and striking Douglas's vehicle. In contrast, the complaint does not allege or even infer that D&W acted negligently by, for example, failing to conduct a background check on Mei's driving record or train and supervise him appropriately. In short, there is nothing in the original complaint that would have signaled to D&W that Douglas made a mistake as to the truck owner's identity.

In this case, Douglas's post-filing conduct is also a significant driver of this court's conclusion. D&W's understanding that, based on the original complaint, Douglas did not intend to sue D&W could have only been confirmed when Douglas filed her first amended complaint. That complaint, filed by counsel and with the benefit of the traffic crash report, did not name

D&W as a defendant. To D&W, the first amended complaint could have only confirmed that what might have been Douglas's pleading error in the original complaint was, in fact, her plain intent not to sue D&W. D&W was correct to rely on that conclusion.

Conclusion

For the reasons presented above, it is ordered that:

1. D&W's motion to dismiss is granted;
2. D&W is dismissed with prejudice; and
3. The case continues against Mei only.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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