

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

Barbara Garbutt, as attorney-in-fact for)	
Oliver McDore,)	
)	
Plaintiff,)	
)	
v.)	No. 19 L 1760
)	
Wentworth Rehabilitation and Health Care)	
Center, Inc. f/k/a Alden-Wentworth)	
Rehabilitation and Health Care Center, Inc.,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Misnaming a party is not grounds for dismissing a case because the misnomer may be corrected at any time, before or after judgment. In this case, the plaintiff originally misidentified her office as “personal representative” rather than “attorney-in-fact.” That mistake constitutes a misnomer and does not provide the basis for granting the defendant’s motion to dismiss.

Facts

On November 2, 2018, Oliver McDore executed an Illinois statutory short-form power of attorney appointing Barbara Garbutt as his attorney-in-fact. On February 19, 2019, Garbutt filed a complaint on McDore’s behalf against the defendants (together, “Wentworth”). Garbutt’s caption to the case identified herself as McDore’s “personal representative.” In July 2020, Garbutt sought and this court granted her leave to file an amended complaint. On July 15, 2020, Garbutt filed her amended complaint and identified herself as McDore’s “attorney-in-fact.”

On September 3, 2020, Wentworth filed a motion to strike and dismiss paragraphs 11-17 of the first amended complaint as time barred based on the two-year statute of limitations, *see* 735 ILCS 5/13-202, because Garbutt lacked standing to sue as McDore's personal representative on July 15, 2020. On October 28, 2020, Garbutt filed her response brief. On November 18, 2020, Wentworth filed its reply.

Analysis

The Code of Civil Procedure explicitly authorizes the dismissal of a complaint based on an expired statute of limitations. *See* 735 ILCS 5/2-619(a)(5). A court considering a section 2-619 motion must construe the pleadings in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Id.*

Wentworth's argument relies on two distinct but often related legal concepts: statutes of limitation and standing. On one hand, Wentworth argues that Garbutt's allegations for McDore's alleged injuries in paragraphs 11-17 are cut off by the two-year statute of limitations applicable to personal injury actions, *see* 735 ILCS 13-202, since no court had appointed Garbutt as McDore's personal representative before she filed the 2019 complaint. Wentworth also argues that since Garbutt lacked any capacity to sue on McDore's behalf, she lacked standing to sue, thereby voiding the original complaint. Both arguments miss the mark.

The resolution to this dispute lies in the savings statute provided to all litigants for misnamed parties. As the Code of Civil Procedure provides: "Misnomer of a party is not a ground for dismissal but the name of any party may be corrected at any time, before or after judgment, on motion, upon any terms and proof that the court requires." 735 ILCS 5/2-401(b). Section 2-401(b) prevents a party from forcing the dismissal of a case because of a mistake in a party's name. *Odle v. Department of State Police*,

2015 IL App (5th) 140274, ¶ 19. “The vast majority of cases addressing misnomer have arisen in the context of misnamed, misidentified, or mischaracterized defendants,” however the statute also applies in instances in which a plaintiff misnames itself. *Bristow v. Westmore Builders, Inc.*, 266 Ill. App. 3d 257, 260-61 (2d Dist. 1994). In *Bristow*, for example, the sole-proprietor-plaintiff originally sued under a corporate name. *Id.* at 261. The court concluded the error was a misnomer because all parties knew the litigant’s real identity, the plaintiff actually existed, and there was no prejudice to the defendant. *Id.* at 261-62. A court reached the same conclusion in a case in which a law firm-plaintiff sued under a similar, but not legally recognized, corporate name. See *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 806-07 (1st Dist. 2009). Similarly, the omission of “U.S.” in a corporate-plaintiff’s name was a misnomer that did not prejudice the defendants. See *U.S. Bk. Nat’l Ass’n v. Luckett*, 2013 IL App (1st) 113678, ¶ 23. Cf. *Pennymac Corp. v. Jenkins*, 2018 IL App (1st) 171191, ¶ 30 (one corporation suing instead of true property owner amounted to mistaken identity, not a misnomer).

These cases put an end to Wentworth’s motion as a matter of law. Garbutt held a position—attorney-in-fact—on McDore’s behalf at the time she filed her 2019 complaint, she simply misnamed her position. Wentworth is not prejudiced by this misnomer because Garbutt did not exceed her role as McDore’s attorney-in-fact since the power of attorney authorized her to file suit on McDore’s behalf.

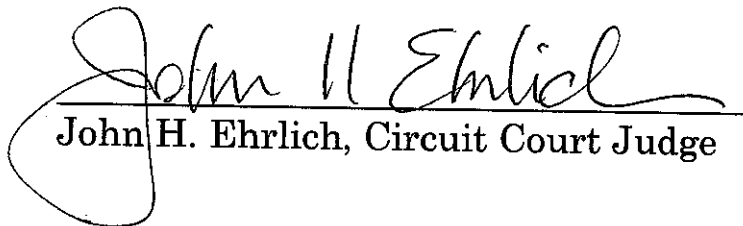
Wentworth’s motion must also fail because Wentworth knew or should have known the error of Garbutt’s status when Wentworth received the summons and the 2019 complaint. The reason is that issuance of letters of office is “a hallmark of ‘personal representatives’ as that term is commonly understood when applied to situations involving estates which must be settled and distributed following a person’s death.” *Relf v. Shatayeva*, 2013 IL 114925, ¶ 33. In other words, when Wentworth saw the title “personal representative” after Garbutt’s name in the caption, Wentworth had to assume McDore had died. Yet a plain reading

of the 2019 complaint would have put Wentworth on notice that McDore was, in fact, still alive and that Garbutt's "personal representative" moniker was incorrect. Easiest of all, Wentworth could have independently confirmed all of these facts had it referred to the circuit court clerk's electronic docket. In short, Wentworth has no excuse for not knowing the error of Garbutt's title.

Conclusion

For the reasons presented above, it is ordered that:

Wentworth's motion to dismiss is denied.


John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

DEC 28 2020

Circuit Court 2075