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Citation: 773 P.2d 1107

773 P.2d 1107, *, 1988 Colo. App. LEXIS 441, **,
12 BTR 1796

Barbara Kathryn STUART, Plaintiff-Appellant, v. The FREDERICK R. ROSS INVESTMENT COMPANY, a Colorado corporation; Jack Worfler; William F. Beattie; John Winsted; Chris Saros; David H. Naus; Bradley K. Brown; Evan Kline; John Tromley; Alan Johnston; Robert Inman; Mike Spriggs; Richard Sampson; Heath Herber; John P. Box; and John Does 1 through 20 whose true names are unknown, Defendants-Appellees

No. 87CA1099

Court of Appeals of Colorado, Division Six

773 P.2d 1107; 1988 Colo. App. LEXIS 441; 12 BTR 1796

December 22, 1988, Filed and Entered

SUBSEQUENT HISTORY: Rehearing Denied January 26, 1989; Certiorari Denied June 5, 1989.

PRIOR HISTORY: [**1] Appeal from the District Court of Eagle County No. 86CV346, Honorable William L. Jones, Judge.

DISPOSITION: Judgment Reversed and Cause Remanded with Directions.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employee sought review of a judgment from the District Court of Eagle County (Colorado), which granted the motions to dismiss filed by appellees, employer and co employees, and dismissed the employee's complaint which sought damages for injuries caused when the employee was assaulted by one or more of her co-employees, and which also prohibited the employee from amending her complaint.

OVERVIEW: The employee worked for an investment firm and claimed that she was assaulted by one or more of her co-employees while on a company retreat. The employee filed an action against her employer and co-employees and claimed that her co-employees were acting in the scope of their employment. The trial court granted the motions to dismiss filed by the employer and co-employees and held that if the co-employees were acting within the scope of their employment, the Colorado Workmen's Compensation Act (Act), Colo. Rev. Stat. § 8-40-101, et seq. (1986), provided the exclusive remedy for the employee's injuries. The employee filed an amended complaint alleging that the incident occurred outside the scope of employment and the lower court struck the amended complaint. The employee appealed and the court reversed the lower court's judgment and reinstated the employee's complaint. The court held that it made no difference whether the acts occurred in the scope of the co-employee's employment. For purposes of the Act, the issue was whether the injuries arose out of the course of the employee's employment. The scope of employment related only to allegations of vicarious liability.

OUTCOME: The court reversed the lower court's judgment which dismissed the employee's complaint and ordered the trial court to reinstate the employee's complaint which sought damages caused by an assault by one or more co-employees. Further, the court permitted the employee to amend her complaint if she desired.

CORE TERMS: co-employee, amend, vicarious liability, verified, matter of law, matter jurisdiction, scope of employment, responsive pleadings, opposing party, workmen's

LEXISNEXIS® HEADNOTES

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Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements

HN1 It is the status of plaintiff's employment at the time of her injuries, and not of the defendants, which determines the applicability of the Colorado Workmen's Compensation Act, Colo. Rev. Stat. § 8-40-101, et seq. (1986). More Like This Headnote | Shepardize: Restrict By Headnote

Workers' Compensation & SSDI > Compensability > Injuries > Psychological Injuries

HN2 The Colorado Workmen's Compensation Act, Colo. Rev. Stat. § 8-40-101, et seq. (1986), has been consistently applied to mental and emotional injuries. More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

HN3 There are no exceptions to the rule permitting amendments where no responsive pleadings have been filed. Moreover, a defect in allegations conferring subject matter jurisdiction can be cured by amendment. More Like This Headnote | Shepardize: Restrict By Headnote

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

HN4 Only if an opposing party can demonstrate prejudice to it or if the court itself is prejudiced is the denial of a motion to amend appropriate. The mere passage of time, without more, is an insufficient reason on behalf of the court or opposing parties, to justify precluding plaintiff from pursuing her claims. [More Like This Headnote](#)

[Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview](#)

HN5 A verified complaint means only that the pleader swears that the facts alleged therein are true. [More Like This Headnote](#)

COUNSEL: Rothgerber, Appel, Powers & Johnson, Richard K. Clark, Angelina Irizarry, Elizabeth T. Wald, Denver, Colorado Attorneys for Defendants-Appellees The Frederick R. Ross Investment Company, William F. Beattie, Alan Johnston, Robert Inman, Heath Herber and John P. Box.

Pryor, Carney and Johnson, P.C., JoAnne M. Zboyan, Englewood, Colorado, Attorneys for Defendants-Appellees Jack Worfler, John Winsted, Chris Saros, David H. Naus, Bradley K. Brown, Evan Kline, John Tromley, Mike Spriggs and Richard Sampson.

JUDGES: Judge Hardeman.* Enoch * and Hodges, JJ., * concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. (1988 Repl. Vol. 10B).

OPINION BY: HARDEMAN

OPINION

[*1109] Barbara Kathryn Stuart (plaintiff) appeals the trial court's dismissal of her complaint for lack of subject matter jurisdiction and the court's ruling prohibiting her from amending her complaint. We reverse.

Plaintiff's verified complaint alleged that the individual defendants (except Sebastian) were co-employees **[**2]** of hers and that one or more of them assaulted her during a company retreat held in Vail. To support a claim of vicarious liability against her former employer, Frederick R. Ross Investment Co., plaintiff alleged that each co-employee was acting in the scope of his employment. Plaintiff also alleged, among other things, that the employer was negligent in hiring and supervising the co-employee defendants and that the employer wrongfully discharged her.

Motions to dismiss were filed by defendants alleging that the court lacked subject matter jurisdiction because if the individual defendants were acting in the scope of their employments, the Colorado Workmen's Compensation Act, § 8-40-101, et seq., C.R.S. (1986 Repl. Vol. 3B) (Act), provided the exclusive remedy for plaintiff's injuries.

The trial court agreed and dismissed all claims except the claim for wrongful discharge and the claims against defendant Sebastian who was not alleged to be a co-employee.

Thereafter, plaintiff filed an amended complaint alleging that the complained of acts occurred outside the scope of the defendants' employments. The vicarious liability claims were deleted. However, the amended complaint was stricken **[**3]** by the court based on the finding that plaintiff could not plead inconsistently with the allegations of the first complaint. These judgments were certified as final pursuant to C.R.C.P. 54(b).

Plaintiff contends that the court erred in dismissing her complaint. We agree.

Concerning the employer's liability, it makes no difference whether the alleged acts occurred in the scope of the co-employee defendants' employments. For purposes of the application of the Act, the dispositive factor is whether plaintiff's injuries arose out of and in the course of her employment. See § 8-52-102(1)(b), C.R.S. (1986 Repl. Vol. 3B). As we see it, the issue of defendants' scope of employment, at this stage, relates only to the allegation of vicarious liability.

Plaintiff's complaint did not allege that she was in the scope of her employment. Moreover, since no evidence has been taken, we cannot ascertain as a matter of law that plaintiff was injured in the scope of her employment. Therefore, we hold that the complaint was sufficient to withstand the motions to dismiss.

The same analysis applies to the claims against the co-employees. **HN1** It is the status of plaintiff's **[**4]** employment at the time of her injuries, and not of the defendants, which determines the applicability of the Act. Kandt v. Evans, 645 P.2d 1300 (Colo. 1982), which held that similar claims were properly dismissed, is distinguishable because there, the plaintiff admitted that she was injured in the scope of her employment (and in fact, had received workmen's compensation benefits). Here, since there was no such admission, the complaint should not have been dismissed.

Plaintiff's argument that the Act does not apply to these facts because her injuries are primarily "non-physical" in nature is without merit. **HN2** The Act has been consistently applied to mental and emotional injuries. See § 8-52-102(2), C.R.S. (1986 Repl. Vol. 3B); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Ft. Logan Mental [**1110] Health Center v. Walker, 723 P.2d 740 (Colo. App. 1986).

Should it be determined that plaintiff was within the scope of her employment, or should plaintiff concede this point, the vicarious liability and negligence claims against the employer must be dismissed. See Kandt v. Evans, supra. However, we hold that in this event, **[**5]** plaintiff should be permitted to amend her complaint to allege that the co-employees were not acting in the scope of their employments. A civil action based on this theory is maintainable pursuant to Kandt v. Evans, supra.

At the time the amended complaint was filed, no responsive pleadings had been filed; therefore plaintiff was entitled to amend her complaint as a matter of right. See C.R.C.P. 15(a), Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960). Even if no such right existed, the court should have permitted her to do so where, as in this case, justice so requires.

We reject defendants' contention that claims dismissed for lack of subject matter jurisdiction cannot be amended as a matter of law and as a matter of public policy. ^{HNS*} There are no exceptions to the rule permitting amendments where no responsive pleadings have been filed. *Renner v. Chilton, supra*. Moreover, we have specifically held that a defect in allegations conferring subject matter jurisdiction can be cured by amendment. *Francisco v. Cascade Investment Co., 29 Colo. App. 516, 486 P.2d 447 (1971)*. If, as defendants allege, plaintiff's amendment is an unwarranted attempt to "create" **[**6]** jurisdiction where it clearly does not exist, an adequate remedy is provided by § 13-17-101, C.R.S. (1986 Repl. Vol. 6A).

Defendants argue that an amendment should not be permitted because too much time has now passed leaving witnesses lost or their memories faded, and evidence destroyed. This contention is wholly unsupported by the record. ^{HNS*} Only if an opposing party can demonstrate prejudice to it or if the court itself is prejudiced is the denial of a motion to amend appropriate. *K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981)*. The mere passage of time, without more, is an insufficient reason on behalf of the court or opposing parties, to justify precluding plaintiff from pursuing her claims. Defendants' remaining allegations of prejudice are similarly without merit.

We also find no significance in the fact that plaintiff's complaint was "verified." ^{HNS*} A verified complaint means only that the pleader swears that the facts alleged therein are true. See *Speed v. Charles Lyon Co., 69 S.W.2d 147 (Tex. Civ. App. 1934)*. However, the issue of scope of employment is one of the ultimate legal questions to be decided, and plaintiff cannot "verify" this issue as fact. Therefore, **[**7]** we conclude that plaintiff should not be bound. Cf. *Skeens v. Kroh, 30 Colo. App. 88, 489 P.2d 347 (1971)*.

The other arguments of defendants, including waiver and request for attorney fees, are without merit.

The judgment of dismissal is reversed and the trial court is ordered to reinstate plaintiff's complaint. If she desires, plaintiff's may amend the complaint in accordance with the views expressed herein.

Enoch * and Hodges, JJ., * concur.

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