State of New York
Court of Appeals

MEMORANDUM

No. 99
Ann Vanyo,
Appellant,
v.
Buffalo Police Benevolent Association, Inc.
et al.,
Respondents.

Phillip A. Oswald, for appellant.
Catherine Creighton, for respondent Buffalo Police Benevolent Association, Inc.
David M. Lee, for respondent City of Buffalo.

MEMORANDUM:

The order of the Appellate Division insofar as appealed from should be modified, without costs, in accordance with this memorandum and, as so modified, affirmed.

While recognizing that this case presents a unique procedural posture, we nevertheless conclude that plaintiff's first and second causes of action should be reinstated. Those claims, asserted in identical form in both the original and amended complaints, were timely interposed when plaintiff filed the original summons and complaint, i.e., "when the action [was] commenced" (see CPLR 203 [c]; 304 [a]). The relation-back doctrine is therefore inapplicable (see CPLR 203 [f]). Although plaintiff failed to serve the original complaint, on this record, the claims should not have been dismissed under CPLR 306-b because defendants did not properly raise such an objection and thus waived it (see CPLR 320 [b]; 3211 [e]). However, we agree with the Appellate Division that plaintiff's fourth cause of action fails to state a due-process cause of action. We remit to the Appellate Division for consideration of defendant Buffalo Police Benevolent Association, Inc.'s argument, raised but not addressed on the appeal to that Court, that plaintiff's first cause of action should be dismissed pursuant to CPLR 3211 (a) (7).

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RIVERA, J. (dissenting):

Plaintiff Ann Vanyo filed a document the parties refer to as an amended complaint after expiration of the statute of limitations for the first two causes of action alleged therein. Nonetheless, plaintiff argues the causes of action are timely because she asserted them in

a prior, unserved complaint, interposed in this same action within the statutory limitations period. Plaintiff's argument proceeds from the assumption that both pleadings stand on equal footing when determining the timeliness of these two causes of action. However, more than a century of case law establishes that there can only be one operative pleading and so plaintiff's first two causes of action survive only if they relate back to a timely filed, valid preexisting action of which defendants had notice before the expiration of the statute of limitations. That is not the case here and therefore the first two causes of action were properly dismissed as time-barred.

I.

Days before the expiration of the statute of limitations, plaintiff, represented by counsel, filed a summons and complaint asserting two causes of action related to her termination of employment, one each against named defendants the Buffalo Police Benevolent Association, Inc. (PBA) and the City of Buffalo. The limitations and service clocks ran out and she never served the summons and complaint. Rather than move to extend the time for service, plaintiff, acting pro se, simultaneously filed two other documents under the same index number and designated them as an amended summons and verified complaint. The amended summons and complaint documents are stamped filed as NYSCEF Doc. No. 2 and 3, respectively. As relevant to this appeal, the amended complaint document asserts the first two causes of action alleged in the previously filed, unserved complaint.[1]

[1] The amended complaint alleges five causes of action, the first four as asserted in the complaint and a new fifth cause of action against the City. On this appeal, plaintiff does

Defendants each moved to dismiss the complaint—referring to the amended complaint—under CPLR 3211 (a) (5) and (7), claiming, amongst other things, that the first and second causes of action are untimely.[2] Plaintiff opposed the motion, asserting that these causes of action were timely interposed based on the filing of the unserved complaint. In its reply, the PBA requested dismissal of the unserved complaint pursuant to CPLR 306-b for lack of service within the statutory time period.

Now represented by new counsel, plaintiff responded by filing a motion under CPLR 306-b to extend the time to file the unserved complaint and deem it timely served nunc pro tunc. That section provides that where, as here, the applicable statute of limitations is four months or less, service of the summons and complaint "shall be made not later than fifteen days after the date on which the applicable statute of limitations expires" (CPLR 306-b). The section further provides that, "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (id.).

In opposition, the PBA asserted that (1) plaintiff delayed in moving under CPLR 306-b until defendants moved to dismiss the amended complaint under CPLR 3211; (2) plaintiff offered no explanation for failing to serve the complaint; and (3) to grant plaintiff's

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not challenge dismissal of the third and fifth causes of action, and she fails to state a claim as to the fourth cause of action.

[2] Defendants also asserted in support of their motions that the first, third, and fourth causes of action failed to state a claim, and that plaintiff was collaterally estopped from seeking relief for the alleged violation asserted under the fifth cause of action.

motion under CPLR 306-b would prejudice the PBA given the particularities of union grievance and arbitration procedures. Thus, according to the PBA, plaintiff failed to satisfy the requirements of CPLR 306-b, as she could not show good cause to grant the motion for an extension of time to serve the complaint and an extension would not be in the interest of justice. For its part, the City argued that plaintiff's "action" was a "de facto application to vacate an arbitration award," and was therefore untimely under CPLR 7511. The City also adopted the PBA's arguments as to why plaintiff's motion should be denied, and similarly requested the complaint be dismissed for lack of timely service under CPLR 306-b. At oral argument on the motions, counsel for plaintiff conceded the complaint was never served but contended that was of no moment because the amended complaint was served and, "[o]nce you amend a complaint, the original complaint becomes a nullity."

Supreme Court, among other things, denied plaintiff's CPLR 306-b motion, and, by separate order, granted defendants' motions to dismiss and dismissed "the complaint" with prejudice. The Appellate Division affirmed the latter order with two Justices dissenting (Vanyo v Buffalo Police Benevolent Assn, Inc., 159 AD3d 1448, 1452 [4th Dept 2018]). The dispositive point of contention between the majority and dissenters was whether the first two causes of action were timely (id. at 1450).

II.

Before turning to the merits of the appeal, it is important to explain the matters I do not consider in my analysis—and which are implicitly left open by the Court's short memorandum affirmance. I do not address whether plaintiff's second document may properly be treated as an amended complaint within the meaning of CPLR 3025, given the

original summons was not served (see CPLR 3025 ["A party may amend (a) pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it"]; CPLR 320 [a] ["An appearance shall be made within twenty days after service of the summons . . . "]). I also do not opine as to whether, under CPLR 306-b, defendants' requests for dismissal of the original complaint, which were contained in the PBA's reply to plaintiff's opposition to the PBA's CPLR 3211 motion and the City's opposition to plaintiff's CPLR 306-b motion, provided a proper basis for dismissal with prejudice under that provision. In other words, I do not address whether defendants were required to proceed by a separate motion seeking affirmative relief. These matters need not be resolved on plaintiff's appeal.

The dispositive question before us, and the only one I answer, is whether the first two causes of action alleged in the amended complaint should be treated as timely interposed by virtue of their inclusion in the prior, unserved complaint filed before the limitations period expired. To answer that question, I accept the plaintiff's repeated unchallenged assertion that the unserved complaint is a nullity because the amended complaint is her operative pleading in this action. I also acknowledge that she has abandoned in this Court her arguments before Supreme Court and the Appellate Division that the first two causes of action are timely because they relate back to the original complaint pursuant to CPLR 203 (f). Given these representations by plaintiff, I conclude the first two causes of action were properly dismissed as untimely.

III.

The CPLR provides plaintiff one pleading: a complaint which may be amended as of right or by leave of court (CPLR 3011, 3025 [a]-[b]). An amended complaint supersedes all former complaints in all respects, and thus serves as the complaint (see Penniman v Fuller & Warren Co., 133 NY 442, 444 [1892]; R & G Brenner Income Tax Consultants v Gilmartin, 166 AD3d 685, 688 [2d Dept 2018] ["When an amended complaint has been served, it supersedes the original complaint and becomes the only complaint in the case"] [citation omitted]; Stella v Stella, 459 NYS2d 478, 479 [2d Dept 1983]; Halmar Distribs. v Approved Mfg. Corp., 49 AD2d 841, 843 [1st Dept 1975] ["An amended complaint having been served, it superseded the original complaint and became the only complaint in the case"]; Branower & Son, Inc. v Waldes, 173 App Div 676, 678 [1st Dept 1916] ["After the complaint had been thus formally amended and served it superseded the original complaint and became the only complaint in the case"], citing Penniman, 133 NY at 444; see also 1 Weinstein, Korn & Miller CPLR Manual § 19.14 [2019] ["When an amended complaint has been served, it supersedes the original complaint and becomes the only complaint in the case"]).[3] In other words, there is only one operative complaint in an action (see Penniman, 133 NY at 444; R & G Brenner Income Tax Consultants, 166 AD3d at 688; Stella, 459 NYS2d at 479; Halmar Distribs., 49 AD2d at 843; 1 Weinstein, Korn & Miller

[3] In contrast, a supplemental pleading does not supersede the former pleading. Rather, "a supplemental pleading is one 'setting forth additional or subsequent transactions or occurrences[ ]' [that] took place after the service of the original pleading" (1 Weinstein, Korn & Miller CPLR Manual § 19.14, quoting CPLR 3025 [b]).

CPLR Manual § 19.14; Kolber v Kolber, 267 AD 837, 838 [2d Dept 1944]; Branower & Son, 173 App Div at 678).

Here, the amended complaint is the plaintiff's operative pleading, and in order for the causes of action to be treated as timely interposed, these claims must relate back to the filing date of the unserved complaint under CPLR 203 (f). That provision states a claim asserted in an amended pleading "is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" (CPLR 203 [f]). However, plaintiff has expressly abandoned her reliance on CPLR 203 (f).

The majority erroneously concludes that the timeliness of the causes of action may be considered by reference to the unserved complaint even without the benefit of CPLR 203 (f). That analysis is flawed, as it fails to acknowledge what the plaintiff assumes: the amended complaint supersedes the unserved complaint. As such, plaintiff cannot bootstrap the untimely causes of action to the properly served amended complaint without relating back to a preexisting valid action filed in the same case. Here, that would have to be the unserved complaint. The CPLR provides but one mechanism to relate back—section 203 (f) —which plaintiff expressly abandoned.

Nevertheless, the majority decides that the relation-back doctrine does not apply because these claims were asserted "in identical form in both the original and amended complaints" (majority mem op at 2). Putting aside that these causes of action in the amended complaint are not in identical form because they incorporate exhibits not

referenced in the unserved complaint, we have never cabined CPLR 203 (f) to previously unalleged claims. The majority essentially rewrites CPLR 203 (f) to limit it to "a new claim asserted in an amended pleading," in violation of our canon of construction and bedrock principle of separation of powers that we are bound by the words chosen by the legislature and so we may not rewrite a statute (see He v Troon Mgmt., Inc., No. 73, 2019 WL 5429374, at *2 [NY Oct. 24, 2019] ["(W)e are not at liberty to second-guess the Legislature's determination, or to disregard—or rewrite—its statutory text"], quoting Matter of New York Civ. Liberties Union v New York City Police Dept., 32 NY3d 556, 567 [2018]; see also McKinney's Cons Laws of NY, Book 1, Statutes § 73).

The fact that defendants did not assert lack of proper service as a ground in support of their motions to dismiss the time-barred causes of action in the amended complaint is no basis to conclude defendants waived their argument that plaintiff may not rely on the unserved complaint to satisfy the statute of limitations. Defendants moved to dismiss the only operative complaint—the amended complaint—based on the alleged defects of that pleading. Once plaintiff asserted timeliness based on the original complaint—which she had not served—and sought an extension of time to serve it, defendants could object on the merits to the plaintiff's CPLR 306-b motion, and could also rely on plaintiff's concession that the original complaint had not been served within the allotted statutory time period. When Supreme Court denied plaintiff's motion, plaintiff had no basis to argue that the causes of action relate back to the filing date of the timely but unserved complaint because defendants did not have notice of her claims until she served the amended complaint.

The legislative history of the 1992 and 1997 amendments to the CPLR support dismissal of plaintiff's causes of action on timeliness grounds, as the legislature recognized the possible harsh consequences when a plaintiff fails to serve within the time allotted under CPLR 306-b, the statute of limitations expires, and the court denies a motion to extend time to serve. The 1992 amendment's State Senate sponsor noted that Rule 4 of the Federal Rules of Civil Procedure requires pre-service filing, and that "the divergence between federal and New York forums [had] been a source of confusion even among veteran litigators" (Introducer's Mem, Bill Jacket, L 1992, ch 216, at 11). The change to commencement by filing of an action was intended to bring New York state practice in line with federal practice, the practice of 35 other states, and the then-existing practice in New York State's Court of Claims, Family Court, and Surrogate's Court (id.). If the action was timely commenced, the plaintiff received additional time to serve beyond the original time allotted in the CPLR. After the amendments went into effect, uncertainty developed concerning judicial authority to extend the time for service. The 1997 amendments to CPLR 306-b were enacted in response to a series of measures requested by former Chief Judge and then-Chief Administrative Judge Jonathan Lippman, upon recommendation of his Advisory Committee on Civil Practice. The amendments sought to address what was viewed as a jurisdictional problem by providing greater flexibility to courts to extend the time to serve beyond the 120 days provided in the former CPLR 306-b. Still the amendments do not provide recourse where the statute of limitations has expired and the motion to extend is denied because "[a]lthough the dismissal would be without prejudice,

where the statute of limitations has run in the interim the dismissal would obviously be fatal to the plaintiff's claim" (Lippman Mem, Bill Jacket, L 1997, ch 476, at 7).

That is the case here. Between the end of the time provided for service of plaintiff's summons and complaint under CPLR 306-b and the filing of plaintiff's motion for an extension of time to serve, the statute of limitations ran on the two causes of action. Although CPLR 306-b permits a court to dismiss the action without prejudice, Supreme Court's denial of plaintiff's CPLR 306-b motion was "fatal to plaintiff's claim[s]" in the operative complaint against defendants.

Although all the parties have made less-than-ideal choices, the majority rewards plaintiff for failing to serve her complaint, allowing her to avoid the consequences of her failure by filing and serving an "amended" complaint rather than seeking CPLR 306-b relief. I see no reason to "save" the two causes of action at issue here when the plaintiff acknowledges that the original complaint is a nullity and the amended complaint is the only valid pleading in this action. Indeed, Supreme Court's decision to deny plaintiff's motion to extend the time to serve the complaint has been upheld on appeal, and so Supreme Court's dismissal of the complaint by separate order, in the exercise of its inherent authority, was wholly proper (see 159 AD3d at 1452 [majority opinion stating that "(W)e agree with the dissent that the court was not authorized to dismiss the complaint sua sponte (see CPLR 306-b), but that issue is academic in view of our determination that the court properly dismissed the original complaint and amended complaint . . . ."]). Accordingly, I would affirm the Appellate Division.

IV.

This appeal only proves that bad facts make bad law. Hopefully, because plaintiffs generally attempt to timely serve the complaint, the majority decision will have limited impact, even if the facts here make for challenging law school hypotheticals. I dissent.

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Order insofar as appealed from modified, without costs, in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge DiFiore and Judges Stein, Fahey, Garcia, Wilson and Feinman concur. Judge Rivera dissents in an opinion.

Decided December 17, 2019