STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0273

Lazaro Despaigne Borrero,
Appellant,

vs.

Heather Gustafson, et al.,
Respondents.

Filed May 13, 2008
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. C9-06-002133

Lazaro Despaigne Borrero, Federal Correctional Institution, P.O. Box 5000, Pekin, IL 61555-5000 (pro se appellant)

John J. Choi, St. Paul City Attorney, James F.X. Jerskey, Assistant City Attorney, 750 City Hall and Court House, 15 West Kellogg Boulevard, St. Paul, MN 55102 (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's grant of summary judgment to respondents in this civil action, arguing that the district court abused its discretion by

allowing respondents leave to amend their answer while denying appellant leave to amend his complaint and that the district court erred in granting summary judgment because genuine issues of material fact exist. Because we hold that the district court did not abuse its discretion and that there are no genuine issues of material fact, we affirm.

FACTS

On July 31, 2003, appellant Lazaro Despaigne Borrero was arrested for selling crack cocaine to undercover officers, convicted in federal court of possession with intent to distribute cocaine base, and incarcerated in federal prison. On February 28, 2006, appellant filed the complaint in this case against the undercover officers and others who participated in his arrest, including "persons unknown." The date of the summons and complaint is February 24, 2006. Appellant's complaint includes three claims of false imprisonment and one claim of assault and battery, alleging that his arrest was unconstitutional and deprived him of his liberty and that respondents subjected him to racial discrimination, physical mistreatment, and harassment. The named defendants, who are respondents in this appeal, served their joint answer on May 12, 2006.

On June 19, 2006, the district court issued a scheduling order that set September 8, 2006, as the deadline for adding parties and scheduled the trial to commence on March 12, 2007. On September 13, 2006, appellant moved to amend his complaint to add the names of 11 new defendants whom appellant claimed were the "unknown persons" referenced in his original complaint. On October 25, 2006, respondents moved for summary judgment and on November 3, moved to amend their joint answer to include

the statute of limitations as an affirmative defense. Respondents' motion to amend was filed more than 30 days before the motion hearing on December 21, 2006.

On November 13, 2006, two months after filing his motion to amend his complaint, appellant filed his proposed amended complaint. In addition to naming 11 new defendants, appellant added a new legal claim under 42 U.S.C. § 1983 (2006). Neither appellant's original complaint nor his motion filed on September 13 contains any mention of section 1983. On November 14, appellant filed a memorandum in opposition to respondents' motion for summary judgment, arguing for relief under 42 U.S.C. § 1983, and filed a memorandum in response to respondents' motion to amend their joint answer.

On January 2, 2007, the district court denied appellant's motion to amend his complaint, granted respondents' motion to amend their joint answer to include the affirmative defense of the statute of limitations, and granted respondents' motion for summary judgment, ruling that the statute of limitations barred appellant's claims in his original complaint.[1] This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court erred in denying him leave to amend his complaint. A district court has broad discretion to grant or deny leave to amend a pleading, and its ruling will not be reversed absent a clear abuse of discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *see Utecht v. Shopko Dep't Store*, 324

[1] The district court also addressed other matters in its order, including, but not limited to, appellant's request that the court order respondents to undergo polygraph and psychiatric examinations.

N.W.2d 652, 654 (Minn. 1982) (holding that district court's denial of a motion to amend a complaint will not be reversed on appeal absent a clear abuse of discretion). Leave to amend shall be "freely given when justice so requires," Minn. R. Civ. P. 15.01, but leave to amend a pleading should not be given if the amendment would prejudice the adverse party. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004). Prejudice may be demonstrated by a "lack of notice, procedural irregularities, or from the lack of a meaningful opportunity" to respond to the motion. *Septran, Inc. v. Indep. Sch. Dist. No. 271*, 555 N.W.2d 915, 920 (Minn. App. 1996), *review denied* (Minn. Feb. 27, 1997).

In this case, the district court denied appellant's motion because the statute of limitations barred his claims against both the proposed defendants and the defendants named in the original complaint. "A motion to amend a complaint is properly denied when the additional claim could not survive summary judgment." *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). The district court did not specifically address appellant's section 1983 claim or whether it would have survived respondents' statute-of-limitations defense[2] because appellant's proposed section 1983 claim was never properly brought before the court. In his motion to amend his complaint, appellant did not seek leave of the court to amend his complaint to add a section 1983 claim. Instead, he merely inserted his proposed section 1983 claims into his proposed amended complaint after receiving notice of respondents' motion to amend

[2] The statute of limitations for section 1983 claims is six years. *Simington v. Minn. Veterans Home*, 464 N.W.2d 529, 530 (Minn. App. 1990), *review denied* (Minn. Mar. 15, 1991).

their answer to include a statute-of-limitations defense. Appellant did not serve and file his proposed amended complaint until November 13, 2006, and he did not serve an amended motion to provide notice to respondents and the district court of his intention to request leave of the court to amend his complaint to assert section 1983 claims against respondents. Because the matter was not properly before the court, the district court did not abuse its discretion in refusing to consider appellant's attempt to prosecute section 1983 claims against respondents. Because appellant's claims in his original complaint could not survive against the proposed 11 new defendants, the district court did not abuse its discretion in denying appellant leave to amend his complaint to add the defendants.

II.

Appellant argues that the district court erred in allowing respondents leave to amend their answer to include the affirmative statute-of-limitations defense. A district court has broad discretion to grant leave to amend a pleading. Leave to amend shall be "freely granted, except where to do so would result in prejudice to the other party," and its ruling will not be reversed absent a clear abuse of discretion. *Fabio,* 504 N.W.2d at 761. Respondents served and filed their motion pleadings to amend their answer, along with their proposed answer, more than 30 days before the motion hearing scheduled on December 21, 2006. Appellant had a meaningful opportunity to respond to the motion and, in fact, filed a responsive memorandum. The district court did not abuse its discretion in granting respondents leave to amend their answer.

III.

Appellant argues that the district court erred in granting summary judgment to respondents. On appeal from summary judgment, this court considers whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). On appeal, a court reviewing a grant of summary judgment must view the record in the light most favorable to the nonmoving party. *Fabio*, 504 N.W.2d at 761. Summary judgment is appropriate when the record shows that "there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Id.*; see also Minn. R. Civ. P. 56.03.

Appellant argues that the statute of limitations does not bar the claims in his original complaint because, although respondents' conduct occurred on July 31, 2003, final judgment in the federal criminal case was not entered until October 11, 2005. Appellant presents no issues of material fact regarding these dates; rather, he argues only that the district court used an incorrect starting date for the running of the limitations period. If no genuine issues of material fact exist, this court reviews the district court's application of the law de novo. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

All actions for "assault, battery, false imprisonment," or any other tort resulting in personal injury "shall be commenced within two years" after the cause of action accrues. Minn. Stat. § 541.07(1) (2006); *see also Larson v. State*, 451 N.W.2d 213, 214 (Minn. App. 1990) ("Actions for . . . assault, battery, false imprisonment, or other tort, resulting

in personal injury shall be commenced within two years after the cause of action accrues." (quotation omitted)). In tort cases, the cause of action generally accrues at the time of injury, which typically coincides with the act that caused the injury. *Dalton v. Dow Chem. Co.*, 280 Minn. 147, 151, 158 N.W.2d 580, 583 (1968). The record here indicates that any injury appellant suffered would have occurred during his arrest. Therefore, the district court properly determined that appellant's claims accrued when he was arrested rather than when final judgment was issued in appellant's criminal court case. Because respondents' allegedly tortious conduct that served as the basis for appellant's claims of false imprisonment, assault, and battery occurred more than two years before he commenced his lawsuit, the claims in appellant's original complaint are barred by the statute of limitations.

On appeal, appellant also argues that the district court erred in granting summary judgment when it did not consider appellant's section 1983 claim discussed in his memorandum in opposition to respondents' motion for summary judgment. But appellant's mere discussion of a section 1983 claim that had not been properly pleaded did not properly place the matter before the district court. When issues are raised for the first time in a memorandum in opposition to summary judgment, the district court need not consider them. *See Great Am. Ins. Co. v. Golla*, 493 N.W.2d 602, 605 (Minn. App. 1992) (holding that where a party attempted to revive a claim it had removed from a complaint, district court did not err in not considering the claim when it was raised in opposing summary judgment). "A party is bound by its pleadings," and may not raise a claim merely by stating it in a memorandum opposing summary judgment. *Id*. Where

the defendant has not consented to litigate issues not raised in the complaint, the district court does not err by refusing to consider them. *Id.* Because the pleadings frame the issue for the district court, it is appropriate to bind the parties to their pleadings. *Id.* We conclude that the district court did not err in granting summary judgment to respondents.

Affirmed.