Michigan Law Review

Volume 39 | Issue 7

1941

PARTIES - RIGHT TO SUE DEFENDANT BY FICTITIOUS NAME

Oliver B. Crager
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Civil Procedure Commons, Courts Commons, and the Litigation Commons

Recommended Citation
Oliver B. Crager, *PARTIES - RIGHT TO SUE DEFENDANT BY FICTITIOUS NAME*, 39 MICH. L. REV. 1243 (1941).
Available at: https://repository.law.umich.edu/mlr/vol39/iss7/20

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

PARTIES — RIGHT TO SUE DEFENDANT BY FICTITIOUS NAME — Plaintiff brought an action of detinue to repossess an electric refrigerator against "John Doe, whose name is to the plaintiff otherwise unknown, but will be inserted by way of amendment when ascertained," in accordance with an Alabama statute allowing suits to be started against defendants by a fictitious name.[1] Writ of seizure issued on the same date as the summons, but the sheriff did not make service. When it was found that the refrigerator was in the possession of a woman, plaintiff amended the complaint to substitute "Mary Roe, whose name is to the plaintiff otherwise unknown, etc." Service was again unsuccessful but the property was seized. Plaintiff then amended the complaint to substitute Cassie Dill and D. G. Ewing for the fictitious names. These parties appeared and moved to discontinue, the trial court granting the motion. *Held*, reversed, on the ground that there was not such a change of parties as would justify the defendants' motion. *McKelvey-Coats Furniture Co. v. Doe*, (Ala. 1940) 198 So. 128.

Code provisions similar in form to the Alabama statute exist in about half the states.[2] A distinction should be noted between suits against defendant in a fictitious name and suits against "unknown claimants" or "unknown heirs," the latter applying more properly to in rem or quasi-in-rem suits where the intention is to preclude the rights of all claimants whether they have actual notice of the suit or not, as in escheat actions.[3] Chief interest in the instant case lies in

[1] Ala. Code (1928), § 5709: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly."

[2] 47 C. J. 174, note 93 (1929); 22 CAL. L. J. 685 (1934); 2 BANCROFT, CODE PRACTICE AND REMEDIES 1101 (1927).

[3] In the "unknown claimants, etc." suits, any person claiming an interest can come in and defend, whereas the following cases indicate that in the suits considered here, it is for the plaintiff to indicate the party he is suing either by service of summons or amendment to substitute the true name: Mercantile Trust Co. of San Francisco v. Stockton Terminal & E. R. R., 44 Cal. App. 512, 185 P. 860 (1919); Union Tank & Pipe Co. v. Mammoth Oil Co., 134 Cal. App. 229, 25 P. (2d) 262 (1933). In the former type of cases, service by publication seems to be allowed, according to Hamilton v. Brown, 161 U. S. 256, 16 S. Ct. 585 (1895), and Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773 (1891). In the fictitious name suits, there must be personal service to ground a judgment, for otherwise there is nothing to apprise defendant he was the party intended. See Enewold v. Olsen, 39 Neb. 59, 57 N. W. 765 (1894) which seems to be the only case in point, apparently because the issue did not arise in other cases due to proper service on defendant.

the court's liberal interpretation of the statute. Reference is made to the statute as an emergency one, applicable where neither the name nor identity of the defendant is known. The Court further states that it is sufficient if plaintiff merely follows the wording of the statute by averring that the name of the defendant is unknown to him and will be inserted by way of amendment when ascertained, although it would be better practice to aver any descriptive matter known to plaintiff, tending to identify the defendant, which will aid the sheriff in making service. The practitioner is confronted with two problems in the use of such a code provision: (1) conforming to procedural requirements, and (2) knowing when such a procedure can be used. Originally interpreted by the courts rather strictly,[4] there has been a tendency in recent years to construe this type of statute liberally.[5] Earlier decisions and some more recently hold that even where the person intended as defendant appears and pleads, a judgment is not binding unless plaintiff amends his complaint to substitute the true name of the defendant for the fictitious one.[6] The more modern and liberal rule seems to be less strict.[7] The better rule does not seem to require any particular effort by plaintiff to ascertain defendant's true name before starting suit with a fictitious name, apparently in line with a liberal construction of what is obviously an emergency statute.[8] But at least plaintiff must be actually ignorant of de-

[4] Rosencrantz v. Rogers, 40 Cal. 489 (1871); McKinlay v. Tuttle, 42 Cal. 570 (1872); McCabe v. Doe, 2 E. D. Smith (N. Y.) 64 (1853).

[5] Irving v. Carpentier, 70 Cal. 23, 11 P. 391 (1886); Roth v. Scruggs, 214 Ala. 32, 106 So. 182 (1925).

[6] McCabe v. Doe, 2 E. D. Smith (N. Y.) 64 (1853); Farris v. Merritt, 63 Cal. 118 (1883); Union Tank & Pipe Co. v. Mammoth Oil Co., 134 Cal. App. 229, 25 P. (2d) 262 (1933). McKinlay v. Tuttle, 42 Cal. 570 (1872), even held that where the true names of defendants appeared in the judgment, the latter was not binding on them.

[7] See Moore v. Lewis, 76 Mich. 300, 43 N. W. 11 (1889), where it was held that when defendant appears and pleads, failure to amend to substitute his true name is immaterial, especially when it appeared correctly on appeal; Hoffman v. Keeton, 132 Cal. 195, 64 P. 264 (1901), holding that trial court's order directing an amendment was sufficient; Blackburn v. Bucksport & E. R. R. R., 7 Cal. App. 649 at 654, 95 P. 668 (1908), holding that on appeal the appellate court will in its judgment direct the lower court to amend the complaint as of a date prior to the original judgment, in order to support it. Wisest course, however, would be always to amend when the defendant's true name is discovered, if ever.

[8] Hoffman v. Keeton, 132 Cal. 195, 64 P. 264 (1901), holding that plaintiff was not required to search the records; Irving v. Carpentier, 70 Cal. 23, 11 P. 391 (1886), holding plaintiff need not search the land title records in county recorder's office. In the last case, the court said plaintiff's ignorance could even be negligent, since the statute was enabling, and time might be lacking for such a search, and the party sued would not be injured anyway since he was personally served. But cf. Arizona Land & Stock Co. v. Markus, 37 Ariz. 530, 296 P. 251 (1930), holding that recording of a tax sale deed was constructive notice to plaintiff of defendant's true name and hence judgment was not binding on him. But there, plaintiff had not used the fictitious name provision in an emergency situation, but rather in an escheat action, and since it sought to preclude all possible claimants, the more stringent rule might be justified.

fendant's true name and aver that fact in his complaint.[9] The statute was not intended to apply where plaintiff uses an actual name for a party but gets the wrong person into court, for an amendment in this situation would be an entire change of parties.[10] The right to sue defendant by a fictitious name is of especial value in three types of situations. The most common application is that where the statute of limitations has nearly tolled a cause of action, but the name of the defendant is still unknown. Use of the statute in this situation is possible for the reason that defendant when served is deemed to have been a party from the commencement of the action.[11] This procedure has been suggested as particularly valuable where the statutory period of limitation is extremely short, as under statutes allowing only ninety days between filing of a mechanic's lien and commencement of action upon it.[12] The second situation to which the statute is applicable is where the plaintiff knows defendant has property which can be attached, but does not know defendant's name and desires to prevent removal of the property from the jurisdiction, as in the instant case. Another occasion for application is where the defendant whose name is unknown has committed a tort against the plaintiff and the latter desires to get out a complaint and summons immediately, before the defendant leaves the jurisdiction.[13]

Oliver B. Crager

[9] Brown v. Reinke, 159 Minn. 458, 199 N. W. 235 (1924) (dicta); 2 CARMODY, NEW YORK PRACTICE, 2d ed., 1080 (1929); Enewold v. Olsen, 39 Neb. 59, 57 N. W. 765 (1894); Gardner v. Kraft, 52 N. Y. Prac. & Code Rep. (How. Pr.) 499 (1877); Crandall v. Beach, 7 How. Pr. 271 (1852).

[10] Roth v. Scruggs, 214 Ala. 32, 106 So. 182 (1925); Baker v. Tormey, 209 Wis. 627, 245 N. W. 652 (1932).

[11] Hoffman v. Keeton, 132 Cal. 195, 64 P. 264 (1901); Farris v. Merritt, 63 Cal. 118 (1883); PHILLIPS, CODE PLEADING, 2d ed., 285 (1932).

[12] 21 CAL. L. REV. 624 at 626 (1933).

[13] Roth v. Scruggs, 214 Ala. 32, 106 So. 182 (1925), suggests in dicta such a use of the fictitious name suit. This and the instant case are apparently the only two saying identity of defendant may be unknown as well as defendant's name, but since it is hard to know what is in the plaintiff's mind when he starts suit, it would seem impossible to require knowledge of identity in practice. Tyrrel v. Seamen's Bank for Savings, 57 App. Div. 381, 68 N. Y. S. 275 (1901), lays down the rule that the statute can be used only against one known to exist, but in that case the bank sought to bring in the "original depositor or his representatives," which immediately indicated to the court that plaintiff did not know whether defendant was alive or dead. A similar statement is to be found in Reynolds v. May, 4 Greene (Iowa) 283 (1854), but there the suit was directed against the "heirs of Otis Reynolds," and hence was really an "unknown claimants" suit, rather than a fictitiously-named defendant suit.