Missouri Court of Appeals

Southern District

Division One

NAYLOR SENIOR CITIZENS HOUSING, LP; NAYLOR SENIOR CITIZENS HOUSING II, LP; Plaintiffs-Appellants, and JOHN DILKS, Plaintiff, v. SIDES CONSTRUCTION COMPANY, INC.; CITY OF NAYLOR; SCHULTZ ENGINEERING SERVICES, INC.; NAYLOR RII PUBLIC SCHOOLS; and DILLE AND TRAXEL, LLC, Defendants-Respondents.	)	No. SD32098 **Filed: April 19, 2013**

APPEAL FROM THE CIRCUIT COURT OF RIPLEY COUNTY

Honorable Michael J. Ligons, Special Judge

REVERSED AND REMANDED

Naylor Senior Citizens Housing, LP, and Naylor Senior Citizens Housing II, LP ("Appellants"), are two limited partnerships, organized and existing under the laws of Missouri. Plaintiff Dilks acted as managing partner for both Appellants but is not an

attorney. Plaintiff Dilks and Appellants filed a petition alleging that defendants' negligence in the design and construction of an elementary school and in the design and maintenance of the drainage system nearby the construction site caused flood damage to property owned by Appellants. John Dilks personally signed a Petition for Damages on behalf of himself and Appellants against Sides Construction Company, Inc., City of Naylor, Schultz Engineering Services, Inc., Naylor R-II Public Schools, and Dill and Traxel, LLC ("Respondents"). The petition was filed one day prior to the expiration of the statute of limitations. All Respondents filed motions to dismiss the petition with respect to Appellants.[1] Although an attorney filed a responsive pleading and an Amended Petition on behalf of the partnerships, it was after the statute of limitations had run. Respondents successfully contended at the trial level that a petition on behalf of limited partnerships must be filed by a licensed attorney, Dilks is not an attorney, and, therefore, the petition filed by Dilks was a nullity and the subsequent Amended Petition was outside the statute of limitations. We reverse the dismissal and remand for further proceedings.

There are two independent, somewhat overlapping, legal principles at issue in this case: first, is the so-called "nullity rule," which provides that legal action undertaken by one not authorized to practice law is a nullity and is subject to dismissal, ***Strong v. Gilster Mary Lee Corp.***, 23 S.W.3d 234, 241 (Mo. App. E.D. 2000); and second, is Rule 55.03(a), which governs the signing of pleadings. At the heart of this issue lies Appellants' failure to have the petition signed by an attorney. According to Respondents,

[1] Pursuant to Rule 74.01(b), the trial court certified its partial judgment for appeal with respect to Appellants, finding no just reason for delay in determining that the petition, on behalf of Appellants, was a nullity. Its judgment did not resolve the claims on behalf of Plaintiff Dilks, who is not a party to this appeal. All rule references are to Missouri Court Rules (2012).

Appellants, as limited partnerships, should be treated like a corporation and must therefore be represented in all legal matters by a licensed attorney.[2] Respondents further advocate that because Plaintiff Dilks is not an attorney, he engaged in the unauthorized practice of law in signing and filing the petition, and because Appellants were not represented by an attorney in filing the petition, the trial court correctly treated the petition as a nullity and sustained Respondents' motions to dismiss.[3]

Appellants rely upon Rule 55.03(a), which provides:

> Every pleading, motion, or other filing shall be signed by at least one attorney of record in the attorney's individual name or by the self-represented party.
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> . . . .
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> An unsigned filing or an electronic filing without the required certification shall be stricken unless the omission is corrected promptly after being called to the attention of the attorney or the party filing same.

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[2] In ***Clark v. Austin***, our Supreme Court stated:

> The law recognizes the right of natural persons to act for themselves in their own affairs, although the acts performed by them, if performed by others, would constitute the practice of law. A natural person may present his own case in court or elsewhere, although he is not a licensed lawyer. A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys.

101 S.W.2d 977, 982 (Mo. 1937).

[3] *See, e.g.*, ***Joseph Sansone Co. v. Bay View Golf Course***, 97 S.W.3d 531, 532 (Mo. App. E.D. 2003) ("[A]ction taken on behalf of the corporation by a non-attorney representative may be void and can result in the dismissal of the corporation's appeal. Indeed, the normal effect of a representative's unauthorized practice of law is to dismiss the cause or treat the particular actions taken by the representative as a nullity.") (internal citation omitted).

We review a motion to dismiss[4] *de novo*. ***Lynch v. Lynch***, 260 S.W.3d 834, 836 (Mo. banc 2008). We accept all facts contained in the petition as true and view the allegations in the light most favorable to the plaintiff. ***Fuller v. Kemna***, 317 S.W.3d 176, 178 (Mo. App. S.D. 2010). In our review, we may not consider evidence outside the pleadings. ***Weems v. Montgomery***, 126 S.W.3d 479, 484 (Mo. App. W.D. 2004).

Respondents Schultz Engineering Services, Inc., City of Naylor, and Sides Construction Company, Inc., filed motions to dismiss on the basis that the petition was not signed by an "attorney of record", as required by Rule 55.03(a). Respondents City of Naylor and Sides Construction also suggested in their motions to dismiss that the petition was a nullity because limited partnerships, like Appellants, were required to act through a licensed attorney in all legal matters. Appellants and Plaintiff Dilks retained counsel and filed a reply to the motions to dismiss, arguing that Rule 55.03(a) and recent Supreme Court case law required they be given an opportunity to correct the omission of an attorney's signature. In support of their reply, Appellants and Plaintiff Dilks filed Plaintiff Dilks' affidavit, which contended: (1) John Dilks is the managing general partner of Appellants; (2) he consulted attorneys with regard to filing a lawsuit and eventually met with a member of a law firm several months before the five-year statute of limitations was to run; (3) on the day before the petition was filed he went to the law firm

[4] Appellants contend that the trial court considered matters outside the pleadings, specifically Plaintiff Dilks' affidavit filed with the court in opposition to Respondents' motions to dismiss, and thereby converted Respondents' motions into ones for summary judgment. Rule 55.27(a) contemplates such a transformation when "matters outside the pleadings are presented to and not excluded by the court[.]" The trial court is required to notify the parties that it is converting the motion and give the parties "reasonable opportunity to present all material made pertinent to such a motion[.]" Rule 55.27(a); ***Pikey v. Bryant***, 203 S.W.3d 817, 820-21 (Mo. App. S.D. 2006). Appellants have not provided us with any support in the record for their assertion that the trial court took any action or gave any notice to the parties to convert Respondents' motions to ones for summary judgment. The trial court simply referred to Respondents' motions as "Motions to Dismiss" in its judgment. Where, as here, the record contains no evidence that the court provided notice to the parties that it intended to or actually considered the matter as a summary judgment motion, we treat the motion as one for dismissal. ***Pikey***, 203 S.W.3d at 821.

expecting to sign paperwork to file the lawsuit, instead he was told by one of the attorneys that the firm had discovered it had a conflict of interest with one of the defendants and thus the firm could not represent Dilks and Appellants; and (4) the attorney handling the matter advised him that because the time for filing was almost up the firm had prepared the petition for him to sign and file personally, and that he should do so. Appellants also filed an Amended Petition that was signed by an attorney.

The initial question posed by the parties is whether a limited partnership is bound by the same rules that apply to a corporation. The parties have provided no cases, nor have we found any, that answer that very specific question whether a limited partnership is treated the same as a corporation in court proceedings. In the argument section of its brief, Respondent City of Naylor points to language in the limited partnership statute, section 359.081,[5] that partnerships must sue and be sued in the partnership name as support for their position and thus are the equivalent of a corporation and must act through an attorney in all legal matters. *See* ***Reed v. Labor and Indus. Relations Com'n***, 789 S.W.2d 19, 23 (Mo. banc 1990) ("It is axiomatic that a corporation must act through an attorney in all legal matters.").[6]

We find that whether the limited partnership was obligated to have an attorney sign the petition is not the dispositive issue. Even assuming that the initial petition was a "nullity," ***Haggard v. Division of Employment Sec.***, 238 S.W.3d 151, 155-56 (Mo. banc 2007), controls. In ***Haggard***, the court indicated that the filing of the petition by a non-

[5] All references to statutes are to RSMo 2000, unless otherwise specified.

[6] We do note that section 359.251 states that a general partner in a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners. The Uniform Partnership Law does not, however, transfer a partnership into a separate or juristic entity. ***Allgeier, Martin Associates v. Ashmore***, 508 S.W.2d 524, 525 (Mo. App. Spfld.D. 1974). "Generally, all partners are necessary parties-plaintiff in actions to enforce an obligation due the partnership." ***Id.***

attorney representing a corporation is not jurisdictional and is merely error. If that is so, then Rule 55.03 applies to a petition of a limited partnership filed by a non-attorney.

In ***Hensel v. American Air Network, Inc.***, the Supreme Court addressed Rule 55.03(a)'s signature requirement and the consequence of failing to provide the appropriate signature on a petition. 189 S.W.3d 582 (Mo. banc 2006). In ***Hensel***, the plaintiffs filed a petition, prepared and signed by their attorney, who was licensed to practice in Kentucky but had not been granted admission in Missouri. ***Id.*** at 583. The petition was filed on the last day for filing under the one-year statute of limitations, and the trial court granted the defendants' motion for summary judgment on the basis that the petition was a nullity because it was unsigned by a Missouri attorney at the time of filing and was then barred by the applicable statute of limitations. ***Id.***

Our Supreme Court found that the plaintiffs' attorneys sought to correct the signature omission in a timely manner in compliance with Rule 55.03(a), even though their attempts had been prohibited by the trial court. ***Id.*** at 583-84. Further, the Court held that the filing was not a nullity, and the purpose of the Rule 55.03(a) signature requirement--protecting the public--was not served under the facts of the case. ***Id.*** at 584. The Court reiterated, "[w]here in a particular case involving an individual the only issue of unauthorized practice is the signature on the petition required by Rule 55.03, the sanction of depriving the litigant of a cause of action is disproportionate to the harm." ***Id.*** However, the footnote accompanying that sentence specifically noted that "[t]he rule is different with respect to filings on behalf of a corporation[,]" citing ***Reed v. Labor and Industrial Relations Commission***, 789 S.W.2d 19, 23 (Mo. banc 1990). ***Hensel***, 189 S.W.3d at 584 n.3.

In ***Reed***, the Court had held that it was the unauthorized practice of law for a non-attorney employee to file an application for review with the Labor and Industrial Relations Commission on behalf of a corporation. 789 S.W.2d at 23. In its analysis, the Court cited extensively to ***Clark v. Austin*** for the proposition that corporations, unlike individuals, may not represent themselves in legal proceedings and must appear at all times through an attorney:

> "Since a corporation cannot practice law, and can only act through the agency of natural persons, it follows that it can appear in court on its own behalf only through a licensed attorney. It cannot appear by an officer of the corporation who is not an attorney, and may not even file a complaint except by an attorney, whose authority to appear is presumed; in other words, a corporation cannot appear in propria persona. *A judgment rendered in such a proceeding is void.*"

Id. at 21 (quoting ***Clark v. Austin***, 101 S.W.2d at 983) (emphasis in original). Numerous Missouri courts have relied on this language in concluding that any legal action taken on behalf of a corporation by a non-attorney is the unauthorized practice of law and, as such, is a nullity. *See, e.g.*, ***6226 Northwood Condo. Ass'n v. Dwyer***, 330 S.W.3d 504, 506 (Mo. App. E.D. 2010); ***Schenberg v. Bitzmart***, 178 S.W.3d 543, 544 (Mo. App. E.D. 2005); ***Joseph Sansone Co.***, 97 S.W.3d at 532; ***Stamatiou v. El Greco Studios, Inc.***, 935 S.W.2d 701, 702 (Mo. App. W.D. 1996); ***Prop. Exch. & Sales, Inc., (PESI) by Jacobs v. Bozarth***, 778 S.W.2d 1, 2-3 (Mo. App. E.D. 1989). Additionally, section 484.020 generally criminalizes the unauthorized practice of law for persons, associations, partnerships, limited liability companies, and corporations.

After ***Hensel***, however, our Supreme Court addressed ***Reed*** in ***Haggard v. Division of Employment Security***, 238 S.W.3d 151 (Mo. banc 2007). In ***Haggard***, the claimant appealed the findings of the Labor and Industrial Relations Commission, in part,

because the Division of Employment Security was represented by a non-attorney during the appeals tribunal hearing. ***Id.*** at 153. In its reasoning, the Supreme Court cited to Rule 5.29(c), promulgated following its decision in ***Reed***, which allows corporations, partnerships, and other business entities to be represented by an officer or managerial employee in the administrative proceedings. ***Id.*** at 154-55. Although the Court ultimately concluded that the Division, as a state agency, was not included in the scope of Rule 5.29(c), it went on to address its previous holding in ***Reed***:

> [T]his Court is not persuaded by Haggard's assertions that the [Commission's] decision is null and void pursuant to *Reed*. This Court rejects any interpretation of *Reed* that suggests that [the Division's] failure to comply with Rule 5.29(c) is a jurisdictional issue. *To the extent that* Reed *suggests that a judgment is null and void solely because a party to the decision was represented by a non-lawyer, it is no longer to be followed.*

Id. at 155 (emphasis added). The Court went on to reiterate "representation by one not authorized to practice law is not jurisdictional and does not render a decision void[.]" ***Id.*** at 155-56.

We do not read ***Haggard*** as being limited to the unemployment compensation context. Our interpretation of its holding and analysis is consistent with the more broad jurisdictional principles outlined by the Court in ***J.C.W. ex rel. Webb v. Wyciskalla***, 275 S.W.3d 249 (Mo. banc 2009), and its progeny. *See also* ***In re Marriage of Hendrix***, 183 S.W.3d 582, 590 (Mo. banc 2006) ("[T]he label 'jurisdictional defect' has no application to mere legal errors."). Respondents have not cited us to, nor can we find, any authority as to why Appellants' petition is a nullity without relying on the outdated cases noted above, which we believe are no longer persuasive in light of ***Haggard*** and the clarification provided in ***Wyciskalla***. ***Haggard*** clearly states that the unauthorized

practice of law is *not* a jurisdictional issue. ***Haggard***, 238 S.W.3d at 155-56. It follows then that the petition is not a nullity simply because Plaintiff Dilks may have engaged in the unauthorized practice of law in signing and filing the petition on behalf of Appellants.

Therefore, Appellants' initial failure to comply with Rule 55.03(a) is not jurisdictional. Although ***Hensel***'s analysis was limited to the facts of its case, it pre-dates ***Haggard*** and ***Wyciskalla***. Assuming, without deciding, that Appellants, as limited partnerships, should be treated under the law in the same manner as corporations rather than individuals, we see no reason for limiting ***Hensel***'s holding to individual plaintiffs. Although the Court in ***Hensel*** distinguished between individuals and corporations, it did so in reliance on ***Reed***, and again, in light of the clarification provided by the Supreme Court since 2006, when ***Hensel*** was decided, we believe that reliance was misplaced and is no longer persuasive.

Rule 55.03(a) provides the proper sanction for failing to abide by its signature requirements: the pleadings will be stricken "unless the omission is corrected promptly[.]" Here, like the plaintiffs in ***Hensel***, Appellants took steps to promptly correct the omission by filing an amended petition, signed by newly-retained counsel, in a timely manner. *See* Rule 55.33(a) ("A pleading may by amended once as a matter of course at any time before a responsive pleading is served[.]") A timely attempt to correct the petition is all Rule 55.03(a) requires. ***Hensel***, 189 S.W.3d at 584. This is consistent with recent cases relaxing signature requirements in other contexts. *See* ***Glover v. State***, 225 S.W.3d 425, 427-28 (Mo. banc 2007) (holding that the signature requirement for post-conviction relief under Rules 29.15 and 24.035 was not jurisdictional and was "subject to the sanctions of Rule 55.03"); ***In re Estate of Conard***, 272 S.W.3d 313, 318-

19 (Mo. App. W.D. 2008) (finding the plaintiffs' claims against an estate should not have been dismissed because the plaintiffs promptly cured the defect, as required by Rule 55.03(a)).[7]

As the ***Hensel*** Court noted, "[t]he purpose of declaring certain acts by those not authorized to practice law a nullity is to protect the public[,]" 189 S.W.3d at 584, and nothing in this opinion should be read to sanction the unauthorized practice of law. However, even assuming Appellants should be treated like corporations, the common law requiring corporations to be represented by an attorney in all legal proceedings does not affect the court's jurisdiction to enter judgment in that case, and therefore there is no legal basis for deeming Appellants' petition a nullity solely because it lacked appropriate representation. Point I is granted.[8]

Because the trial court erred in determining the petition was a nullity with respect to Appellants its judgment is reversed and remanded for proceedings not inconsistent with this opinion.

Nancy Steffen Rahmeyer, J. – Opinion Author

Gary W. Lynch, P.J. – Concurs

William W. Francis, Jr., J. – Concurs

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[7] Respondents argue that these cases, cited by Appellant, are inapposite because the plaintiffs in these cases were individuals. Given that Respondents' argument necessarily relies on the principle that anything filed by a corporation (or, according to Respondents, a limited partnership) without appropriate representation is a nullity, a point we have already addressed above, we find their attempt to distinguish these cases unpersuasive.

[8] We do not address Appellants' second point in view of our resolution of the first point. Respondent Schultz's "Motion to Dismiss Appellants' Appeal for Failure to Comply with Rule 84.04 of the Missouri Rules of Civil Procedure", which was taken with the case, is denied.