

STATE OF MICHIGAN
COURT OF APPEALS

SOUTH HAVEN MARINE, INC., a Michigan corporation, DAVID NIXON, JENNIFER ANN NIXON, and RICHARD C. REMES, as bankruptcy trustee,

UNPUBLISHED
April 23, 1996

Plaintiffs-Appellants,

v

No. 174776
LC No. 92-037275-NM

FRANK C. HANSON, attorney at law, NEAL, HANSON, HANSON & HAMLIN, WILLIAM H. SHAW, attorney at law, STANLEY, DAVIDOFF & GRAY, P.C.,

Defendants-Appellees.

Before: Doctoroff, C.J., and Hood and Gribbs, JJ.

PER CURIAM.

The trial court granted defendants' motion for summary disposition and denied plaintiffs an opportunity to amend their complaint. Plaintiffs appeal as of right. We affirm.

Plaintiffs David and Jennifer Ann Nixon [hereinafter plaintiffs] operated plaintiff South Haven Marine, Inc [hereinafter SHM]. Plaintiffs started to develop a condominium project on the marina but soon experienced financial difficulties. In April 1987, SHM filed a petition in bankruptcy court to reorganize pursuant to chapter eleven of the bankruptcy code. 11 USC 1101 *et seq.* Plaintiffs initially operated SHM as debtors-in-possession. When the creditors of the bankruptcy estate moved for an appointment of a trustee, the bankruptcy court appointed plaintiff Remes as the trustee. On September 16, 1987, the bankruptcy court authorized Remes to retain defendant Stanley, Davidoff & Grey as special counsel. On December 3, 1987, the bankruptcy court authorized Remes to retain defendant Hanson as special counsel.

In November 1988, defendant Hanson began to negotiate a sale of the marina to Donald Patterson. Defendant Hanson drafted a warranty deed conveying the property to Patterson while reserving a utility easement for plaintiffs. When Patterson refused to close the transaction due to the utility easement, defendant Hanson modified the deed. On June 21, 1989, the parties transferred the property by a deed that did not contain a utility easement. Defendant Shaw signed the deed on the trustee's behalf.

On June 21, 1991, plaintiffs filed this case in state circuit court against defendants without joining Remes as a plaintiff. Plaintiffs alleged that defendants violated their duty to provide competent legal services when they sold the marina without reserving a utility easement. The statute of limitations for a legal malpractice action expires after two years. MCL 600.5838; MSA 27A.5838; MCL 600.5805; MSA 27A.5805. Plaintiffs amended the complaint to join Remes as a plaintiff on May 18, 1992, more than two years after the alleged malpractice occurred. On August 13, 1992, the bankruptcy court granted permission for Remes to file suit against defendants. The bankruptcy court stated that any proceeds from the lawsuit would become part of the bankruptcy estate.

On October 15, 1993, defendants moved for summary disposition. The trial court determined that plaintiffs lacked the legal capacity to file suit against defendants in state court without the permission of the bankruptcy court. Only the trustee could file a suit on behalf of the bankruptcy estate. Because the trustee did not join the suit until the statute of limitations had expired, the trial court held that the matter was time-barred. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(5) & (C)(7) and denied plaintiffs' motion to amend their complaint.

First, plaintiffs argue that the trial court erred when it determined that plaintiffs were not entitled to file suit after a trustee had been appointed. Plaintiffs correctly state that Bankruptcy Rule 6009 authorizes the trustee or the debtor-in-possession to commence or prosecute any action on behalf of the estate before any tribunal. F. Bankr. R. 6009. However, once a trustee is appointed on behalf of the estate's creditors in a chapter eleven proceeding, the debtor of the estate ceases to be a debtor-in-possession. The bankruptcy code defines "debtor-in-possession" as a "debtor *except when a person that has qualified under section 322 of this title is serving as trustee in the case.*" 11 USC 1101(1) [emphasis added]. Section 322 authorizes the appointment of a trustee pursuant to section 1104. 11 USC 322(a). Section 1104 states that the bankruptcy court may appoint a trustee in the interest of the creditors. 11 USC 1104. When Remes was appointed as trustee in the interest of the creditors, plaintiffs were no longer debtors-in-possession. Therefore, the trial court properly determined that, because only the trustee could file a suit on behalf of the estate, plaintiffs lacked standing to file suit.

Next, plaintiffs argue that the trial court erred when it determined that MCR 2.116(I)(5) barred them from amending their complaint to include Remes, the trustee, as a plaintiff. We agree that MCR 2.116(I)(5) did not bar plaintiffs from amending their complaint to join Remes as a plaintiff. However, because this amendment would have been futile, we affirm the ruling of the trial court. *See McNees v*

Cedar Springs Stamp, 184 Mich App 101, 103; 457 NW2d 68 (1990). We will affirm the decision of the trial court if it reached the right result for the wrong reason. *In re Condemnation of Land*, 211 Mich App 688, 692; 536 NW2d 598 (1995).

Plaintiffs correctly state that, when considering the statute of limitations, their amendment to the complaint should have related back to the date that the initial complaint was filed. MCR 2.118(D). However, even if the trial court considered the amended complaint, plaintiffs would still lack capacity to sue. MCR 2.116(C)(5).

Leave of the bankruptcy court must be obtained by any party wishing to institute an action in another court against a trustee for acts done in the trustee's official capacity and within the trustee's authority as an officer of the court.¹ *In re DeLorean Motor Co.*, 991 F 2d 1236, 1240 (CA 6, 1993). Counsel for the trustee is the functional equivalent of a trustee where he acts at the direction of the trustee for the purpose of administering the estate or protecting its assets. *Id.* at 1241. After appointing Remes as bankruptcy trustee, the bankruptcy court ordered Remes to "complete the sale of the condominiumized boat slips previously authorized by this Court, it being the intent of the Court to have the Trustee fulfill the financial management, record keeping and reporting requirements of the estate. . ." The bankruptcy court later authorized the trustee to retain defendants as special counsel. Defendants sold the marina upon the order of the bankruptcy court as the functional equivalent of the trustee. Therefore, in order to sue defendants, plaintiffs were required to obtain permission of the bankruptcy court. At the time that plaintiffs filed their amended complaint, the trustee had not obtained the permission of the bankruptcy court to sue defendants. Therefore, even if the trial court had allowed plaintiffs to file their amended complaint, the trial court should have dismissed the claim for lack of capacity to sue. MCR 2.116(C)(5).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Roman S. Gribbs

¹ A trustee may be sued, without the leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. 28 USC 959(a). Administering and liquidating the estate does not constitute "carrying on business" as that term has been judicially interpreted. *DeLorean, supra* at 1241. Because defendants were selling the boat slips as ordered by the bankruptcy court, they were not "carrying on business" within the meaning of § 959.

The purpose of § 959 is to permit actions redressing torts committed in furtherance of the bankrupt's business operations, and is not intended to foster interference with the use, control, maintenance and operation of the bankrupt's property. *In re American Associated Systems, Inc.*, 373

F Supp 977 (ED Ky, 1974). Allowing plaintiffs to initiate a suit against defendants without the permission of the bankruptcy court would not serve this purpose.