

STATE OF MICHIGAN
COURT OF APPEALS

LINDSAY CLARK ROSS,

Plaintiff-Appellant,

v

MARK D. TOUSIGNANT, Personal
Representative for the Estate of VIVIAN ALICE
BILLINGS,

Defendant-Appellee,

and

Estate of LELIA M. VAN ORNUM, Estate of
EARL VAN ORNUM, and Estate of ROBERT
VAN ORNUM,

Defendants.

UNPUBLISHED
October 23, 2012

No. 302458
Iron Circuit Court
LC No. 10-004330-CH

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this quiet title action, plaintiff Lindsay Ross appeals as of right the trial court's order granting summary disposition in favor of defendant Mark D. Tousignant, personal representative for the estate of Vivian Alice Billings, and dismissing plaintiff's case in regard to all the named defendants. For the reasons stated in this opinion, we reverse and remand for reinstatement of plaintiff's case.

On August 25, 2010, plaintiff filed a complaint to quiet title, naming the estates of Lelia M. Van Ornum, Earl Newell Van Ornum, Robert Van Ornum, and Vivian Alice Billings, "and all unknown heirs, devisees, and assignees of the deceased" as defendants. The trial court ordered service by publication on September 20, 2010, and notice was published on October 6, 13, and 20, 2010. None of the estates named in plaintiff's complaint filed a response, and plaintiff moved for default judgment on November 9, 2010. A hearing on plaintiff's motion for default judgment was held on December 7, 2010. At the default hearing, Tousignant, who is the personal representative for the Billings estate named in plaintiff's complaint appeared on a limited basis to challenge the "jurisdiction" on the basis that it was not proper because the

Billings estate was not the proper defendant in a quiet title action. The trial court stated on the record that it was granting plaintiff's motion for default judgment in regard to all the named defendants in plaintiff's complaint except the Billings estate; however, the default judgments were never entered. The trial court also stated that it agreed with Tousignant, and that plaintiff's complaint named incorrect parties as defendants. The trial court informed plaintiff that he would have to issue "a proper summons and complaint" and that it would extend the summons, which expired on November 24, 2010.

On January 10, 2011, Tousignant moved for summary disposition pursuant to MCR 2.116(C)(2) (process issued insufficient) and MCR 2.116(C)(3) (service of process insufficient). A hearing regarding Tousignant's motion was held on January 21, 2011. At that hearing, Tousignant stated that he did not receive a summons with an extended expiration date, and reiterated his argument that plaintiff improperly named the estate as a defendant. Plaintiff argued, in essence, that whether the summons expired and/or the Billings estate was improperly named as a defendant did not matter because plaintiff's notice was properly published as directed by the trial court. The trial court noted that the parties named in the published notices were improper, and that accordingly, it was going to grant Tousignant's motion. The trial court told plaintiff that he was "going to have to start all over." An order dismissing plaintiff's case without prejudice in regard to all the various estates named as defendants in plaintiff's complaint was entered on February 3, 2011.

On appeal, plaintiff first argues that the trial court erred when it granted Tousignant's motion for summary disposition. Specifically, plaintiff argues that dismissal was not the proper response to his failure to name the proper defendants, and that the trial court should have permitted him to amend his pleadings instead of dismissing the case.

We review de novo a trial court's decision on a motion for summary disposition. *Morarity v Shields*, 260 Mich App 566, 569; 678 NW2d 642 (2004). Summary disposition pursuant to MCR 2.116(C)(2) "is appropriate where the process issued in the action is insufficient. When ruling on a motion brought under MCR 2.116(C)(2), the trial court must consider the pleadings, affidavits, and other documentary evidence submitted by the parties." *Id.* Summary disposition pursuant to MCR 2.116(C)(3) is appropriate when the service of process is insufficient. MCR 2.116(C)(3).

We also review de novo the interpretation of statutes and court rules. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011); *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 258; 739 NW2d 121 (2007). Court rules are interpreted using the same legal principles that govern the construction and application of statutes. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). "Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text." *Id.*

Generally, actions must be prosecuted in the name of the real party in interest. MCR 2.201(B). An estate is the real party in interest, even though the personal representative acts for and represents the interests of the estate. *Shenkman v Bragman*, 261 Mich App 412, 415-416; 682 NW2d 516 (2004). However, title to real property of a decedent's estate passes directly to the decedent's heirs or devisees, subject to charges for administration and "the rights of others

resulting from abatement, retainer, advancement, or ademption.” MCL 700.3901. Accordingly, the heirs or devisees are proper parties to litigation involving title or right to possession of real estate. See 13 Michigan Pleading and Practice (2d ed), § 101.96, p 261; *Van Horn v Herndon*, 253 Mich 408, 409; 235 NW 201 (1931) (ancestor, not administrator of estate, is the proper party in action to set aside land contract). Accordingly, we conclude that naming the various estates as defendants in this action to quiet title was incorrect because estates have no interest in the property. Accordingly, we must determine whether dismissal was the appropriate remedy for plaintiff’s error of naming the various estates as defendants.

Complaints are pleadings that may be amended to reflect the real parties in interest. See *Estate of Tice v Tice*, 288 Mich App 665, 669; 795 NW2d 604 (2010); *Stamp v Mill Street Inn*, 152 Mich App 290, 298; 393 NW2d 614 (1986). Amendment of process or pleadings is governed by MCL 600.2301, which provides:

The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

Thus, the trial court “has the power to amend any process [or] pleading” and “shall disregard any error or defect that does not affect the substantial rights of the parties.” MCL 600.2301. The word “shall” indicates a mandatory provision. *Lamkin v Engram*, 295 Mich App 701, 709; 815 NW2d 793 (2012). Process includes “the issuance of a summons, the filing of a complaint, service of the summons and complaint on a defendant, and the overall commencement of any action.” *Zwiers v Growney*, 286 Mich App 38, 50; 778 NW2d 81 (2008).

In *Tice*, this Court addressed a somewhat analogous situation. *Tice*, 288 Mich App at 667-671. There, the plaintiff was the personal representative of the estate, but filed a complaint in his own name for fraudulent transfer and insufficient deed against the owner of the property that had been deeded by his deceased mother. *Id.* at 667. The case was dismissed because the plaintiff was not a party in interest. *Id.* When the plaintiff re-filed as the personal representative and a party in interest, the claim was barred by the statute of limitations. *Id.* This Court concluded that the trial court should have treated the amended complaint as an amendment to the original complaint for the purposes of the relation-back doctrine. *Id.* at 670. This was particularly true because the defendants had notice of the claim. *Id.* at 671. Thus, when there is a problem with the caption of a case, the trial court should change the caption to reflect the real parties in interest, and the form of a caption is generally not important. *Id.* at 668, 670.

In this case, the trial court dismissed the complaint because plaintiff named the various estates “and all unknown heirs, devisees, and assignees of the deceased” instead of naming the deceased and “all unknown heirs, devisees, and assignees of the deceased.” Therefore, consistent with *Tice*, we conclude that the trial court should have instructed plaintiff to amend his complaint to reflect the real parties in interest instead of dismissing the entire case. *Id.* at 670-671; MCL 600.2301. Accordingly, we reverse and remand for reinstatement of plaintiff’s case and proceedings consistent with this opinion.

On appeal the parties also dispute whether dismissal of plaintiff's case was required under MCR 2.102(E)(1) because the summons expired. This issue was not raised in the trial court and is accordingly not properly before us. This Court may review an unpreserved issue when it presents a question of law and all the facts necessary for its resolution have been presented. *Heydon v MediaOne*, 275 Mich App 267, 278; 739 NW2d 373 (2007). The issue raised regarding MCR 2.102(E)(1) is one of law that would be subject to de novo review if it had been raised in the trial court. *Krohn*, 490 Mich at 155. Accordingly, we elect to consider the issue and conclude that MCR 2.101(E)(1) does not mandate dismissal of plaintiff's claim in this case.

MCR 2.102(E)(1) provides:

On the expiration of the summons as provided in subrule (D), the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction. As to a defendant added as a party after the filing of the first complaint in the action, the time provided in this rule runs from the filing of the first pleading that names that defendant as a party.

On the basis of the plain language of MCR 2.101(E)(1), dismissal on the expiration of the summons is only required in regard to a defendant "who has not been served with process as provided in these rules." Accordingly, if the named defendants in this case were served with process as provided by the court rules, dismissal was not required upon the expiration of the summons.

The trial court may "permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." MCR 2.105(I)(a). If persons who might be interested in the subject matter of an action are unknown, the filing party may describe them as "unknown heirs, devisees, or assignees of a deceased person." MCR 2.201(D)(1)(C). Unknown persons may be served by publication. MCR 2.201(D)(3). "The publication and all later proceedings in the action are conducted as if the unknown parties were designated by their proper names." MCR 2.201(D)(4). A plaintiff may request service of process by publication, and if the trial court permits this type of service, the defendant is notified of the action when the order is published for three consecutive weeks. MCR 2.106(D).

In this case, the trial court ordered service by publication, and it is not disputed that the notice was published for three consecutive weeks before the expiration of the summons. Accordingly, the various estates that were named as defendants were served in a manner permitted by the court rules. Therefore, dismissal upon the expiration of the summons was not required by MCR 2.101(E)(1) in this case.

Because we are reinstating plaintiff's case in regard to all the named defendants, we need not address plaintiff's final argument that the trial court erred by failing to enter default judgments against the estates that did not appear. Upon reinstatement of the case, plaintiff may renew his motion for default judgment if appropriate.

Reversed and remanded. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra