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AMERICA'S WHOLESALE LENDER *v.* GAIL M. PAGANO ET AL.
(AC 24447)

Schaller, Dranginis and Berdon, Js.

Argued October 15, 2004—officially released February 15, 2005

(Appeal from Superior Court, judicial district of New Britain, Quinn, J.; Cohn, J.; Dunnell, J.)

Stephen P. Wright, for the appellant (named defendant).

Peter A. Ventre, for the appellee (substitute plaintiff).

Opinion

DRANGINIS, J. The dispositive issue in this appeal is whether a corporation that brings an action solely in its trade name, without the corporation itself being named as a party, has standing so as to confer jurisdiction on the court. We conclude that, because a trade name is not an entity with legal capacity to sue, the corporation has no standing to litigate the merits of the case. We, therefore, reverse the judgment of the trial court.

The following facts and procedural history are relevant to our disposition of this appeal. On January 22, 2001, the defendant Gail M. Pagano[1] executed and delivered a note in the amount of $45,000 and a mortgage on her real property to the original plaintiff in this action, America's Wholesale Lender (America's). America's is the trade name of Countrywide Home Loans, Inc. (Countrywide), a corporation with its principal place of business in California.[2] On November 27, 2002, America's commenced this action, alleging that the defendant had defaulted on the note and seeking to foreclose on the defendant's property. On February 11, 2003, America's filed a motion to substitute the Bank of New York, as trustee, as the plaintiff in order to reflect an assignment of the note and mortgage that Countrywide had made to the Bank of New York.[3] On February 27, 2003, the defendant filed an objection to the motion to substitute the Bank of New York, as trustee, as the plaintiff, as well as a motion to dismiss. In both the objection and the motion to dismiss, the defendant argued that the court lacked subject matter jurisdiction because America's did not have the legal capacity to sue. The court reserved judgment on the motion to substitute until after it ruled on the defendant's motion to dismiss.[4] The court denied the defendant's motion to dismiss and later granted America's motion to substitute the Bank of New York as the plaintiff. Ultimately, the court rendered summary judgment as to liability in favor of the substitute plaintiff, the defendant's default on the note not being disputed. This appeal followed.

On appeal, the defendant claims that the court improperly denied her motion to dismiss on the basis of Countrywide's lack of standing to bring an action solely in a trade name. The defendant relied on America's motion to substitute the Bank of New York, as trustee, as the plaintiff, in which America's identified itself as ''Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender.'' The defendant argues that because Countrywide initiated suit solely in its trade name, which is a fictitious name and not a legal entity, Countrywide lacked standing and, consequently, the court lacked subject matter jurisdiction to decide the merits of Countrywide's claim. We agree.

''It is elemental that in order to confer jurisdiction on the court the plaintiff must have an actual legal existence, that is he or it must be a person in law or a

legal entity with legal capacity to sue.'' (Internal quotation marks omitted.) *Isaac* v. *Mount Sinai Hospital*, 3 Conn. App. 598, 600, 490 A.2d 1024, cert. denied, 196 Conn. 807, 494 A.2d 904 (1985). Although a corporation is a legal entity with legal capacity to sue, a fictitious or assumed business name, a trade name, is not a legal entity; rather, it is merely a description of the person or corporation doing business under that name. *Bauer* v. *Pounds*, 61 Conn. App. 29, 36, 762 A.2d 499 (2000). Because the trade name of a legal entity does not have a separate legal existence, a plaintiff bringing an action solely in a trade name cannot confer jurisdiction on the court.

On appeal the substitute plaintiff claims, however, that bringing an action in the name of America's rather than in the name of Countrywide was a misnomer or circumstantial error that, pursuant to General Statutes § 52-123, should not deprive the court of jurisdiction. ''Section 52-123 is a remedial statute and therefore it must be liberally construed in favor of those whom the legislature intended to benefit.'' (Internal quotation marks omitted.) *Andover Ltd. Partnership I* v. *Board of Tax Review*, 232 Conn. 392, 396, 655 A.2d 759 (1995). In interpreting this statute, however, we are mindful of the broader statutory scheme. Specifically, we must compare § 52-123 with § 52-45a, which our Supreme Court has read to require the use of legal names, not fictitious ones, when commencing an action. *Buxton* v. *Ullman*, 147 Conn. 48, 60, 156 A.2d 508 (1959) (''[t]he privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest''), appeal dismissed sub nom. *Poe* v. *Ullman*, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961). We recognize that this court, as well as our Supreme Court, has held in numerous circumstances that the mislabeling or misnaming of a *defendant* constituted a circumstantial error that is curable under § 52-123 when it did not result in prejudice to either party. See, e.g., *Andover Ltd. Partnership I* v. *Board of Tax Review*, supra, 232 Conn. 392 (permitting plaintiff to amend citation in order to name town instead of board of tax review as defendant); *Lussier* v. *Dept. of Transportation*, 228 Conn. 343, 636 A.2d 808 (1994) (permitting action to stand when summons indicated action against state instead of action against commissioner of transportation and commissioner of transportation received actual notice). This is true even when the plaintiff used only the defendant's trade name and not the defendant's legal name. See, e.g., *Motiejaitis* v. *Johnson*, 117 Conn. 631, 169 A. 606 (1933) (permitting plaintiff to substitute individual for nonexistent corporation under which individual was doing business); *World Fire & Marine Ins. Co.* v. *Alliance Sandblasting Co.*, 105 Conn. 640, 136 A. 681 (1927) (permitting plaintiff to amend writ to

include individual doing business as named defendant). We decline, however, to extend the use of § 52-123 in this manner to a *plaintiff* that has used a fictitious name for *itself* when commencing an action.[5]

In reaching our decision, we are mindful of the policies underlying our legislature's requirements for legal entities doing business under fictitious names. General Statutes § 35-1, our trade name regulation statute, requires legal entities doing business in this state under an assumed or fictitious name to file a trade name certification in the town in which such business is to be conducted prior to engaging in such business.[6] We have recognized that while § 35-1 ''may provide some protection to persons transacting business under a trade name, it is primarily intended to protect [those doing business with the trade name] by giving them constructive notice of the contents of the trade name certificate.'' *Metro Bulletins Corp.* v. *Soboleski*, 30 Conn. App. 493, 500, 620 A.2d 1314, cert. granted on other grounds, 225 Conn. 923, 625 A.2d 823 (1993) (appeal withdrawn June 4, 1993). The ''object [of the registration requirement] is to enable a person dealing with another trading under a name not his own, to know the man behind the name, that he may know or make inquiry as to his business character or financial responsibility . . . .'' *DiBiase* v. *Garnsey*, 103 Conn. 21, 27, 130 A. 81 (1925). As Judge Schaller noted in his dissent in *Metro Bulletins Corp.* v. *Soboleski*, supra, 503, the trade regulation statute, by itself, however, provides only minimal protection to the public because trade name certificates are recorded in any one of the many towns across the state. That fact highlights the importance of placing on those who use a trade name the burden of making their identities known to the public. As court filings are a matter of public record, we cannot conclude that *no harm* would come to the public by permitting legal entities to commence actions under fictitious names, as court documents are another means by which the public may ascertain the identity and the character of those with whom they do business. Both § 52-45a and the policy of protecting consumers and creditors from the potential fraud that can arise when legal entities do business under assumed names that may or may not be revealed to those consumers or creditors mandate that plaintiffs not commence an action under a fictitious name except in those extreme circumstances recognized by our Supreme Court in *Buxton* v. *Ullman*, supra, 147 Conn. 48.

The defendant does not argue, nor could she, that she suffered prejudice as a result of Countrywide's commencing this action solely under its trade name. Since the beginning of her relationship with Countrywide, the defendant has conducted business with Countrywide only under its trade name. A lack of subject matter jurisdiction, however, requires dismissal, regardless of whether prejudice exists.[7]

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to dismiss and to render judgment dismissing the complaint.

In this opinion SCHALLER, J., concurred.

[1] The Knollwood Homeowners Association, Inc., also was named as a defendant at trial. Because only Pagano has appealed, we refer to her as the defendant.

[2] The substitute plaintiff, the Bank of New York, indicated in its brief that it did not know in which state Countrywide was incorporated, though, at different times throughout the proceedings, it alleged that Countrywide and America's were incorporated in New York and California. These inconsistencies, however, do not inform our decision in this case, as all parties agree that America's is a trade name by which Countrywide does business and is not a corporation organized under the laws of any state.

[3] Under the law of our state, the assignee of a note may bring an action either in its name or the name of its assignor. See e.g. *Jacobson* v. *Robington*, 139 Conn. 532, 539, 95 A.2d 66 (1953); *Dime Savings Bank of Wallingford* v. *Arpaia*, 55 Conn. App. 180, 184, 738 A.2d 715 (1999).

[4] "Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 245, 558 A.2d 986 (1989).

[5] In *Dyck O'Neal, Inc.* v. *Wynne*, 56 Conn. App. 161, 742 A.2d 393 (1999), we concluded that the court properly permitted the substitute plaintiff to amend his designation from Dyck O'Neal individually to Dyck O'Neal, Inc. That case is distinguishable from the present case for two reasons. First, at no time was the plaintiff's true identity concealed; rather, the omission of its designation amounted to an incorrect description of the plaintiff. Furthermore, the record in that case suggested the omission of the plaintiff's designation was a typographical error in the court's judgment file, not an action necessarily attributable to the plaintiff. Id., 164 n.4.

[6] The record in this case shows that Countrywide either did not file a trade name certificate in the town of Berlin, where it conducted business with the defendant, or could not locate such a certificate. The substitute plaintiff claims that filing a trade certificate in the town of Hartford was sufficient. These circumstances further support our decision.

[7] When the statute of limitations for an action has not run in an action commenced under a trade name, we question the reasonableness of that plaintiff pursuing an action in a trade name, possibly at a defendant's expense, when the plaintiff could withdraw the action and recommence the action under its legal name.