



Court: Shawnee County District Court
Case Number: 2022-CV-000670
Case Title: Randy Dean Read vs. Charles Louis Lariver, et al.
Type: MEMORANDUM DECISION AND ORDER DENYING DEFENDANT LARIVER'S MOTION TO DISMISS (1-6-23)

SO ORDERED.

A handwritten signature in black ink that reads "M.E. Christopher". The signature is fluid and cursive.

/s/ Honorable Mary E Christopher, District Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION EIGHT**

RANDY DEAN READ,)	
)	
Plaintiff,)	
vs.)	Case No. 2022-CV-000670
)	
CHARLES LOUIS LARIVER and)	
AUTO-OWNERS (MUTUAL))	
INSURANCE COMPANY,)	
)	
Defendants.)	
)	

MEMORANDUM DECISION AND ORDER
DENYING DEFENDANT LARIVER’S MOTION TO DISMISS (1-6-23)

This matter comes before the Honorable Mary E. Christopher on defendant Charles Lariver’s Motion to Dismiss, filed January 6, 2023, and the Response filed by plaintiff Randy Read. Plaintiff appears through his attorney Thomas B. Diehl. Defendant Lariver appears pro se. Defendant Auto-Owners (Mutual) Insurance Company appears through its attorneys, Derek H. MacKay and Brian M. Bartlett.

The Court has reviewed the motion, response, and all supporting briefs of the parties. The Court finds under Kansas Supreme Court Rule 133(c)(1), oral argument would not aid the Court materially and there is no need for a hearing. After careful consideration and being fully apprised on the premises, the Court is ready to rule.

I. OVERVIEW

Plaintiff's lawsuit arose after an automobile collision in Silver Lake, Kansas in November 2020. Plaintiff alleges his "personal bodily injuries and other damages were the direct and proximate result of the negligent, reckless, and wanton conduct" of defendant Charles Lariver. (Pet., ¶ 27.) The Petition also asserts an uninsured motorists claim against defendant Auto-Owners Insurance. Lariver is incarcerated in Hutchinson Correctional Facility, serving a criminal sentence arising from the events that occurred on November 2, 2020. (See Shawnee County Case No. 2020-CR-2397.)

II. FACTS

1. Plaintiff's lawsuit arose after an automobile collision in Silver Lake, Kansas on November 2, 2020. (Pet., ¶ 14.)
2. Plaintiff filed his Petition on November 1, 2022. (Ct. file, Pet.)
3. Plaintiff filed his First Amended Petition on December 5, 2022. (Ct. file, 1st Am. Pet.)
4. Plaintiff alleges his "personal bodily injuries and other damages were the direct and proximate result of the negligent, reckless, and wanton conduct" of defendant Charles Lariver. (1st Am. Pet., ¶ 27.)
5. Service via certified mail of was accomplished as to defendant Lariver on November 22, 2022; Lariver was served with copies of the Petition and Summons. (Ct. file, Return filed 12-7-22).
6. Defendant Lariver filed a Motion for Time Extension on December 8, 2022. (Ct. file.)
7. Defendant Lariver was served via certified mail with Summons and Plaintiff's First Amended Petition on December 12, 2022. (Ct. file.)

8. Plaintiff also served copies of the original Petition and the First Amended Petition upon the warden of the Hutchinson Correctional Facility, Dan Schnurr, per the provisions of K.S.A. 60-304(c)(1)(B). (Ct. file.)

III. ANALYSIS

A. Standard of Review

When considering a motion to dismiss pursuant to K.S.A. 60-212, a court “must decide the issue based only on the well-pled facts and allegations, which are generally drawn from the petition.” *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576, 790 (2019). A court resolves every factual dispute in the plaintiff's favor in determining whether the petition states a valid claim for relief. Dismissal is appropriate only when the plaintiff's allegations clearly demonstrate they do not have a valid claim. *Kudlacik*, 309 Kan. at 790.

B. Defendants arguments

Defendant Lariver argues plaintiff's case should be dismissed because: (1) this Court lacks jurisdiction; (2) insufficient/untimely service; (3) failure to set forth a valid claim in the Petition; (4) conflict of interest; (5) claim for set-off of restitution. The Court will address each argument in turn.

1. Jurisdiction

Defendant argues this Court lacks jurisdiction because he is not a resident of Kansas or any County of Kansas; rather he “is and has been a resident of El Paso County, Colorado” and “is not by choice or willingly incarcerated in the K.D.O.C., therefore, can not be considered a resident in

terms of Geographic placement.” Plaintiff contends jurisdiction is established under the Kansas Long Arm Statute, K.S.A. 60-308(b)(1)(B).

In the First Amended Petition plaintiff alleges a cause of action against defendant for negligent, reckless, and wanton conduct. The First Amended Petition states plaintiff suffered serious personal bodily injuries which are permanent and progressive, “[a]s a result of the above-described collision and the negligence of Defendant Lariver.” The Kansas Long Arm Statute states, in pertinent part:

(b) *Submitting to jurisdiction.* (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the following acts, thereby submits the person and, if an individual, the individual's representative, to the jurisdiction of the courts of this state for any claim for relief arising from the act:

...
(B) committing a tortious act in this state;

K.S.A. 60-308(b)(1)(B).

Parties who commit tortious acts within the State of Kansas submit themselves to the jurisdiction of Kansas courts under this statute. As alleged in the First Amended Petition, Lariver committed a tortious act, i.e., caused a motor vehicle collision, within the State of Kansas and thus, the long-arm statute grants this Court jurisdiction over him.

Defendant Lariver also takes issue with the statement in the Petition that he submitted himself to the jurisdiction of the State of Kansas, citing K.S.A. 21-5110 as authority for a bar on further prosecution. Lariver argues any criminal procedure that occurred as the result of any allegation has now terminated jurisdiction at the end of said proceeding and contends, “authority of jurisdiction for this court does not exist.”

K.S.A. 21-5110 represents a codification of the Kansas double jeopardy rules: “A prosecution is barred if the defendant was formerly prosecuted for the *same crime*, based upon the same facts....” (Emphasis added.) Significantly, we are not talking about a subsequent prosecution for the same crime. Civil tort claim proceedings are not the same as criminal prosecutions; in a civil case a crime is not charged against the defendant by the State and defendant’s liberty is not at stake, only monetary damages are at issue. See also *State v. Applegate*, 266 Kan. 1072, 1078, 976 P.2d 936 (1999) (“Restitution ordered in criminal proceedings and civil damages are separate and independent remedies under Kansas law.”).

This Court concludes the double jeopardy prohibitions in K.S.A. 21-5110 do not act as a bar to plaintiff’s tort claim case against defendant Lariver. In addition, jurisdiction over Lariver is established under the Kansas Long Arm Statute, K.S.A. 60-308(b)(1)(B). Viewing the allegations in the light most favorable to plaintiff, the Court finds it enjoys both personal and subject matter jurisdiction and, thus, dismissal is denied.

2. *Insufficient/untimely service*

Defendant Lariver next argues plaintiff’s case should be dismissed due to insufficient/untimely service. Defendant contends the lawsuit is untimely due to both insufficient service of process and expiration of the statute of limitations.

K.S.A. 60-513(a) is the general statute of limitations for tort actions, which provides for a two–year statute of limitation period from the time the cause of action accrues. *See v. Hartley*, 257 Kan. 813, 820, 896 P.2d 1049 (1995). K.S.A. 60–513(a) lists actions that are limited to 2 years, to wit:

- (a) The following actions shall be brought within two years:
- (1) An action for trespass upon real property.
 - (2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.
 - (3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.
 - (4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.
 - (5) An action for wrongful death.
 - (6) An action to recover for an ionizing radiation injury as provided in K.S.A. 60-513a, 60-513b and 60-513c, and amendments thereto.
 - (7) An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

K.S.A. 60-513(a).

The automobile collision giving rise to plaintiff's lawsuit is alleged to have occurred in Silver Lake, Kansas on November 2, 2020. (Pet., ¶ 14.) Plaintiff filed his Petition on November 1, 2022, less than two years after the date of the collision. An action is commenced under K.S.A. 60-203(a) when a Petition is filed with the court and service of process is obtained within ninety days of filing the Petition. Here, defendant Lariver was served with a copy of the Petition and Summons via certified mail on November 22, 2022. November 22nd is well within the 90-day time period for commencement of plaintiff's lawsuit under K.S.A. 60-203; thus, the relation-back commencement date for lawsuit is November 1, 2022.

This Court concludes plaintiff brought his action "for injury to the rights of another, not arising on contract, and not herein enumerated," within two years as required by the statute of limitations. Further, service by certified mail is a proper method of service under K.S.A. 60-303(c)(1), and plaintiff substantially complied with the service requirements, taking care to serve the warden. K.S.A. 60-204 and 60-304(c)(1)(B).

3. *“Bad Pleading,” Failure to State Clear, Concise Claim*

Next, defendant Lariver argues for dismissal based on plaintiff filing an initial Petition that was “bad” and “[did] not stat[e] a clear concise, accurate pleading initially ...” including using the wrong statute to justify attorney fees in the initial Petition “clearly shows the initial pleading was insufficient altogether.”

Under K.S.A. 60-215(a)(1)(A), plaintiff was allowed to amend his petition once as a matter of course within 21 days of service if no responsive pleadings to the original Petition had been filed. The Court file reflects that is what happened here.

Once the Amended Petition was filed, its allegations effectively replaced the original Petition’s contents. A review of the Amended Petition establishes that plaintiff has stated a claim for negligence. The First Amended Petition sets forth the elements of existence of a duty; breach of that duty; an injury; and proximate cause, meaning a causal connection between the duty that was breached and the injury. See *Hale v. Brown*, 287 Kan. 320, Syl. ¶ 1, 197 P.3d 438 (2008).

Kansas is a notice pleading state; all the rules require is a short and plain statement of a claim that will provide defendant fair notice of the plaintiff’s claim and the grounds upon which it rests. The Court concludes plaintiff’s argument that the initial pleading was insufficient is not a valid reason for dismissal. Further, plaintiff filed the Amended Petition in accordance with the Kansas Rules of Civil Procedure. Defendant Lariver fails to show that plaintiff fails to state a valid claim for relief under K.S.A. 60-212(b)(6) and, thus, dismissal is denied.

4. *Conflict of Interest, Restitution, Fraud*

Defendant also argues that plaintiff's case should be dismissed because: (1) he wrote a letter to plaintiff's counsel requesting representation in his criminal case, 20CR2397; (2) in his criminal case at sentencing he was ordered to pay restitution in the amount of \$5,626.00 to plaintiff for repairs to the Cadillac CTS¹; (3) false misrepresentations as to damages, including claims of future losses which have yet to occur, constitute fraud.

Upon consideration of defendant's contentions and plaintiff's response, viewing the allegations in the Petition in the light most favorable to the plaintiff, this Court concludes these remaining arguments do not provide a sufficient basis for dismissal of plaintiff's claims.

IV. CONCLUSION

For all the reasons stated, defendant Lariver's *Motion to Dismiss* (1-6-23) is DENIED.

This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

**HON. MARY E. CHRISTOPHER
DISTRICT COURT JUDGE**

¹ Defendant's argument regarding restitution may be better understood as an affirmative defense or claim of set-off. See *Rose v. Via Christi Health System, Inc.*, 276 Kan. 539, 557, 78 P.3d 798 (2003), opinion modified on reh'g 279 Kan. 523, 113 P.3d 241 (2005) (plaintiffs are not entitled to have defendants pay twice for the damages they have caused).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, with a copy sent via U.S. Mail to any *pro se* party, providing notice to the following:

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I do hereby certify that the following *pro se* parties received a copy of the foregoing document, via U.S. mail, postage prepaid, as of the date-stamped above.

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