Opinion issued July 28, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00058-CV

JAMIE GENENDER, Appellant

V.

LARRY KIRKWOOD AND USA STORE FIXTURES, L.L.C., Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Case No. 2013-59766

O P I N I O N

Jamie Genender appeals the trial court's rendition of summary judgment in favor of Larry Kirkwood and USA Store Fixtures, L.L.C. [hereafter, "Store Fixtures"]. Genender sued appellees for DTPA, fraud, unfair debt collection practices, and trespass—all claims that related to Genender's purchase of certain

store fixtures from appellees. The trial court granted summary judgment and rendered a take-nothing judgment in favor of Store Fixtures. We affirm in part and reverse and remand in part.

BACKGROUND

In May 2011, Genender used her credit card to order some used shelving from Store Fixtures. When the shelving arrived, Genender was not satisfied with its quality or Store Fixtures's response to her concerns, so she filed a dispute with her credit card company, resulting in a charge back to Store Fixtures.

When Genender did not return or pay for the shelving, Store Fixtures filed suit against her in justice court in Harris County. After a bench trial, the justice court signed a take nothing judgment in Genender's favor, and Store Fixtures appealed to the county court at law. In the county court at law, Genender counterclaimed, alleging breach of contract and violations of the Deceptive Trade Practices—Consumer Protection Act [DTPA]. *See Genender v. USA Store Fixtures, LLC*, 451 S.W.3d 916, 921 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Store Fixtures moved to dismiss Genender's counterclaims, asserting that they were not properly before the county court because they had not been raised before in the justice court. *See* former TEX. R. CIV. P. 574a, 50 Tex. B.J. 868 (1987, repealed 2013) (providing that in appeal to county court "no new ground of recovery shall be set up by the plaintiff, nor shall any set-off or counterclaim be set

up by the defendant which was not pleaded in the court below"). The county court allowed both parties' breach of contract claims to move forward in the appeal from justice court, but, as requested by Genender, severed her DTPA claim into a separate cause number because it could not be heard with the appeal. *Id.*

After trial de novo on the parties' breach of contract claims, the jury in the county court found that Genender failed to comply with the agreement to purchase the shelving, and that Store Fixtures did not fail to comply with the agreement. *See Genender*, 451 S.W.3d at 919–20. Accordingly, the county court rendered judgment in favor of Store Fixtures for $2,303.42, plus attorney's fees.[1] *Id.* at 920.

After the adverse judgment on her breach of contract claim in county court, Genender filed her DTPA claims in district court on October 4, 2013, and, on October 18, 2013, nonsuited the severed and still pending DTPA claim in county court so that her case in district court could proceed.

Store Fixtures filed a motion for summary judgment, claiming that Genender's DTPA claims were filed in district court more than two years after they accrued. Genender responded that her DTPA claims, even though untimely in district court, related back to the date of her original filing in county court. The

[1] The Fourteenth Court of Appeals modified and affirmed the county court's judgment, *see Genender*, 451 S.W.3d at 928, and that judgment is not before us in this appeal.

district court granted Store Fixtures's motion for summary judgment on June 19, 2014.

After the trial court granted summary judgment on her DTPA claims based on limitations, Genender amended her petition to allege claims for fraud, unfair debt collection, and trespass. Store Fixtures filed a Second Motion for Summary Judgment and No-Evidence Motion for summary judgment, which the trial court granted.

This appeal followed.

PROPRIETY OF SUMMARY JUDGMENT

In five issues on appeal, Genender contends the trial court erred in granting traditional summary judgment on her DTPA, fraud, and unfair debt collection claims. In a sixth issue, Genender contends the trial court erred in granting a no-evidence summary judgment on her trespass claim. We address each respectively.

Standard of Review

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). In a traditional summary judgment motion, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c) (West 2004); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). When reviewing a summary judgment,

we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each of the elements specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524.

DTPA—Limitations

In her first issue on appeal, Genender contends "the District Court erred in granting summary judgment as to [her] DTPA claims originally filed in county as § 16.064 TEX. CIV. PRAC. & REM. CODE applied and tolled the applicable limitation period." Genender concedes that her DTPA claims were not filed in district court within two years of their accrual,[2] but argues that because of the tolling statute, her claims are timely. Store Fixtures responds that the tolling statute will not save

[2] *See* TEX. BUS. & COM. CODE ANN. § 17.565 (West 2011) (providing two-year limitations period for DTPA violations).

Genender's DTPA claims because she voluntarily non-suited them in county court. We agree with Store Fixtures.

> Section 16.064 of the Civil Practices and Remedies Code provides:
>
> The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.

TEX. CIV. PRAC. & REM. CODE § 16.064 (West 2015).

Genender claims that once the county court determined that it could not hear her DTPA claims in the justice court appeal, it effectively dismissed those claims for lack of jurisdiction, thereby making § 16.064 applicable, and that she complied with § 16.064 by filing her claims in district court within 60 days. In support, Geneder relies on a Fifth Circuit case, *Hotvedt v. Schlumberger, Ltd.*, 914 F.2d 79 (5th Cir. 1990) (withdrawn and superseded on reh'g, 942 F.2d 294 (5th Cir. 1991). In *Hotvedt*, the case was originally filed in California federal court, which declined to exercise jurisdiction and stayed the case based on *forum non conveniens*. *Id.* at 81. Plaintiffs then filed in Texas and dismissed their California action. *Id.* The defendants argued that the tolling statute did not apply because plaintiffs

voluntarily nonsuited the California case. *Id.* The court held that the statute applied because, "[w]hether the action is stayed or dismissed on the grounds of *forum non conveniens*, the end result is the same; the California trial court is not going to hear this action because it has disclaimed jurisdictional authority." *Id.* at 82.

Hotveldt, however, is distinguishable. In *Hotfeldt*, the California court had jurisdiction, but refused to exercise it under the doctrine of forum non conveniens. Here, however, the county court did not refuse to hear or exercise jurisdiction over the DTPA claims; instead it severed them into their own case number and was prepared to hear them separately from the justice court appeal. The severance was necessary because the remedy when a party asserts a new matter not previously pleaded in the justice court is severance, not dismissal for lack of jurisdiction. *See Harrill v. A.J.'s Wrecker Service, Inc.*, 27 S.W.3d 191, 195 (Tex. App.—San Antonio 2000, no pet.) ("Because [the party appealing to county court] could have brought any additional claims constituting new grounds of recovery in county court, the trial court should have severed any such claims from the appeal of the original judgment instead of dismissing the claims."); *D'Tel Commc'ns v. Roadway Package Serv., Inc.*, 987 S.W.2d 213, 214 (Tex. App.—Eastland 1999, no pet.) (holding that new counterclaim pleaded in appeal from county court to

justice court was improperly brought under rule 574a; remedy was not dismissal but severance).

The reason to sever, rather than dismiss, is because the county court ***did***, in fact, have jurisdiction to hear the DTPA claims; it just could not hear them in the appeal from justice court. And, the county court did not, like the court in *Hotveldt*, refuse to hear the DTPA claims. Had it done so, it would not have created a new case with a new cause number.

Because the county court was not without jurisdiction over Genender's DTPA claims, and did not refuse to exercise jurisdiction like the court in *Hotveldt*, the tolling statute does not apply. The statute of limitation is not tolled when the prior court had jurisdiction. *See Armstrong v. Ablon*, 686 S.W.2d 194, 196 (Tex. App.—Dallas 1984, no writ); *Oram v. Gen. Am. Oil Co. of Texas*, 503 S.W.2d 607, 609 (Tex. Civ. App.—Eastland 1973, *writ ref'd n.r.e*) by 513 S.W.2d 533 (Tex. 1974).

Therefore, the trial court did not err in granting summary judgment as to Genender's DTPA claims based on limitations. Accordingly, we overrule issue one. Issues two and four also relate to Genender's DTPA claims, which we have held are time barred. Thus, we also overrule issues two and four for the same reason.

Fraud

Store Fixtures moved for summary judgment on Genender's fraud claims, asserting that the county court's final judgment on Geneder's breach of contract claim served as res judicata on her fraud claim arising out of the same facts. In issue three, Genender contends "the District Court erred in granting summary judgment as to [her] fraud claim as res judicata does not preclude a cause of action in one case because it could have been argued as an affirmative defense in another."

Res judicata bars the relitigation of claims that have been finally adjudicated or that could have been litigated in a prior action. *See Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992); *Texas Gen. Indem. Co. v. Texas Workers' Comp. Comm'n*, 36 S.W.3d 635, 638 (Tex. App.—Austin 2000, no pet.). For res judicata to apply, the following elements must be present: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) the same parties in each action; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 86 (Tex. 2008); *Citizens Ins. Co. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007).

However, the res judicata doctrine has been modified for those situations in which, as here, the initial lawsuit is brought in a court of limited jurisdiction and

the subsequent suit is brought in district court. *Kizer v. Meyer, Lytton, Alen & Whitaker, Inc.*, 228 S.W.3d 384 (Tex. App.—Austin 2007, no pet.), *Webb v. Persyn*, 866 S.W.2d 106 (Tex. App.—San Antonio 1993, no writ), and *McClendon v. State Farm Mut. Auto Ins. Co.*, 796 S.W.2d 229 (Tex. App.—El Paso 1990, writ denied) all stand for the legal principle that a party is not barred from pursuing a claim in district court after receiving a favorable or unfavorable judgment on other claims in county court, even when the two suits involve the same parties and issues. *E.g.*, *McClendon*, 796 S.W.2d at 232. This is an exception to general estoppel rules. *Kizer*, 228 S.W.3d at 391–92; *McClendon*, 796 S.W.2d at 232–33. The exception is codified in section 31.004 of the Civil Practice and Remedies Code, which states:

> A judgment or a determination of fact or law in a proceeding in a lower trial court is not res judicata and is not a basis for estoppel by judgment in a proceeding in a district court, except that a judgment rendered in a lower trial court is binding thereto as to recovery or denial of recovery.

TEX. CIV. PRAC. & REM. CODE ANN.§ 31.004(a) (West 2015). A lower trial court includes a county court or a statutory county court. TEX. CIV. PRAC. & REM. CODE ANN.§ 31.004(c).

The purpose of this exception is "to preclude a judgment in a court of limited jurisdiction from controlling the results in a suit in a district court." *McClendon*, 796 S.W.2d at 232. "In the situation where a litigant brings a lawsuit

in a district court subsequent to filing suit in a court of limited jurisdiction, section 31.004 . . . modifies the common law so that 'res judicata bars only those claims that were ***actually litigated*** in the limited-jurisdiction court.'" *Kizer*, 228 S.W.3d at 391 (quoting *Wren v. Gusnowski*, 919 S.W.2d 847, 848–49 (Tex. App.—Austin 1996, no writ) (emphasis added)). "In other words, under section 31.004, res judicata does not bar unlitigated claims simply because they *could have* been litigated in the lower trial court." *Id.* (emphasis added).

Thus, we must decide whether Genender's fraud claims were ***actually*** litigated in the county court action, not just whether they could have been brought there as contended by Store Fixtures. An issue is "actually litigated" when it is properly raised, by the pleadings or otherwise, submitted for determination, and determined. *Van Dyke v. Bosell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384, (Tex. 1985) (citing Restatement (Second) of Judgments § 27 cmt. d (1982)).

Here, Genender's county court pleadings do not include a fraud claim, no fraud claim was submitted to the jury, and the jury did not determine whether fraud occurred. Additionally, while fraud may be a defense to a breach of contract claim, it was not asserted in the county court case as such. Although the breach of contract claims in the county court at law and the fraud claims in the district court essentially complain about the same conduct—Store Fixtures's sale of defective fixtures and the representations made therewith—and likely seek, in large part, the

same damages, the claims are distinct and require proof of different elements. *See Kizer*, 228 S.W.3d at 391–92. As such, we cannot conclude that Genender's fraud claims were "actually tried" along with her breach of contract claim in county court. Therefore, pursuant to § 31.004(a) of the Civil Practices and Remedies Code, Genender's fraud claim is not precluded by the doctrine of res judicata.

Accordingly, we sustain issue three. We reverse the summary judgment as it relates to Genender's fraud claims and remand for further proceedings.

Unfair Debt Collection

In her petition, Genender claimed that Store Fixtures violated the Texas Debt Collection Act [TDCA][3] by sending a private investigator to her store to collect information to be used in the lawsuit. Specifically, Genender complained that the private investigator entered her store and made a video showing that the disputed shelving was inside Genender's store and was actually being used by Genender. Store Fixtures moved for summary judgment, alleging that, as a matter of law, their private investigator was not a "debt collector."

The TDCA has a two-tiered structure that includes both "third-party debt collectors" (defined the same as "debt collectors" under the Federal Debt Collection Act) and "debt collectors," which include anyone "who directly or indirectly engages in debt collection." *See* TEX. FIN. CODE ANN. § 392.001(6)

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[3] *See* TEX. FIN. CODE ANN. § 392.304 (West 2006).

(West 2006). Here, Genender does not contend that the investigator was a third party debt collector, but an agent of Store Fixtures who was directly or indirectly engaged in attempting to collect her debt to Store Fixtures. *See Monroe v. Frank*, 936 S.W.2d 654, 660 (Tex. App.—Dallas 1996, writ dism'd w.o.j.) (holding that TDCA applies to entities attempting to collect their own debt); *see also Lilly v. Tolar*, No. 06-01-00163-CV, 2002 WL 1926527, at *8 (Tex. App.—Texarkana 2002, pet. denied) (holding bail bond service was a debt collector when it attempted to repossess a truck to satisfy a debt it believed it was owed after bail bond was forfeited).

However, Genender cites no authority, and we can find none, to support her assertion that a private investigator hired to collect information for use in a breach of contract suit is attempting to collect a debt for his or her employer. Because it is undisputed that the private investigator was collecting evidence, not Genender's debt, we conclude that the trial court properly granted summary judgment on Genender's claims under the TDCA.

We overrule issue four.

Trespass

Genender's petition contained a cause of action for trespass, alleging that Store Fixtures's private investigator trespassed in her store when he came in and filmed without her permission. Store Fixtures filed a no-evidence motion for

summary judgment, alleging that Genender did not "have a scintilla of evidence to support element number 3 [of her trespass cause of action]: defendant's trespass cause injury to plaintiff's right of possession." Genender did not file a response presenting such evidence, but, instead, requested a continuance until after the private investigator had been deposed.

On appeal, Genender argues that her right of possession was interfered with because she would have refused entry to the investigator had she known his true purpose in being there, and that, because he was not there to conduct business, he was trespassing. However, Genender's response in the trial court did not contain this argument or the necessary evidence in support thereof, but was merely a request for a continuance. Because Genender did not come forward with a scintilla of evidence to support her trespass claims, the trial court did not err in granting Store Fixtures' no-evidence motion for summary judgment.

We overrule issue five.

CONCLUSION

We reverse the trial court's summary judgment as it relates to Genender's fraud claim. We affirm the remaining portions of the judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.

Justice Keyes, dissenting.