Affirmed and Memorandum Opinion filed May 27, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01168-CV

GUY J. SCHNEIDER, Appellant

V.

HARRIS COUNTY SHERIFF'S DEPARTMENT, WILLIAM M. THOMAS, AND MITCHEL HATCHER, Appellees

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2007-40449

M E M O R A N D U M O P I N I O N

Appellant, inmate Guy J. Schneider, appeals from the trial court's dismissal of his *pro se* lawsuit brought *in forma pauperis*. In three separate orders, the trial court dismissed all of appellant's claims against appellees the Harris County Sheriff's Department (the "Department"), William M. Thomas, and Mitchel Hatcher. We affirm.

I. BACKGROUND

On August 23, 2005, Harris County deputies responded with a K-9 unit to a burglary in progress. At the scene of the burglary, the K-9 followed a scent trail from the burglarized house to a nearby house shed. Deputies observed appellant hiding in the

shed. The deputies ordered appellant out of the shed and to the ground, but he refused. After repeated unanswered requests, deputies released the K-9 to seize appellant. A struggle ensued between appellant and the K-9 and then between appellant and the deputies. Eventually, appellant was seized and arrested.

On June 29, 2007, an incarcerated appellant filed a *pro se* and *in forma pauperis* lawsuit against the Department, alleging that his Fourth Amendment rights had been violated during the Department's 2005 seizure efforts. *See* 42 U.S.C. § 1983 (2006). Appellant contended that the Department had used excessive force to seize him: deputies allegedly struck appellant by hitting and kicking him in his head and needlessly ordered the K-9 to attack him. Appellant alleged that the Department's use of excessive force, causing appellant physical injury, violated the Fourth Amendment's prohibition against unreasonable seizures. On August 21, 2007, appellant filed a similar *pro se* lawsuit in federal court against the Department.

On July 10, 2008, appellant amended his state petition, adding Deputies William M. Thomas ("W. Thomas"), David A. Thomas ("D. Thomas"), and Mitchel Hatcher. The amended pleading also named "John Doe Officers" as defendants. On July 18, 2008, a citation was issued on appellant's first amended petition to the Department and Deputies W. Thomas, D. Thomas, and Hatcher. The Department was served with appellant's amended petition on or around July 21, 2008, Deputy W. Thomas was served on or around July 24, 2008, and Hatcher was served on or around August 26, 2008. D. Thomas was never served with citation and the "John Doe Officers" were neither identified nor served.

The Department and Deputies W. Thomas and Hatcher subsequently filed dispositive motions: the Department filed a motion to dismiss, and the deputies filed separate motions for summary judgment. In its motion to dismiss, the Department sought dismissal on two grounds under the Texas Civil Practice and Remedies Code: (1) appellant's lawsuit was frivolous as defined under section 14.003(a)(2); and (2) appellant

failed to disclose previous *pro se* lawsuits by affidavit with his petition pursuant to section 14.004.[1] Deputies W. Thomas and Hatcher filed separate summary judgment motions, similarly alleging that (1) appellant's 1983 claim was barred by the statute of limitations, and (2) appellant failed to exercise due diligence in serving the deputies with citation. The trial court granted the three dispositive motions, and appellant appealed.[2]

On appeal, appellant contends in unnumbered arguments that the trial court erroneously granted the Department's motion to dismiss and the deputies' motions for summary judgment.

II. THE DEPARTMENT'S MOTION TO DISMISS: DECLARATION OF PREVIOUS *PRO SE* LITIGATION AND FRIVOLOUSNESS OF SUIT

Appellant challenges the trial court's order granting the Department's motion to dismiss appellant's *pro se* and *in forma pauperis* lawsuit under chapter 14 of the Civil Practice and Remedies Code. We review a trial court's dismissal of an action pursuant to chapter 14 under an abuse-of-discretion standard. *Hickman v. Adams*, 35 S.W.3d 120, 123 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Clark v. Unit*, 23 S.W.3d 420, 421 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). A trial court abuses its discretion if it acts without reference to any guiding rules or principles. *Hickman*, 35 S.W.3d at 123.

In its motion, the Department sought dismissal on the grounds that (1) appellant's *in forma pauperis* affidavit was deficient under section 14.004 of the Civil and Practice and Remedies Code because it failed to disclose his *pro se* litigation history; and (2) appellant's lawsuit was frivolous pursuant to section 14.003(a)(2) because the Department lacked legal capacity to be sued and appellant had an identical suit pending in federal court. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 14.003(a)–(b), 14.004 (Vernon 2002). On appeal, appellant contends that he complied with chapter 14 and that the Department did not lack legal capacity to be sued.

[1] *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 14.003(a)–(b), 14.004 (Vernon 2002).

[2] Deputy D. Thomas and Officers John Doe, defendants in the underlying lawsuit, were neither served nor appeared in the trial court. Accordingly, they are not parties to the instant appeal.

Prison inmates who file suits in Texas state courts *pro se* seeking to proceed *in forma pauperis* must comply with numerous procedural requirements set forth in chapter 14 of the Civil Practice and Remedies Code. *Id.* §§ 14.002, 14.004–.006. Because appellant brought the underlying lawsuit *pro se* and filed a request to proceed *in forma pauperis*, he was required to fulfill the various procedural requirements set forth in section 14.004. *See id.* § 14.004. Section 14.004 requires an inmate seeking to proceed *in forma pauperis* to file a separate affidavit or declaration identifying all suits the inmate has previously filed as a *pro se* plaintiff, describing the operative facts for which relief was sought in each suit and stating the result of each suit. *Id.* § 14.004(a). The purpose of section 14.004 is to curb constant, often duplicative, inmate litigation by requiring an inmate to notify the trial court of previous litigation and the outcome. *Bell v. Tex. Dep't of Criminal Justice-Inst. Div.*, 962 S.W.2d 156, 158 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Failure to fulfill the procedural requirements may result in dismissal of an inmate's action. *See id.*

Here, the record reveals that appellant did not comply with section 14.004's requirement of filing an affidavit with an inmate's *pro se* litigation history. Because appellant undisputedly failed to file an affidavit specifically identifying suits he had filed *pro se*, the trial court did not abuse its discretion in dismissing the suit. *See Clark*, 23 S.W.3d at 422. Furthermore, without appellant's *pro se* litigation history, the trial court was unable to consider whether appellant's current suit was substantially similar to a previous claim, or appellant's then-pending federal claim. *See id.* As such, we must assume that the underlying suit is substantially similar to a previously filed suit by appellant, and therefore frivolous. *See id.* (holding that in the absence of adequate affidavits, the trial court is to assume the suit is substantially similar to previous suits and thus frivolous). Accordingly, we conclude that the trial court did not abuse its discretion in dismissing appellant's suit under the section 14.003 frivolous ground.

III. THE DEPUTIES' MOTIONS FOR SUMMARY JUDGMENT

Appellant also challenges the trial court's orders granting summary judgment in favor of Deputies W. Thomas and Hatcher. We review a trial court's summary judgment *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A summary judgment movant has the burden to show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). In reviewing a summary judgment, we must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755–56 (Tex. 2007) (per curiam). We must consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the motion. *Id.* at 756. A defendant movant is entitled to summary judgment if he either disproves at least one essential element of the plaintiff's causes of action or establishes all the elements of an affirmative defense. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). When, as here, the summary judgment order does not specify the grounds upon which the summary judgment motion was granted, we will affirm the judgment if any of the theories advanced in the motion is meritorious. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993).

Both deputies filed a motion for summary judgment, each arguing that appellant's 1983 claim was barred by the applicable statute of limitations and that he failed to exercise due diligence in service of process. The statute of limitations in Texas on a section 1983 claim is two years. *Li v. Univ. of Tex. Health Sci. Ctr. at Houston*, 984 S.W.2d 647, 651 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *see also* Tex. Civ. Prac. & Rem. Code Ann. §16.003(a); *Wallace v. Kato*, 549 U.S. 384, 387–88 (2007) (holding that the statute of limitations for a § 1983 claim is governed by the personal-injury tort statute of limitations of the state in which the cause of action arose).

Generally, a cause of action accrues the moment the plaintiff has a "complete and present cause of action." *Wallace*, 549 U.S. at 388.

Here, appellant's cause of action accrued when he allegedly suffered physical injuries from his arrest, August 23, 2005. It was therefore incumbent on appellant to file suit against the deputies by August 23, 2007. Appellant did not add the deputies to his lawsuit until July 10, 2008, almost a year after the statute of limitations had expired. Consequently, failure to add the deputies as defendants within the two year limitations period bars appellant's 1983 suit, as a matter of law, against the deputies.[3] *See Morrell v. Finke*, 184 S.W.3d 257, 291 (Tex. App.—Fort Worth 2005, pet. denied) (concluding that plaintiff could not assert a claim against defendants who had been added to the lawsuit after expiration of limitations period); *Mello v. A.M.F., Inc.*, 7 S.W.3d 329, 331 (Tex. App.—Beaumont 1999, pet. denied) (concluding that summary judgment was appropriate where defendants were added in an amended petition after the statute of limitations had run); *Muckelroy v. Richardson Indep. Sch. Dist.*, 884 S.W.2d 825, 829–30 (Tex. App.—Dallas 1994, writ denied) (same). Accordingly, we conclude that the trial court properly granted summary judgment on appellant's 1983 claims against the deputies. We overrule appellant's second issue.[4]

[3] Appellant claims that he did not add the deputies until after the limitations period expired because he was incarcerated, inhibiting his ability to identify and add the deputies to the lawsuit. However, incarceration is not a valid reason for tolling the statute of limitations. *See Lerma v. Pecorino*, 822 S.W.2d 831, 832 (Tex. App.—Houston [1st Dist.] 1992, no writ); *see also* Tex. Civ. Prac. & Rem. Code § 16.001.

[4] Because Deputies W. Thomas and Hatcher were entitled to summary judgment on the limitations ground, we need not address the alternate summary judgment ground—lack of due diligence in service—raised by appellant in his second argument. *See* Tex. R. App. P. 47.1; *see also Seureau v. ExxonMobil Corp.*, 274 S.W.3d 206, 231 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Having overruled all of appellant's arguments, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.