In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00157-CV

THERESA ALLEN, Appellant

V.

DAVID DIES, SANDEE L. HART AND DIES & HART, LLP, Appellees

On Appeal from the 260th District Court
Orange County, Texas
Trial Cause No. D-080488

MEMORANDUM OPINION

Theresa Allen, *pro se*, appeals a summary judgment granted in favor of David Dies, Sandee L. Hart, and Dies & Hart, LLP. Appellees represented Allen in a medical malpractice lawsuit against certain doctors and other healthcare professionals. The case was settled. Allen sued appellees for breach of fiduciary duty for the manner in which they settled the case.

Appellees filed a traditional and no-evidence motion for summary judgment. They asserted Allen did not produce any evidence to support her cause of action for breach of fiduciary duty, and no genuine issue of material fact exists regarding whether the

defendants breached a fiduciary duty. Defendants also argued that summary judgment was proper because Allen's breach-of-fiduciary duty claim is barred by the applicable four-year statute of limitations. The trial court granted summary judgment "based on all of the grounds contained in the Defendants' Traditional and No-Evidence Motion for Summary Judgment."

Allen asserts that genuine issues of material fact preclude summary judgment on her cause of action for breach of fiduciary duty and on the affirmative defense of limitations. A party filing a traditional motion for summary judgment must show that no genuine issue of material fact exists, and that the movant is entitled to judgment as a matter of law. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); Tex. R. Civ. P. 166a(c). When filing a no-evidence motion, a movant must allege there is no evidence of an essential element of the opposing party's claim. Tex. R. Civ. P. 166a(i). Although not required to marshal his proof, the non-moving party must then present evidence that raises a genuine fact issue on each of the challenged elements. *Sw. Elec. Power Co.*, 73 S.W.3d at 215 (citing Tex. R. Civ. P. 166a, notes and cmts.).

The limitations period for an action for breach of fiduciary duty is four years. Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(5) (West 2002); *Rampart Capital Corp. v. Egmont Corp.*, 18 S.W.3d 318, 321 (Tex. App.—Beaumont 2000, no pet.). The settlement hearing was held on January 26, 2005. The malpractice suit was filed December 22, 2008. On December 19, 2008, Allen's counsel sent the Orange County

District Clerk the petition and copies (along with payment for fees), and a request for the clerk to issue citations for the defendants and forward them to Allen's counsel's office. The file-stamped copies of the citations in the record were issued on December 23, 2008. The defendants were not served until May 5, 2009, more than three months after the applicable statute of limitations had expired and more than four months after the filing of Allen's suit. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(5).

When a plaintiff files suit within the limitations period, but obtains service on the defendant outside of the limitations period, the service may still be valid if the plaintiff exercised diligence in procuring service. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *see also Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) ("[A] timely filed suit will not interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation."). If a plaintiff diligently obtains service after the expiration of the statute of limitations, the date of service relates back to the date of filing. *Proulx*, 235 S.W.3d at 215. If a defendant affirmatively pleads the defense of limitations and shows that service occurred after the limitations deadline, the burden shifts to the plaintiff to prove diligence. *Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216. The plaintiff must then present evidence regarding the efforts made to serve the defendant and "explain every lapse in effort or period of delay." *Proulx*, 235 S.W.3d at 216. A plaintiff's explanation of the efforts in obtaining service may demonstrate a lack

of diligence "as a matter of law" when "one or more lapses between service efforts are unexplained or patently unreasonable." *Id.*

In Allen's *pro se* response to the motion, she conceded the defendants were served after the expiration of the applicable statute of limitations. She argues she did not know limitations had expired prior to service on the defendants until the defendants filed their motion for summary judgment. She argues the process server should have noted "each attempt of service, date and time." She maintains that she "nor her case should be harmed or injured because none of the attorneys acted with due diligence . . . in protecting her rights and case from the statu[t]e of limitations" and that she should not "be held accountable for an obvious mishandling of the Court's records." In her affidavit attached to her motion for new trial, Allen stated that although her counsel failed to check on the status of service, he was only partly to blame because "[the Orange County] Clerk's office ha[d] a duty to provide adequate service and did not."[1]

Although the clerk of the court has the duty, upon the plaintiff's request, to issue and deliver the citation as directed, and although a party "may ordinarily rely on the clerk to perform his duty within a reasonable time," the ultimate responsibility to ensure that citation was served on the defendant still rests with the plaintiff. *Bilinsco Inc. v. Harris Cnty. Appraisal Dist.*, 321 S.W.3d 648, 652 (Tex. App.—Houston [1st Dist.] 2010, pet.

[1]On appeal, Allen asserts that the guardianship case was not dismissed until after the defendants were served. She notes the record does not reflect this fact. The record does not reflect that she raised this issue in the trial court. *See Wohlfahrt v. Holloway*, 172 S.W.3d 630, 639-40 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (An argument raised on appeal must comport with an argument made at trial.).

denied) (quoting *Boyattia v. Hinojosa*, 18 S.W.3d 729, 733-34 (Tex. App.—Dallas 2000, pet. denied). A plaintiff "who wholly ignores her duty to have the citation served on the defendant during a lengthy period of time [in which] the citation remains with the clerk does not manifest a bona fide intention to have process served." *Boyattia*, 18 S.W.3d at 734.

Any deficiency in the server's performance is imputed to Allen. *Gonzalez v. Phoenix Frozen Foods, Inc.*, 884 S.W.2d 587, 590 (Tex. App.—Corpus Christi 1994, no writ). A court looks to "the time it took to secure citation, service, or both, and the type of effort or lack of effort the plaintiff expended in procuring service." *Proulx*, 235 S.W.3d at 216; *see also Mauricio v. Castro*, 287 S.W.3d 476, 479 (Tex. App.—Dallas 2009, no pet.) ("Texas courts have consistently held that lack of diligence may be shown based on unexplained lapses of time between the filing of the suit, issuance of the citation, and service of process."). It is the responsibility of the one requesting service to see that service is properly accomplished. Tex. R. Civ. P. 99(a); *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 153 (Tex. 1994). Allen does not adequately explain her effort in procuring service during the more than four months after she filed suit and more than three months after the limitations period expired. *See Boyattia*, 18 S.W.3d at 734 (Plaintiff's failure to take any action during the clerk's three-month delay in delivering the citation constituted a lack of diligence as a matter of law.); *Webster v. Thomas*, 5 S.W.3d 287, 288-90 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (Plaintiff failed to

use due diligence as a matter of law, in part, because evidence showed that during three month period from filing suit to issuance of citation, plaintiff called wrong clerk's office when inquiring about issuance of citation.).

Allen's issue is overruled. The trial court did not err in granting summary judgment. The judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on May 3, 2011
Opinion Delivered June 16, 2011

Before McKeithen, C.J., Gaultney and Horton, JJ.