

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00221-CV

ROOSEVELT BARNES, JR., Appellant

V.

**POLK COUNTY SHERIFF DEPARTMENT, SHERIFF BILLY
RAY NELSON, SR., SHERIFF MIKE NETTLES, and
THE POLK COUNTY DRUG TASK FORCE,
Appellees**

**On Appeal from the 258th District Court
Polk County, Texas
Trial Cause No. CIV23,724**

MEMORANDUM OPINION

Roosevelt Barnes, Jr., an inmate in the Texas Department of Criminal Justice Institutional Division, filed suit *in forma pauperis* against the Polk County Sheriff's Department and other defendants. The claims asserted by Barnes in his lawsuit are related to his arrest. The trial court dismissed his lawsuit as frivolous pursuant to Chapter 14 of

the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001-.014 (West 2002). Barnes filed this appeal. We conclude the trial court did not abuse its discretion in dismissing Barnes’s claims. The dismissal order is affirmed.

BACKGROUND

Barnes was arrested on December 17, 2003. On September 20, 2005, Barnes originally filed suit against Polk County Sheriff’s Department and other defendants alleging that agents of the sheriff’s department forced their way into his ex-girlfriend’s house, improperly arrested him, and stole thousands of dollars worth of valuables. The trial court dismissed the original suit without prejudice for failure to comply with Chapter 14 of the Texas Civil Practice and Remedies Code. *See id.* We affirmed the Chapter 14 dismissal.¹ *Barnes v. Polk County Sheriff Dept.*, No. 09-05-516 CV, 2007 WL 846644, at **1-2 (Tex. App.—Beaumont March 22, 2007, no pet.) (mem. op.).

On June 1, 2007, Barnes filed his original petition in the underlying action. Barnes acknowledges that his original petition is merely a refile of his initial civil suit related to his arrest. Like his first suit, his original petition in the present case alleges that agents of the sheriff’s department forced their way into his ex-girlfriend’s house, improperly arrested him, and stole thousands of dollars worth of valuables. In April 2010, the Attorney

¹ In the present case, Barnes filed an “Objection to the Clerk’s Record,” which we construed as a request to take judicial notice of the record filed in the appeal from Barnes’s September 2005 suit. Therefore, the record from Barnes’s appeal of the trial’s dismissal of his September 2005 suit is before this court.

General filed an *amicus curiae* advisory recommending dismissal of Barnes's suit based on Chapter 14 of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001-.014. The Attorney General argued that Barnes's claims should be dismissed as frivolous under Chapter 14 because they were barred by the Texas Tort Claims Act and the applicable statutes of limitation. *See id.* § 14.003(a), (b); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West Supp. 2010). Barnes filed an objection to the report and recommendation of the Attorney General. On April 13, 2010, the trial court dismissed plaintiff's action as frivolous pursuant to Chapter 14. *See* Tex. Civ. Prac. & Rem. Code Ann. § 14.003(a).

ANALYSIS

On appeal, Barnes argues that his suit is not frivolous and the court erred in dismissing his suit. The dismissal of a cause of action under Chapter 14 is reviewed under an abuse of discretion standard. *Hickson v. Moya*, 926 S.W.2d 397, 398 (Tex. App.—Waco 1996, no pet.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Chapter 14 of the Civil Practice and Remedies Code applies to lawsuits filed by an inmate in district court in which the inmate files an affidavit or unsworn declaration of inability to pay costs. Tex. Civ. Prac. & Rem. Code Ann. § 14.002(a). Under Chapter 14, a trial court may dismiss a lawsuit as frivolous or malicious. *Id.* § 14.003(a)(2). In

determining whether a claim is frivolous or malicious, a trial court may consider whether: (1) the claim's realistic chance of success is slight; (2) the claim has no arguable basis in law or in fact; (3) it is clear that the party cannot prove facts in support of the claim; (4) the claim is substantially similar to a previous claim filed by the inmate because the claim arises from the same operative facts. *Id.* § 14.003(b).

Barnes filed suit pursuant to 42 U.S.C. § 1983 and the Texas Tort Claims Act. *See* 42 U.S.C.A. § 1983 (West 2003); Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-.109 (West 2011). Section 1983 provides a remedy if any person acting under the color of state law deprives another person of any rights, privileges, or immunities protected by the United States Constitution or laws. 42 U.S.C.A. § 1983; *see also Thomas v. Collins*, 960 S.W.2d 106, 109 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). The “Tort Claims Act does not create a cause of action; it merely waives sovereign immunity as a bar to a suit that would otherwise exist.” *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 101.021. Barnes asserts causes of action for violation of his constitutional and civil rights, taking of property, and intentional and negligent infliction of emotional distress. Polk County argues, in part, that Barnes's claims are barred by applicable statutes of limitation, and the trial court's ruling was therefore proper. *See generally* Tex. Civ. Prac. & Rem. Code Ann. § 14.003(b).

In Texas, the statute of limitations for 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, 127 S.Ct. 1091, 166 L.Ed.2d 973 (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). Likewise, the two-year statute of limitations applies to Barnes’s claims for intentional and negligent infliction of emotional distress,² and taking of property. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a); *see also J & J Sports Prods., Inc. v. JWJ Mgmt., Inc.*, 324 S.W.3d 823, 832 (Tex. App.—Fort Worth 2010, no pet.) (trespass to or taking of personal property); *Duzich v. Marine Office of Am. Corp.*, 980 S.W.2d 857, 872 (Tex. App.—Corpus Christi 1998, pet. denied) (negligent infliction of emotional distress); *Stevenson v. Koutzarov*, 795 S.W.2d 313, 319 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (op. on reh’g) (intentional infliction of emotional distress).

Barnes argues that his claims are not barred by limitations because his original suit was filed timely in September 2005.³ “When a cause of action is dismissed and later refiled, limitations are calculated to run from the time the cause of action accrued until the date that the claim is refiled.” *Clary Corp. v. Smith*, 949 S.W.2d 452, 459 (Tex. App.—Fort Worth 1997, pet. denied). “This is because a dismissal is equivalent to a suit

² In Texas there is no general duty not to negligently inflict emotional distress. *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993); *see also City of Tyler*, 962 S.W.2d at 494.

³ Barnes argues that his original suit was filed in August 2005; however, the record establishes that his original suit was filed in September 2005.

never having been filed; thus, the statute of limitations is not tolled for any new pleading filed.” *Id.*; *see also Cunningham v. Fox*, 879 S.W.2d 210, 212 (Tex. App.—Houston [14th Dist.] 1994, writ denied). In contrast, under the relation-back doctrine, if an amended pleading adds a cause of action based on the same transaction or occurrence forming the basis of the claims made in the original pleading, the amended pleading “relates back” to the original filing. *Delhomme v. Comm’n for Lawyer Discipline*, 113 S.W.3d 616, 621 (Tex. App.—Dallas 2003, no pet.). However, the relation-back doctrine does not save claims that have been dismissed and are later refiled from the operation of a statute of limitations. *Id.*

Barnes’s claims are all based on rights allegedly violated during his arrest on December 17, 2003. Barnes filed his first suit asserting these claims on September 20, 2005. Barnes’s original suit was dismissed without prejudice for failure to comply with Chapter 14. *See Barnes*, 2007 WL 846644, at *1. Barnes filed the underlying lawsuit on June 1, 2007, well after the expiration of the applicable two-year statute of limitations for his claims. From the face of his pleadings, it is evident that Barnes’s claims are barred by limitations. *See Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a)*; *see also Wallace*, 549 U.S. at 387-88. The record establishes that Barnes’s claims are barred as a matter of law, therefore; his suit had no realistic chance of success. *See Tex. Civ. Prac. & Rem. Code Ann. § 14.003(b)(1)*; *see generally McCollum v. Mt. Ararat Baptist Church, Inc.*, 980 S.W.2d 535, 537 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (when petition

established that enforcement of contract was barred by statute of frauds, inmate's suit had no realistic chance of success and dismissal was proper). The trial court did not abuse its discretion in dismissing his suit as frivolous under Chapter 14. *See* Tex. Civ. Prac. & Rem. Code Ann. § 14.003(a)(2), (b)(1); *see also McCollum*, 980 S.W.2d at 537. Having overruled Barnes's sole issue, we affirm the trial court's dismissal order.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on January 24, 2011
Opinion Delivered March 17, 2011

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