COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00350-CV

COREY ERVEN — APPELLANT

V.

DEANNA L. SPRINGER — APPELLEE

FROM THE 342ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 342-276521-15

MEMORANDUM OPINION[1]

Appellant Corey Erven appeals from the summary judgment granted in favor of Appellee Deanna L. Springer on his negligence claims against her. Erven did not serve Springer until nearly a year after filing suit and after the expiration of the applicable limitations period. The trial court granted summary

[1]*See* Tex. R. App. P. 47.4.

judgment for Springer on the basis of limitations. Because Erven failed to raise a fact issue on whether he exercised reasonable diligence in serving Springer, we affirm.

I. Background

Erven sued Springer and another party not involved in this appeal for damages resulting from a car accident. Erven alleged that the accident occurred on or about February 4, 2013. He filed his suit on January 21, 2015, asserting negligence claims.

The trial court dismissed the suit on June 30, 2015 for want of prosecution. Upon Erven's motion, the trial court reinstated the case on its docket. Erven served Springer by private process server on January 7, 2016. The other party to the suit was served by private process server on May 27, 2016.

Springer filed an answer in which she asserted the affirmative defense of limitations. She then filed a combined traditional and no-evidence motion for summary judgment based on that defense.

In her motion, Springer alleged that the court clerk had issued the original citation on January 23, 2015, but she had not been served because, although the police report from the accident listed her address in Irving, Erven had listed her address in his petition as being in Dallas, and this incorrect address was incorporated into the citation. As evidence, Springer attached a copy of the police report listing an address for her in Irving and a copy of the petition in which Erven alleged a different address in Dallas. Springer alleged that the Dallas

address Erven had used had been included in the police report, but not as *her* address. Rather, it was the address of the owner of the car she had been driving at the time of the accident, a person Erven had not sued.

In the no-evidence part of her motion, Springer alleged that Erven had no evidence to show that he was diligent in serving her after he filed his original petition.

As a traditional summary judgment ground, Springer asserted that the evidence conclusively showed that she was not served until after limitations had expired and that Erven did not use diligence in serving her. Further, Springer alleged in her motion that her summary judgment evidence showed "the virtual non-existence of any efforts to serve" her. In support, Springer attached: (1) a copy of Erven's petition listing a Dallas address for her; (2) the police report from the accident, which listed an address in Irving for Springer and an address in Dallas for "Enterprise," the owner of the car she had been driving; (3) the first citation, issued January 23, 2015, which listed Springer's address as the Dallas address; (4) an affidavit of attempted service at the Dallas address, averring that the process server received the citation on March 12, 2015, that Springer could not be found at the Dallas address, and that there had been a company called "Enterprise" at this location "some time back"; (5) the second citation, listing an address for Springer in Carrollton; (6) an affidavit of nonservice at the Carrollton address; and (7) the return of service for Springer, showing service on January

11, 2016 at an address in Midland. She also attached copies of the trial court's show cause notice, the order dismissing the case, and the order reinstating it.

In response to the summary judgment motions,[2] Erven asserted that whether he had used reasonable diligence in serving Springer was a fact question and could not be decided via summary judgment. In support, he attached an affidavit from the investigator who he had hired to locate Springer, in which the investigator discussed his attempts to locate her. According to the investigator, he eventually located Springer in Midland, Texas. Erven also attached an affidavit from the process server who attempted to serve Springer in Carrollton.

The trial court granted Springer's summary judgment motions "in [their] entirety." Erven then filed a motion for new trial, which the trial court denied. The trial court severed Erven's claims against Springer from the suit,[3] and Erven now appeals.

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[2]Springer filed a reply to Erven's summary judgment response in which she asserted that Erven's response was untimely filed and in which she objected to his summary judgment evidence. The trial court did not expressly rule on Springer's objections. The court stated in its order granting summary judgment that it had considered Springer's motion, Erven's response, Springer's reply, and the admissible summary judgment evidence. For purposes of this appeal, we need not address the merits of Springer's objections.

[3]Erven filed suit in the name of "Luis Cory Erven." Erven's answers to interrogatories give his name as "Cory Christ[o]pher Erven." In some parts of the record, his first name is spelled as "Corey," and in others, it appears as "Cory." In the order severing the claims against Springer, the trial court assigned the severed action the style, "Corey Erven v. Deanna L. Springer."

II. Standard and Scope of Review

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). We review a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We credit evidence favorable to the nonmovant if reasonable jurors could, and we disregard evidence contrary to the nonmovant unless reasonable jurors could not. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009) (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009).

III. Discussion

Erven raises two issues on appeal. First, Erven argues that he presented sufficient evidence of diligence to defeat Springer's no-evidence summary judgment. Second, Erven argues that Springer did not present sufficient evidence in support of her traditional motion for summary judgment to prove as a matter of law that he did not exercise diligence in serving her after the expiration of the limitations period.

A. Limitations and Due Diligence of Service

A plaintiff asserting a negligence claim must generally bring suit "not later than two years after the day the cause of action accrues." Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West 2017). "To 'bring suit' within the two-year limitations period prescribed by section 16.003, a plaintiff must not only file suit within the applicable limitations period, but must also use diligence to have the defendant served with process." *Tate v. Beal*, 119 S.W.3d 378, 380 (Tex. App.—Fort Worth 2003, pet. denied). If a plaintiff files suit within the limitations period but serves the defendant after the limitations period has run, the date of service relates back to the date of filing if the plaintiff exercises due diligence in serving the citation. *Id.* "The duty to exercise diligence is a continuous one, extending from the date suit is filed until service is obtained." *Id.*

"[O]nce a defendant has affirmatively pled the limitations defense and shown that service was effected after limitations expired, the burden shifts to the plaintiff to explain the delay." *Proulx v. Wells*, 235 S.W.3d 213, 216 (Tex. 2007)

(quotation marks and citation omitted). "Thus, it is the plaintiff's burden to present evidence regarding the efforts that were made to serve the defendant, and to explain every lapse in effort or period of delay." *Id.* "[I]f the plaintiff's explanation for the delay raises a material fact issue concerning the diligence of service efforts, the burden shifts back to the defendant to conclusively show why, as a matter of law, the explanation is insufficient." *Id.* However, "[i]n some instances, the plaintiff's explanation may be *legally* improper to raise the diligence issue and the defendant will bear no burden at all." *Id.* In other cases, "the plaintiff's explanation of its service efforts may demonstrate a lack of due diligence as a matter of law, as when one or more lapses between service efforts are unexplained or patently unreasonable." *Id.*

"Generally, the question of the plaintiff's diligence in effecting service is one of fact, and is determined by examining 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." *Id.* "In assessing diligence, the relevant inquiry is whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served." *Id.*; *see also Sharp v. Kroger Tex. L.P.*, 500 S.W.3d 117, 120–21 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (noting that Texas courts have consistently held that due diligence is lacking as a matter of law when there are unexplained lapses of time between filing suit, issuance of citation, and service).

B. Erven Did Not Produce Evidence to Raise a Fact Issue on Due Diligence.

Springer pled limitations as an affirmative defense and showed that she was served after limitations had expired, and therefore Erven had the burden to explain the delay. In response to Springer's no-evidence motion, Erven relied on two affidavits.

The first affidavit was from Andrew Manger, president of the company hired to locate and serve Springer. Manger swore that on March 3, 2015, he received a citation to serve on Springer at an address in Dallas. On March 13, 16, and 19, a process server went to the Dallas address and attempted to serve Springer. Manger did not explain why the first two attempts were unsuccessful, but he stated that on the third attempt, the server spoke with an office manager of the business at that address, who verified that no one with Springer's name worked at that office.

Manger further swore that on July 21, 2015, Erven's law firm requested that Manger's company locate an address for service on Springer. The company searched public records and, on August 21, located a possible address for Springer in Carrollton. The company received a new citation from the law firm on November 16, 2015 and made unsuccessful attempts at service in November and December. The company continued to search for Springer and finally located a new home address and work address for Springer in Midland.

The second affidavit was from Gean Smith, the process server who attempted to serve Springer at a house in Carrollton. Smith explained his attempts at service and swore that he received the citation on November 20, 2015. He stated that he attempted service on Springer on November 23, November 25, and November 30, but no one answered the door. On December 3, he spoke with someone at the house who told him that she had moved into the house the prior month and did not know anyone with Springer's name.

These two affidavits fail to explain: (1) the nearly six-week gap between when the suit was filed on January 21, 2015 and when Erven's law firm sent the citation to Manger's company for service on March 3, 2015; (2) the three-month gap between the unsuccessful March attempts and Erven's law firm asking Manger's company to locate Springer; and (3) the three-month gap between Manger's company finding a Carrollton address for Springer and Erven's law firm then obtaining a second citation and forwarding it to Manger's company for service. Erven's summary judgment evidence also fails to explain how long it took Manger's company to locate Spring in Midland and why she was not served at that address until January 2016. As a result, Erven's summary judgment response wholly failed to explain these significant periods of inaction. *See Sharp*, 500 S.W.3d at 121 (holding that summary judgment on limitations was proper when the plaintiff failed to explain the five-month delay between filing suit and requesting citation and effecting service). Accordingly, Erven failed to raise

a fact issue on the issue of diligence, and the trial court did not err by granting no-evidence summary judgment for Springer.

Having sustained the no-evidence summary judgment, we do not address Erven's issue challenging the traditional summary judgment. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

IV. Conclusion

Having overruled Erven's first issue, which is dispositive, we affirm the trial court's summary judgment.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: MEIER, GABRIEL, and PITTMAN, JJ.

DELIVERED: June 8, 2017