



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-20-00107-CV

TRIX TEXAS HOLDINGS, LLC AND BRYAN WEINER, APPELLANTS

V.

**MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF NEVADA, INC.,
APPELLEE**

On Appeal from the 99th District Court
Lubbock County, Texas
Trial Court No. 2016-519,366-B, Honorable William C. Sowder, Presiding

September 23, 2021

MEMORANDUM OPINION

Before **PIRTLE** and **PARKER** and **DOSS, JJ.**

Appellants, Triex Texas Holdings, LLC, and Bryan Weiner, appeal the trial court's grant of summary judgment in favor of appellee, Marcus & Millichap Real Estate Investment Services of Nevada, Inc. We reverse the trial court's summary judgment and remand to the trial court for further proceedings.

Factual and Procedural Background

In April of 2008, Hamilton Holdings, L.P. sold a piece of commercial property to Triex. Both parties to the transaction were represented by Marcus & Millichap. An agent of Marcus & Millichap, Drew Wetherholt, told Weiner, sole owner of Triex, that having Marcus & Millichap representing both parties to the transaction would be beneficial because Wetherholt would be able to find out more information about the property from another Marcus & Millichap agent than he would from an outside broker. The transaction was a sale-and-leaseback in which Triex would buy the property from Hamilton Holdings, whose sole limited partner was Larry Jack Taylor, and then immediately lease it back to Taylor Petroleum Companies, Inc., which operated a gas station and convenience store on the property. Triex and Taylor Petroleum executed a twenty-year lease agreement.

In December of 2012, Taylor Petroleum defaulted on the lease. Appellants brought suit against Taylor Petroleum, Hamilton Holdings, Taylor, and others associated with Taylor Petroleum (collectively referred to as "Taylor") on February 10, 2016. Marcus & Millichap was not named as a defendant in that lawsuit. Marcus & Millichap was not named because appellants believed, based on representations made by Marcus & Millichap, that Taylor had been solely responsible for appellants' losses. On February 8, 2017, appellants took the depositions of Larry Jack Taylor and Robert Kenton Dorris, Taylor Petroleum's President and Chief Financial Officer. During these depositions, appellants learned that Taylor had given material information regarding the sale-and-leaseback transaction to Marcus & Millichap that had never been provided to appellants. As a result of this new information, appellants suspected that Marcus & Millichap had participated in, if not initiated, the dishonest activity that caused appellants' injury.

After discovering this information, appellants amended their petition to add Marcus & Millichap as a defendant on March 24, 2017. Appellants asserted claims against Marcus & Millichap for breach of fiduciary duty, fraud by nondisclosure, and conspiracy. These claims were asserted within approximately six weeks of their discovery. However, they were asserted nearly nine years after the sale-and-leaseback transaction closed and more than four years after Taylor breached the lease.

On July 5, 2017, Marcus & Millichap filed a motion for traditional summary judgment. Its motion was based on the statute of limitations barring appellants' claims. Appellants responded and sought leave to amend their pleadings to plead the discovery rule. The trial court granted Marcus & Millichap's motion. Appellants appealed and this Court reversed the trial court's ruling on the basis that appellants were entitled to leave to amend their pleadings to add the discovery rule. See *Triex Tex. Holdings, LLC v. Marcus & Millichap Real Estate Inv. Servs. of Nev., Inc.*, No. 07-18-00077-CV, 2019 Tex. App. LEXIS 3365, at *7-8 (Tex. App.—Amarillo Apr. 25, 2019, no pet.) (mem. op.) (per curiam).

Appellants amended their pleadings to add the discovery rule on August 6, 2019. Marcus & Millichap again filed a motion for traditional summary judgment contending that appellants' claims are barred by the applicable statute of limitations. Appellants responded. After hearing arguments, the trial court granted summary judgment for Marcus & Millichap. It is from this summary judgment that appellants appeal.

Appellants present four issues by their appeal. By their first issue, appellants contend that the trial court erred in granting summary judgment based on limitations

because the trial court refused to apply the discovery rule to appellants' claims. Appellants contend, by their second issue, that the trial court erred in granting summary judgment because Marcus & Millichap failed to conclusively establish the date upon which appellants knew, or in the exercise of reasonable diligence should have known of their claims. By their third issue, appellants contend that the trial court erred in granting summary judgment because it improperly weighed disputed factual evidence in determining that appellants were not reasonably diligent in investigating potential claims. Finally, by their fourth issue, appellants contend that the trial court erred in granting summary judgment because the limitations period for a civil conspiracy claim accrues at the same time as the underlying cause of action.

Standard of Review

We review a grant of summary judgment de novo. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* In reviewing a summary judgment, a reviewing court takes all evidence favorable to the nonmovant as true and indulges every reasonable inference and resolves any doubts in the nonmovant's favor. *Id.* Limitations is an affirmative defense. TEX. R. CIV. P. 94. Therefore, to be entitled to summary judgment, Marcus & Millichap was required to conclusively prove (1) when appellant's cause of action accrued, and (2) that, if the discovery rule applies to appellants' claims, there is no genuine issue of material fact about when appellants discovered or in the exercise of reasonable diligence should have discovered the nature of their injury. *Gator Frac Heating & Rentals, LLC v. Brooks*, 581 S.W.3d 460, 463 (Tex. App.—Amarillo 2019, pet.

denied). If the movant establishes that the statute of limitations bars the action, the nonmovant must then present evidence raising a fact issue in avoidance of limitations. *Id.*

We will focus our analysis on appellants' breach of fiduciary duty claim because summary judgment was inappropriate if there is a genuine issue of material fact about any of appellants' claims.

Issue One: Application of Discovery Rule

By their first issue, appellants contend that the trial court erred in granting summary judgment when it refused to apply the discovery rule. Marcus & Millichap responds contending that the discovery rule does not apply because the injury about which appellants complain was not inherently undiscoverable.

Statutes of limitations are intended to compel plaintiffs to assert their claims within a reasonable period while the evidence is fresh in the minds of the parties and witnesses. *Wagner & Brown v. Horwood*, 58 S.W.3d 732, 734 (Tex. 2001). The discovery rule exception operates to defer accrual of a cause of action until the plaintiff knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim. *Id.* The discovery rule is a very limited exception to statutes of limitations that is available only when the nature of the plaintiff's injury is both inherently undiscoverable and objectively verifiable. *Id.* We determine whether an injury is inherently undiscoverable on a categorical basis. *Id.* at 735. One category in which the discovery rule has been found to apply is in breach of fiduciary duty claims. See *Willis v. Maverick*, 760 S.W.2d 642,

645 (Tex. 1988). This is true because we presume¹ that a person who is owed a fiduciary duty is either unable to inquire into the fiduciary's transactions or unaware of the need to do so. *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996); *Computer Assocs. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996).

Initially, we must determine whether a fiduciary relationship existed between appellants and Marcus & Millichap. Marcus & Millichap was Weiner's real estate broker and agent in the sale-and-leaseback transaction. A real estate broker who acts as an agent for another is a fiduciary. 22 TEX. ADMIN. CODE § 531.1 (Tex. Real Estate Comm'n, Canons of Prof. Ethics and Conduct); *Birnbaum v. Atwell*, No. 01-14-00556-CV, 2015 Tex. App. LEXIS 8775, at *29 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, pet. denied) (mem. op.). Consequently, we conclude that Marcus & Millichap owed a fiduciary duty to appellants.² As such, appellants were relieved of the responsibility of diligent inquiry. *Melton v. Waddell*, No. 07-18-00105-CV, 2019 Tex. App. LEXIS 9531, at *4 (Tex. App.—Amarillo Oct. 30, 2019, no pet.) (mem. op.) (per curiam). Under the discovery rule, the cause of action accrues when the misconduct becomes known or apparent. *Id.*

However, our determination that the discovery rule applies to appellants' breach of fiduciary duty claim does not resolve the issue raised by appellants. By their first issue, appellants contend that the trial court refused to apply the discovery rule. Marcus & Millichap's summary judgment motion raised the issue of whether the discovery rule

¹ We note that this presumption is rebuttable and that the fiduciary can show that the injury was not inherently undiscoverable.

² We express no opinion regarding the existence of an informal fiduciary relationship between Weiner and Marcus & Millichap's representative, Drew Wetherholt.

applied to appellants' claims. The trial court's order granting summary judgment in favor of Marcus & Millichap does not indicate the basis for its ruling. When the trial court does not specify the grounds upon which it granted summary judgment, we presume that judgment was granted on all grounds raised by the moving party and the burden rests on the nonmoving party to show that each independent ground alleged in the motion was insufficient to support the trial court's order. *Lang v. City of Nacogdoches*, 942 S.W.2d 752, 767-68 (Tex. App.—Tyler 1997, writ denied). The record does not support appellants' contention that the trial court refused to apply the discovery rule, so we must presume the trial court applied the discovery rule to appellants' claims.

Because the record does not establish that the trial court "refused to apply the discovery rule," we overrule appellants' first issue.

Issues Two and Three: Date of Discovery

By their second issue, appellants contend that Marcus & Millichap did not meet its burden to show the date upon which Weiner discovered or, in the exercise of reasonable diligence, should have discovered his claims against Marcus & Millichap. In a related third issue, appellants contend that the trial court improperly considered disputed factual issues. Marcus & Millichap respond contending that it is undisputed that appellants knew of their injury by December 1, 2012, at the very latest.

A claim for breach of fiduciary duty has a four-year statute of limitations period. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5). Ordinarily, this statute of limitations period begins to run when the plaintiff becomes aware of his injuries. *West v. Proctor*, 353 S.W.3d 558, 564 (Tex. App.—Amarillo 2011, pet. denied). However, when the

discovery rule applies, the cause of action accrues when a reasonably diligent and careful plaintiff knows or should have known of the wrongful act and resulting injury. *Agar Corp. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 146 (Tex. 2019); *West*, 353 S.W.3d at 566. The focus of our analysis is on when the type of injury was discoverable rather than when the particular injury was discoverable. *Pham v. Carrier*, No. 07-15-00031-CV, 2017 Tex. App. LEXIS 2850, at *12 (Tex. App.—Amarillo Apr. 3, 2017, no pet.) (mem. op.) (citing *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006) (per curiam)).

Marcus & Millichap argued to the trial court and on appeal that appellants were aware of their injury no later than December 1, 2012, the date of Taylor's default. While the evidence conclusively establishes that appellants were aware that they had sustained an injury by December 1, 2012, this is not sufficient to support summary judgment. As indicated above, when the discovery rule applies, such as in the present case, a cause of action accrues when a reasonably diligent person knows or should know of the wrongful act and the resulting injury. *Agar Corp.*, 580 S.W.3d at 146; *West*, 353 S.W.3d at 566. The evidence establishes that appellants were aware that they had been injured at the time that Taylor defaulted but there was no reasonable way for them to discover that their injury was caused by the wrongful acts of Marcus & Millichap. In fact, at the time of Taylor's default, Weiner relied on representations made by Marcus & Millichap's representative, Wetherholt, that Taylor was solely to blame for not disclosing all information relevant to the sale-and-leaseback transaction. It was not until appellants took the depositions of Taylor and Dorris on February 8, 2017, that they discovered the basis for their claim that Marcus & Millichap had committed the wrongful act that led to appellants' injury. Because the discovery rule applies in the current case, Marcus &

Millichap was required to prove the date upon which appellants knew or should have known of both the injury and the wrongful acts that caused the injury. *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). While the evidence establishes that appellants were aware of their injury on December 1, 2012, there is no evidence that would establish as a matter of law that they knew or should have known on that date that the injury was the result of wrongful acts committed by Marcus & Millichap. Consequently, we must conclude that there is a genuine issue of material fact as to the applicable date that appellants discovered their breach of fiduciary duty claim against Marcus & Millichap. Such a material fact issue precludes summary judgment. *Cantey Hanger, LLP*, 467 S.W.3d at 481.

Marcus & Millichap cites to *Childs v. Haussecker* for the proposition that limitations commence upon the discovery of an injury that was likely the result of the wrongful acts of another even if the exact identity of the wrongdoer is unknown. 974 S.W.2d 31, 40 (Tex. 1998). Here, appellants were aware of their injury when Taylor defaulted on the lease agreement. Appellants were also aware that their injury was the likely result of wrongdoing at least by the time they filed suit against Taylor. However, the record also contains evidence indicating that Marcus & Millichap actively misled appellants to believe that Taylor was the sole wrongdoer responsible for appellants' injury. Claimants are to be given "the benefit of deferring the accrual of a cause of action in cases where the facts forming the basis of an injury were concealed." *Computer Assocs. Int'l*, 918 S.W.2d at 455. Considering this evidence of Marcus & Millichap's obfuscation of the type of injury suffered by appellants and the nature of the wrongdoing, we conclude that Marcus & Millichap failed to meet its burden to establish the applicable discovery date. *Id.*

Furthermore, the determination of the discovery date is ordinarily a fact question for the jury to resolve. See *Williard Law Firm, L.P. v. Sewell*, 464 S.W.3d 747, 752 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Childs*, 974 S.W.2d at 47) (“The specific date by which a plaintiff knew or should have known of an injury is generally a question of fact for the jury”); *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 722 (Tex. 2016) (the exercise of reasonable diligence is a question of fact).

Because there remains a genuine issue of material fact concerning the date upon which appellants discovered or in the exercise of reasonable diligence should have discovered their injury and the wrongful acts causing that injury, we affirm appellants’ second and third issues.

Issue Four: Statute of Limitations for Conspiracy

By their fourth issue, appellants argue regarding the proper statute of limitations for conspiracy. Having determined that there remains a genuine issue of material fact concerning appellants’ breach of fiduciary duty claim, we need not address the applicable statute of limitations for another of appellants’ claims. See TEX. R. APP. P. 47.1.

Conclusion

Because there remains a genuine issue of material fact regarding the date of appellants’ discovery of their claim of breach of fiduciary duty against Marcus & Millichap, we reverse the trial court’s summary judgment and remand to the trial court for further proceedings.

Judy C. Parker
Justice