NUMBER 13-16-00257-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

MIGUEL ROJAS AND LOURDES ROJAS, Appellants,

v.

CITIMORTGAGE, INC., Appellee.

On appeal from the 404th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Rodriguez

The trial court granted summary judgment in favor of appellee Citimortgage, Inc. (Citi) and ordered judicial foreclosure of a house owned by appellants Miguel Rojas and Lourdes Rojas. By one issue, which we construe as two, the Rojases argue that

summary judgment was erroneously granted because Citi's foreclosure claim was barred by the statute of limitations and because the ruling conflicts with the Texas Constitution's provisions on home-equity loans. Because we find that the Rojases created a fact issue with regard to limitations, we reverse and remand.

I. BACKGROUND

On July 30, 1999, the Rojases obtained a home-equity loan from Associates Financial Services Company of Texas, Inc. (Associates). They executed several documents, including two instruments in which the Rojases promised to repay the loan and pledged their home in Harlingen, Texas as security.[1]

The summary judgment proof shows that Associates assigned the instruments to Citi. On January 16, 2009, Citi sent a notice of default to the Rojases, in which Citi cautioned the Rojases of acceleration and possible foreclosure. On July 21, 2010, Citi notified the Rojases that it was accelerating the loan, such that the alleged balance of $188,167.84 was immediately due. The Rojases did not subsequently make any payments on the loan. Citi sent similar notices on May 16, 2011 and again on August 16, 2011, stating that the note had been accelerated and urging the Rojases to pay the full balance of the note.

[1] Citi refers to these instruments simply as a "note and deed of trust." However, as the Rojases point out, the various instruments are more fully titled as follows: a "Loan Agreement," in which the Rojases promised to repay the loan; the "Associates Freedom Loan Agreed Rate Reduction Rider," which provided for the reduction of the applicable interest rate upon the Rojases' timely completion of various stages of repayment; a "Texas Home Equity Agreement," which set out terms related to Texas law on home-equity loans; an "Allonge to Note," in which Citi endorsed the instruments in a non-recourse capacity; and a "Texas Home Equity Security Instrument," in which the Rojases pledged their home as security for the loan.

On November 6, 2013, Citi sent the Rojases a notice of default. Rather than demanding the accelerated balance, this notice urged the Rojases to pay "the past due amount of $95,828.51" and stated that the Rojases' failure to "cure the default by 12/11/2013 will result in acceleration of the loan."

On June 23, 2014, Citi filed suit seeking judicial foreclosure. Citi moved for summary judgment, asserting that it was entitled to judgment as a matter of law. The Rojases responded that Citi's foreclosure action was time-barred because Citi had not served its suit within the statute of limitations.[2]

On January 20, 2016, the trial court granted summary judgment in favor of Citi on its foreclosure claim. On February 19, 2016, the Rojases filed a motion to reconsider the summary judgment. The motion was overruled by operation of law. The Rojases filed this appeal on May 2, 2016.

II. TIMELINESS OF APPEAL

As an initial matter, Citi argues that the Rojases' appeal was untimely. We disagree.

The Rojases filed a motion to reconsider the summary judgment within thirty days after the judgment was signed. A party who wishes to appeal generally must file a notice of appeal within thirty days after the trial court signs its judgment, or within ninety days after the trial court signs its judgment if any party files a timely motion for new trial or a motion to modify the judgment. TEX. R. APP. P. 26.1(a). When a party files a motion for

[2] The Rojases offered other responsive arguments which are not at issue here. Furthermore, the Rojases filed counterclaims, which were also summarily adjudged in favor of Citi. On appeal, the Rojases do not challenge the summary judgment as to their counterclaims.

reconsideration that seeks reversal or modification of a judgment, we treat it as a motion for new trial or a motion to modify the judgment, pursuant to the appellate rules. *See Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex. 1995) (concluding that an appellant's "motion for reconsideration was the equivalent of a motion to modify the judgment, extending the appellate deadlines"); *see also Fox v. Wardy*, 318 S.W.3d 449, 451 n.1 (Tex. App.—El Paso 2010, pet. denied) (construing a motion to reconsider as a motion for new trial); *Adams v. Ross*, No. 01-15-00315-CV, 2016 WL 4128335, at *2 (Tex. App.—Houston [1st Dist.] Aug. 2, 2016, no pet.) (mem. op.) (same). Thus, the Rojases timely filed a constructive motion for new trial, which extended the deadline for the Rojases' notice of appeal to ninety days. *See* TEX. R. APP. P. 26.1(a).

The Rojases filed their notice of appeal on May 2, 2016, more than ninety days after the judgment was signed. However, a motion for extension of time is necessarily implied when an appellant, acting in good faith, files a notice of appeal beyond the time allowed by rule 26.1 but within the fifteen-day grace period provided by rule 26.3 for filing a motion for extension of time. *Hone v. Hanafin*, 104 S.W.3d 884, 886 (Tex. 2003) (per curiam) (citing *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997)); *see In re J.Z.P.*, 484 S.W.3d 924, 925 n.2 (Tex. 2016) (per curiam) ("Filed two days after the deadline, [appellant's] notice of appeal implied a motion for an extension of time.").[3]

[3] Citi asserts that we may not imply a motion for extension of time, citing *Brown v. State*. No. 13-17-00109-CR, 2017 WL 930019, at *1 (Tex. App.—Corpus Christi Mar. 9, 2017, no pet.) (mem. op., not designated for publication). *Brown* is a criminal case, and it does not apply here, especially given that the Texas Court of Criminal Appeals has not adopted *Verburgt's* holding "that an extension is implied if a notice of appeal is filed within fifteen days after the deadline." *Lair v. State*, 321 S.W.3d 158, 159 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd); *see Olivo v. State*, 918 S.W.2d 519, 523 (Tex. Crim. App. 1996) (en banc) ("When a notice of appeal, but no motion for extension of time, is filed within the fifteen-day period, the court of appeals lacks jurisdiction to dispose of the purported appeal in any manner other than by dismissing it for lack of jurisdiction.").

If the notice of appeal is filed within the fifteen-day grace period, the appellant must offer a reasonable explanation for failing to file the notice of appeal in a timely manner. *See Hone*, 104 S.W.3d at 886. A reasonable explanation is "any plausible statement of circumstances indicating that failure to file within the [specified] period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance." *Id.* We apply a permissive standard of review to assess the reasonableness of the explanation, and any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake, or mischance. *Id.* at 886–87.

As explanation, the Rojases submit that their trial counsel withdrew following the summary judgment. According to the Rojases, they attempted to represent themselves while searching for appellate counsel, and they inadvertently filed their pro se notice of appeal after the deadline because of their inexperience in the law. Under our permissive standard of review, the Rojases' conduct falls shy of deliberate noncompliance and qualifies as a reasonable explanation. *See id.*; *Newsom v. Ballinger Indep. Sch. Dist.*, 213 S.W.3d 375, 377 n.3 (Tex. App.—Austin 2006, no pet.) (finding reasonable explanation based on counsel's miscalculation of appellate deadlines); *Scott-Richter v. Taffarello*, 186 S.W.3d 182, 186 (Tex. App.—Fort Worth 2006, pet. denied) (same); *see also Kessel-Revis v. State*, No. 09-12-00519-CV, 2014 WL 2616903, at *2 (Tex. App.—Beaumont June 12, 2014, no pet.) (mem. op.) (finding reasonable explanation based upon a pro se petitioner's unfamiliarity with appellate deadlines).

In light of the implied motion for extension of time and the Rojases' reasonable explanation for the delay, we consider the notice of appeal to be timely filed. *See Hone*, 104 S.W.3d at 886.

III. STATUTE OF LIMITATIONS

By their first issue, the Rojases argue that summary judgment ordering foreclosure was inappropriate because they created a fact issue on their affirmative defense of limitations. According to the Rojases, Citi's foreclosure claim is time-barred because Citi did not obtain service of its suit within limitations, and because Citi made no attempt to show that it was diligent in obtaining service or to otherwise explain the delay.

In response, Citi asserts that the Rojases have incorrectly stated the date when the foreclosure action began to accrue. Citi also contends that even if the Rojases have stated the correct date of accrual, the delay in service was so minimal that it is excusable.

Essentially, the parties' summary judgment dispute turns on: (1) the date Citi's foreclosure action accrued; and (2) whether Citi acted diligently in serving its lawsuit.

A. Summary Judgment Standard of Review & Burdens of Proof

We review a grant of summary judgment de novo. *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013) (per curiam). The party moving for traditional summary judgment has the burden to submit sufficient evidence to establish that it is entitled to judgment as a matter of law. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014). When a movant meets that burden of establishing each element of the claim or defense on which it seeks summary judgment, the burden then shifts to the non-movant. *Id.* "If the party opposing a summary judgment relies on an affirmative

defense, he must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment." *Mena v. Lenz*, 349 S.W.3d 650, 656 (Tex. App.—Corpus Christi 2011, no pet.) (op. on reh'g) (quoting *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984)). We review the record in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012) (per curiam).

B. Accrual & Abandonment

The parties first dispute the date Citi's foreclosure action accrued. The Rojases assert that Citi's claim accrued when Citi sent its notice of acceleration on July 21, 2010. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). The Rojases contend that the four-year statute of limitations therefore expired on July 21, 2014. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(a) (West, Westlaw through 2017 R.S.) (prescribing a four-year limitations period).

In response, Citi concedes that it initially accelerated the Rojases' note on July 21, 2010, which began the accrual of limitations for the foreclosure action. However, Citi contends that it later abandoned this acceleration and thereby stopped the accrual of limitations. Citi cites a notice of default that it sent to the Rojases on November 6, 2013 and argues that through notice, Citi abandoned the earlier acceleration and reset the accrual of limitations. Citi relies on *Leonard v. Ocwen Loan Servicing, LLC* for the proposition that its 2013 notice of default showed an abandonment because: (1) the notice only demanded the past-due balance under the original payment schedule rather

than the full, accelerated balance, and (2) the notice referred to acceleration as a future risk rather than a present reality. 616 Fed.App'x 677, 680 (5th Cir. 2015) (per curiam); *see Boren v. US Nat'l Bank Ass'n*, 807 F.3d 99, 104 (5th Cir. 2015) (same).[4]

However, as the Rojases point out, Citi never submitted its theory concerning abandonment to the trial court. Our appellate review of summary judgment is limited to those issues presented, in writing, to the trial court. TEX. R. CIV. P. 166a(c); *Franks v. Roades*, 310 S.W.3d 615, 625 n.6 (Tex. App.—Corpus Christi 2010, no pet.). Rule 166a(c) "unequivocally restrict[s] the trial court's ruling to issues raised in the motion, response, and any subsequent replies," and we cannot affirm summary judgment on grounds not expressly set out before the trial court. *Stiles v. Resolution Tr. Corp.*, 867 S.W.2d 24, 26 (Tex. 1993).

Because Citi never submitted its abandonment theory to the trial court, we do not consider it as a basis for affirmance on appeal. *See id.* Instead, we employ the only potential date of accrual that was raised before the trial court: July 21, 2010.

C. Reasonable Diligence

The parties next dispute whether Citi timely and diligently served its suit. The Rojases submitted summary judgment proof which, they contend, shows that limitations expired before Citi accomplished service of its suit. According to the Rojases, it was

[4] *But see Residential Credit Sols., Inc. v. Burg*, No. 01-15-00067-CV, 2016 WL 3162205, at *4 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.) (mem. op.) (rejecting the arguments relied upon by the Fifth Circuit and instead emphasizing that the lender did not take any of the actions that *Holy Cross* cited as sufficient to effect an abandonment: an agreement to abandon acceleration or continuing to accept payments without exacting any remedies available to it upon declared maturity); *Fitzgerald v. Harry*, No. 2-02-330-CV, 2003 WL 22147557, at *4–5 (Tex. App.—Fort Worth Sept. 18, 2003, no pet.) (mem. op.) (same); *see also Denbina v. City of Hurst*, 516 S.W.2d 460, 463 (Tex. Civ. App.—Tyler 1974, no writ) (holding that a nonsuit may effect an abandonment, as cited in *Holy Cross*).

therefore Citi's burden to show that it acted diligently in pursuing service. The Rojases contend that because Citi made no attempt to explain the delay or demonstrate diligence, there remains a fact issue on limitations that is sufficient to defeat summary judgment.

Citi responds that because there was only an eight-day gap between the passing of limitations and the completion of service, Citi was diligent in pursuing service as a matter of law.

1. Applicable Law

A timely filed suit will not interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation. *Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) (per curiam). If service is diligently effected after limitations has expired, the date of service will relate back to the date of filing. *Id.*

When a defendant has affirmatively pleaded the defense of limitations and shown that service was not timely, the burden shifts to the plaintiff to prove diligence. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009). The plaintiff then has the 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.* (quoting *Proulx*, 235 S.W.3d at 216). Generally, the question of the plaintiff's diligence in effecting service is one of fact, though it may be determined as a question of law "when one or more lapses between service efforts are unexplained or patently unreasonable." *Proulx*, 235 S.W.3d at 216.

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.* Generally, diligence 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.*

The duty to use due diligence continues from the date the suit is filed until the date the defendant is served. *Parsons v. Turley*, 109 S.W.3d 804, 808 (Tex. App.—Dallas 2003, pet. denied); *Taylor v. Thompson*, 4 S.W.3d 63, 65 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Jimenez v. Cnty. of Val Verde*, 993 S.W.2d 167, 170 (Tex. App.—San Antonio 1999, pet. denied); *see Martinez v. Becerra*, 797 S.W.2d 283, 285 (Tex. App.—Corpus Christi 1990, no writ).

2. Analysis

It is undisputed that the Rojases pleaded the affirmative defense of limitations. Further, the Rojases submitted summary judgment proof showing the following sequence of events: the foreclosure action began to accrue when Citi sent an unequivocal notice of acceleration on July 21, 2010; Citi timely filed its suit on June 23, 2014; limitations expired on July 21, 2014; but Citi did not serve the Rojases with suit until July 29, 2014. The Rojases' proof showed untimely service, and the burden therefore shifted to Citi to prove diligence in the thirty-six days between the filing of suit and the completion of service. *See Ashley*, 293 S.W.3d at 179.

Rather than factually explaining the delay, Citi urges us to hold that because only thirty-six days elapsed between the filing of suit and service of process, this negligible delay shows diligence as a matter of law. Citi urges us to apply cases from the context of a plea in abatement, such as *Curtis v. Gibbs*, which also involved an evaluation of diligence in service. 511 S.W.2d 263 (Tex. 1974) (orig. proceeding). Citi contends that

under *Curtis*, a minor delay in service shows "as a matter of law[] that there was no want of diligence." *See id.* at 268. We cannot agree that these plea-in-abatement cases are strictly applicable here.[5]

Although a thirty-six day delay between filing of suit and service is minor, *see*, *e.g.*, *Reynolds v. Alcorn*, 601 S.W.2d 785, 788 (Tex. App.—Amarillo 1980, no pet.), a negligible delay in service does not necessarily translate to a showing of diligence as a matter of law in cases involving service beyond the statute of limitations. Instead, minimal delay simply means that a minimal explanation would have sufficed. "In cases of relatively short delay, such as here, it may take little evidence to prove that, as a matter of fact, the plaintiff acted as a reasonably prudent person and was diligent in obtaining service; however, it does take some evidence. We have none." *Mauricio v. Castro*, 287 S.W.3d 476, 480 (Tex. App.—Dallas 2009, no pet.); *see Rodriguez v. Tinsman & Houser, Inc.*, 13 S.W.3d 47, 51 (Tex. App.—San Antonio 1999, pet. denied) (finding no diligence as a matter of law where the plaintiff offered unsatisfactory explanation for a delay of thirty-six days between filing suit and, after limitations expired, serving suit); *Perkins v. Groff*, 936 S.W.2d 661, 668 (Tex. App.—Dallas 1996, writ denied) (finding similar delay of forty-seven days, with no explanation, to show lack of diligence as a matter of law).

[5] Where, as here, a plaintiff serves suit beyond the statute of limitations, our supreme court has established clear burdens of proof regarding the questions of timeliness and diligence, including 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." *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009). By comparison, our supreme court has suggested that it remains an open question whether any similar burdens apply in the context of a plea in abatement. *See In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 297 (Tex. 2016) (orig. proceeding) (assuming, without deciding, that the party seeking abatement had the burden to "explain the delay and the attempts at service"). We therefore decline to rely on cases such as *Curtis* in evaluating whether Citi adequately explained delays and demonstrated diligence, since it is uncertain whether such a burden even applies in the context of a plea in abatement.

Here, Citi submitted no "evidence regarding the efforts that were made to serve the defendant[s] and to explain every lapse in effort or period of delay." *See Ashley*, 293 S.W.3d at 179. Accordingly, we cannot conclude that Citi carried its burden to demonstrate diligence in a manner that was sufficient to prove its entitlement to judgment as a matter of law.[6] Instead, reviewing the record in the light most favorable to the non-movant, and indulging every reasonable inference and resolving any doubts against the motion, *see Buck*, 381 S.W.3d at 527, we conclude that the Rojases have demonstrated the existence of a fact issue concerning their affirmative defense of limitations. *See Mena*, 349 S.W.3d at 656. This issue of fact is sufficient to defeat summary judgment. *See id.*

We sustain the Rojases' first issue, which disposes of this appeal. We need not address the Rojases' remaining issue concerning compliance with the Texas Constitution. *See* TEX. R. APP. P. 47.1.

IV. CONCLUSION

We reverse the trial court's grant of summary judgment and remand the case to the trial court for further proceedings consistent with this opinion.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the 14th
day of September, 2017.

[6] The Rojases did not pursue summary judgment against Citi's foreclosure action on the ground of limitations, and we therefore may not consider whether summary judgment should have been granted in the Rojases' favor. *See Garner v. Corpus Christi Nat'l Bank*, 944 S.W.2d 469, 476 (Tex. App.—Corpus Christi 1997, writ denied). We only hold that in the absence of any explanation, Citi has not conclusively negated the existence of a fact issue concerning untimely service.