AFFIRM; and Opinion Filed January 7, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01060-CV

LAZO TECHNOLOGIES, INC., W&R TECHNOLOGY LLC D/B/A ATS SOUTH D/B/A ADVANCED TECHNOLOGY SOLUTIONS SOUTH, AND EDDIE HILL D/B/A HILL PROFESSIONAL SERVICES, Appellants

V.

HEWLETT-PACKARD COMPANY, GARRETT GOETERS, DAN WAMPLER, SHEARRARD THOMAS, AND DOES 1–5, Appellees

On Appeal from the County Court at Law No. 4
Dallas County, Texas
Trial Court Cause No. CC-12-06786-D

MEMORANDUM OPINION

Before Justices Evans, Whitehill, and Schenck
Opinion by Justice Schenck

Lazo Technologies, Inc., W&R Technology LLC, and Eddie Hill appeal the trial court's dismissal of their claims on summary-judgment based limitations grounds. Appellants contend the judgment was in error because appellees Hewlett-Packard ("HP"), Garrett Goeters, Dan Wampler, and Shearrard Thomas did not conclusively establish the accrual date of appellants' claims and because appellants raised a genuine issue of material fact as to their defense of fraudulent concealment. We affirm the trial court's judgment. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND FACTS

Appellants are minority-owned companies that specialize in technology and consulting telecommunications services, such as installation of cabling and wiring. In January 2003, they

joined HP and Micro Systems Engineering, Inc. ("MSE") in a consortium of independent contractors ("Consortium") bidding to provide telecommunication and internet services to the Dallas Independent School District ("DISD") pursuant to a request for proposals. The DISD contract was funded by a program referred to as a federal E-Rate program that was administered by the Universal Service Administrative Company ("USAC") under the supervisory authority of the Federal Communications Commission ("FCC").

In March 2004, the USAC approved the DISD application for E-Rate funding, and appellants began providing services to DISD. During the summer of 2005, news articles reported allegations of illegal gifts from MSE's president, Frankie Wong, to Ruben Bohuchot, DISD's then Chief Technology Officer. In August 2005, the USAC suspended payments to the Consortium while it investigated the relationship. Later that month, Tom Lazo, president of Lazo Technologies, Inc., commented to the area newspaper about how the payment freeze would hurt minority companies, including his own. In October 2005, the USAC resumed E-rate payments based on MSE's and DISD's representations that there had been no undue influence, though it warned of its obligation to rescind payment commitments and seek recovery of funds if program rules were violated. Appellants continued providing services to DISD through the fall of 2006, when USAC again suspended payments. Appellants received their last payment in May 2006.

Six years later, on November 9, 2012, appellants filed suit against HP and former HP employee Garret Goeters, asserting claims of fraud, breach of fiduciary duty, negligence, tortious interference with existing contract, and civil conspiracy.[1] In July 2013, appellants added former HP employees Dan Wampler and Shearrard Thomas as defendants to the suit. In February 2014, appellees filed traditional motions for summary judgment, in which they argued that appellants'

[1] Appellants' original petition included a claim for violation of the Texas Deceptive Trade Practices Act, which appellants later withdrew.

causes of action were barred by applicable statutes of limitations.[2] Appellants filed responsive motions in which they argued their causes of action did not accrue until the FCC made its determination on November 29, 2011, that appellants would not be paid for their outstanding claims. The trial court granted summary judgment.

STANDARD OF REVIEW

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We examine whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law. *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). We take as true all evidence favorable to the non-movant, and we make all reasonable inferences in the non-movant's favor. *Id.*

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to establish the applicability of the defense. *Id.* Thus, the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the nature of its injury. *Id.* If the movant establishes that the statute of limitations bars the action, the non-movant must then adduce summary-judgment proof raising a genuine fact issue in avoidance of the statute of limitations. *Id.*

[2] Appellees HP and Dan Wampler filed a traditional motion for summary judgment. Appellee Shearrard Thomas filed a traditional motion for summary judgment in which Mr. Thomas incorporated by reference the motion, brief, and exhibits filed by HP and Mr. Wampler. Appellee Garrett Goeters filed a motion to join in and incorporate the arguments of HP and Mr. Wampler in their motion for summary judgment.

DISCUSSION

In their first issue, appellants argue appellees did not conclusively establish the accrual date of appellants' causes of action or negate the discovery rule. The statute of limitations for appellants' claims for fraud and breach of fiduciary duty is four years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(4), (5) (West 2014). Appellants' remaining claims for negligence, tortious interference with a contract, and civil conspiracy are subject to a two-year limitations period. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West 2014). Since appellants first filed their original petition on November 9, 2012, appellees must conclusively prove appellants' claims for fraud and breach of fiduciary duty accrued before November 9, 2008, and that appellants' claims for negligence, tortious interference with a contract, and civil conspiracy accrued before November 9, 2010.

Generally, a cause of action accrues when a wrongful act causes some legal injury, when facts come into existence that authorize a claimant to seek a judicial remedy, or whenever one person may sue another. *Am. Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 430 (Tex. 2015). Knowledge of injury initiates the accrual of the cause of action and triggers the putative claimant's duty to exercise reasonable diligence to investigate the problem, even if the claimant does not know the specific cause of the injury, the party responsible for it, or the full extent of it. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 207, 209 (Tex. 2011). However, under the discovery rule, a cause of action will not accrue until the plaintiff knew or should have known of the wrongfully caused injury. *Baxter v. Gardere Wynne Sewell LLP*, 182 S.W.3d 460, 462 (Tex. App.—Dallas 2006, pet. denied).

Appellants argue that the circumstances between obtaining their last payment in May 2006 and when they filed suit in November 2012 prevented them from discovering appellees' wrongdoing. In May 2007, Mr. Wong and Mr. Bohuchot were indicted by federal authorities for

bribery, conspiracy, and money laundering. The indictment stemmed from their long standing bribery and corruption scheme and specifically identified the Consortium's successful bid for work under both the E-Rate program at issue here and an earlier "Seats Management" contract. During the criminal trial in June 2008, Mr. Goeters testified. Despite the news coverage of the trial and the fact that the proceedings were open to the public, appellants assert they did not have the transcripts of the criminal trial after the proceedings and even if they did, most of Mr. Goeters' criminal trial testimony does not relate to the Consortium's E-Rate contract, but to the Seats Management contract. In contrast with their arguments on appeal, appellants' petition claims Mr. Goeters' testimony detailed the illegal conduct, collusion, and conspiracy of each of the appellees, along with MSE and DISD, in a continuing pattern of conduct extending from before the award of the Seats Management contract through and after the award of the E-Rate program contract.

Regardless of the foregoing, it is clear from the record that appellants were not paid their final invoice and no later than November 30, 2006, were aware of the suspension of payments as they complained to the FCC. Thus, appellants were aware by that date at the latest of their injury. *Exxon Corp.*, 348 S.W.3d at 202. Additionally, the record contains depositions and other documents obtained during discovery that show Mr. Lazo put together his own investigation files and knew by early 2007 that the USAC decided to suspend payments in 2006 because of the wrongdoing the USAC suspected and the newspaper reported in 2005. There was also evidence Mr. Lazo shared his investigation files with Mr. Hill and Billy Ratcliff, the principal of W&R Technology LLC, in early 2007. Meanwhile, there is no evidence of any affirmative acts by appellees designed to obscure the injury or discourage appellants from filing suit. Thus, appellants were aware of their injury and the alleged wrongdoing that caused it by 2007 at the latest, which triggered their duty to investigate the problem, regardless of whether they knew the

specific cause of the injury or the party responsible for it. *Id.* at 207, 209. Appellants cannot rely on the discovery rule to toll limitations because the discovery rule only defers accrual of a cause of action until the plaintiff discovered, or should have discovered through reasonable diligence, the injury and that it was likely caused by the wrongful acts of another. *Baxter*, 182 S.W.3d at 463. Once these requirements are satisfied, limitations commences, even if the plaintiff does not know the exact identity of the wrongdoer. *Id.* We overrule appellants' first issue.

In their second issue, appellants argue they raised a genuine issue of material fact as to their defense of fraudulent concealment. Appellants assert appellees falsely certified their compliance with DISD guidelines through an affidavit from Mr. Goeters and that appellants relied upon appellees' representations they had not violated DISD policy. Although a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until after limitations has run, if the plaintiff has actual or constructive notice of alleged injury-causing conduct, such as when information of same is readily accessible and publicly available, the limitations period commences, regardless of any fraudulent concealment. *Hooks v. Samson Lone Star, LP*, 457 S.W.3d 52, 57–59 (Tex. 2015). Here, by 2007 appellants were aware they had not been paid due to the alleged wrongdoing of others involved in the E-Rate contract with DISD, but they were unaware of which entities and persons involved in the E-Rate contract had committed the wrongdoing. We conclude that under these circumstances, the doctrine of fraudulent concealment will not toll the running of the statute of limitations. *Id.* We overrule appellants' second issue.

Appellees have established the affirmative defense of limitations by conclusively showing that appellants' causes of action accrued more than four years before appellants filed suit. As a result, limitations bars appellants' claims for fraud, breach of fiduciary duty,

negligence, tortious interference with contract, and civil conspiracy, and appellees are entitled to summary judgment.

CONCLUSION

We affirm the trial court's grant of summary judgment in favor of appellees.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LAZO TECHNOLOGIES, INC., W&R TECHNOLOGY LLC D/B/A ATS SOUTH D/B/A ADVANCED TECHNOLOGY SOLUTIONS SOUTH, AND EDDIE HILL D/B/A HILL PROFESSIONAL SERVICES, Appellants

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Trial Court Cause No. CC-12-06786-D.
Opinion delivered by Justice Schenck, Justices Evans and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees HEWLETT-PACKARD COMPANY, GARRETT GOETERS, DAN WAMPLER, AND SHEARRARD THOMAS recover their costs of this appeal from appellants LAZO TECHNOLOGIES, INC., W&R TECHNOLOGY LLC D/B/A ATS SOUTH D/B/A ADVANCED TECHNOLOGY SOLUTIONS SOUTH, AND EDDIE HILL D/B/A HILL PROFESSIONAL SERVICES.

Judgment entered this 7th day of January, 2016.