

Opinion issued February 10, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-01026-CV

REDA IBRAHIM, Appellant

V.

ERNESTINE MATCHETT DIXON, Appellee

**On Appeal from the County Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 883,671**

MEMORANDUM OPINION

Appellant, Reda Ibrahim, challenges the trial court's rendition of summary

judgment in favor of appellee, Ernestine Matchett Dixon, in Ibrahim's suit against Dixon for negligence. In her sole issue, Ibrahim contends that the trial court erred in granting Dixon summary judgment on the ground that Ibrahim did not exercise due diligence in serving Dixon after the statute of limitations had expired.

We affirm.

Background

In her petition, filed on January 24, 2007, Ibrahim alleged that on May 5, 2005, Dixon, while driving her car, negligently struck Ibrahim as she walked across a private drive. Ibrahim served Dixon with her petition on March 21, 2009, approximately twenty-two months after the expiration of the statute of limitations. On April 9, 2009, Dixon filed her answer, in which she asserted the affirmative defense of limitations. Dixon subsequently filed a summary-judgment motion, asserting that Ibrahim "did not use diligence in effecting service of process" and had no explanation for the delay in service. Dixon attached to her motion her affidavit in which she testified that she had lived at "3714 Wyoming Street" in Harris County, Texas since the date of the accident. She noted that this address had been correctly identified in the police accident report. Dixon further testified that she had not left the State of Texas, she spent most of her time at her home address for personal reasons, and no one had attempted to serve her at her home address until March 21, 2009.

Dixon also attached to her summary-judgment motion the three citations that Ibrahim, through her counsel, had requested in the case. The first citation, issued on January 25, 2007, identified Dixon's service address as "3719" Wyoming Street, not "3714" Wyoming Street. The return for the citation revealed that a deputy, on February 1, 2007, unsuccessfully attempted service of this citation at 3719 Wyoming Street and wrote in his notes on the return "B/A," indicating that it was a "bad address," and "new occupant," indicating that someone else lived at the address. The deputy further wrote that on February 2, 2007, he had "left [a] message for new address" and, on March 2, 2007, he returned the citation to court because there was "no address from attorney to serve." The second citation, issued on May 23, 2007, again identified Dixon's service address as 3719 Wyoming Street. The return for the citation provided that the deputy, on May 29, 2007 and June 4, 2007, unsuccessfully attempted service on Dixon at 3719 Wyoming Street and wrote on the return that he notified the attorney regarding the "bad address." The deputy, on August 28, 2007, further wrote on the return, "return to court, no new address from attorney to serve." The third citation, issued on September 12, 2007, identified Dixon's correct service address as 3714 Wyoming Street. Andrea Hoxie, a process server, served this citation, but her service affidavit, which was attached to the citation, revealed that she did not receive the citation and petition until February 2008. Also, Hoxie served Dixon at her residence on 3714 Wyoming

Street approximately thirteen months later, on March 21, 2009.

Based upon the citations and evidence, Dixon argued that Ibrahim and her counsel did not exercise due diligence in serving her because they knew by March 2, 2007 that 3719 Wyoming Street was an incorrect service address for Dixon, Dixon's correct address of 3714 Wyoming Street had been disclosed in the police accident report on the date of the accident, Ibrahim did not obtain the citation with Dixon's correct address until September 12, 2007, Ibrahim waited another five months before sending the new citation to the process server, and the process server failed to serve Dixon for another thirteen months after receiving the citation.

In her response to Dixon's summary-judgment motion, Ibrahim asserted that Dixon had been "avoiding service," and, in support of this assertion, Ibrahim attached the affidavit of Hoxie, who testified that after receiving the citation, she had made "dozen of attempts" "at various times of the day" and on "different days of the week" to serve Dixon at her home on 3714 Wyoming Street. Hoxie left her contact information with an occupant at the home and on the door, but she never received any contact from Dixon. Hoxie noted that service attempts on Dixon "became part of [her] weekly routine," and she believed that Dixon had been avoiding service. Hoxie eventually made personal contact with Dixon at her home on March 21, 2009 and served her with the citation.

Ibrahim also attached the affidavit of her counsel, who testified that because

the police accident report was “almost two years old,” he consulted an online resource containing driver’s license records, which identified Dixon’s address as 3719 Wyoming Street, and he requested that the first citation include this address. Ibrahim’s counsel further testified that after the first citation was returned by the deputy in March 2007, he “investigated further” using additional online resources and determined again that 3719 Wyoming Street was Dixon’s address. Thus, he requested a second citation for that same address. However, Ibrahim’s counsel also explained that in May 2007, he hired a private investigator who prepared a report reflecting Dixon’s “residence address” as 3714 Wyoming Street, which was Dixon’s voter registration address. Ibrahim’s counsel explained that although the investigator identified Dixon’s home address as 3714 Wyoming Street in this report, the investigator had also identified seven “previous addresses” for Dixon, including 3719 Wyoming Street, as well as a spouse’s address and a separate vehicle registration address. Ibrahim’s counsel conceded that he did not “become aware that the second citation,” which was issued in May 2007 for 3719 Wyoming Street, had been returned for a bad address until September 2007.

In September 2007, Ibrahim’s counsel requested a third citation and used 3714 Wyoming Street as Dixon’s service address. Ibrahim’s counsel noted that he had “either picked [the citation] up or had [it] mailed to [him] later that month.” Ibrahim’s counsel “continued attempting to use online resources to locate which of

the several addresses” was Dixon’s correct address. In January or February 2008, he contacted Hoxie, the process server, and instructed her to serve the citation “starting [with] 3714 Wyoming” Street and “then to work through the other addresses.” Ibrahim’s counsel noted that Hoxie “became convinced relatively soon that 3714 Wyoming [Street] was the correct address,” and she subsequently served her there in March 2009. Finally, Ibrahim’s counsel testified,

At all times between January 2007 and March 21, 2009, I either believed that I had a citation out to be served at what I believed was a good address for Ms. Dixon or I was attempting to get a good address for Ms. Dixon. There was also never a time that I concluded that 3714 Wyoming was definitely Ms. Dixon’s correct address until Ms. Hoxie made that conclusion in early 2008.

Ibrahim contended that her evidence established that she had “tried diligently to locate and serve” Dixon, who, she asserted, had been avoiding service.

Standard of Review

To prevail on a summary judgment motion, a movant has the burden of proving that she is entitled to judgment as a matter of law and that there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When a defendant moves for summary judgment, she must either (1) disprove at least one essential element of the plaintiff’s cause of action or (2) plead and conclusively establish each essential element of her

affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey*, 900 S.W.2d at 341; *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts must be resolved in her favor. *Id.* at 549.

Diligence in Service

In her sole issue, Ibrahim argues that the trial court erred in granting Dixon's summary-judgment motion on the ground that limitations had expired because she presented "competent summary judgment evidence that [she] used due diligence to locate and effect service on [Dixon] and that [Dixon] was avoiding service."

If a plaintiff files her petition within the limitations period, but obtains service on the defendant outside of the limitations period, such service is valid only if the plaintiff exercised "diligence" in procuring service. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *see also Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) (explaining that "a timely filed suit will not interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation"). If a plaintiff diligently effects service after the expiration of the statute of limitations, the date of service relates back to the date of filing. *Proulx*,

235 S.W.3d at 215. If a defendant affirmatively pleads the defense of limitations and shows that service has occurred after the limitations deadline, the burden shifts to the plaintiff to prove diligence. *Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216. The plaintiff then must present evidence regarding the efforts made to serve the defendant and “explain every lapse in effort or period of delay.” *Proulx*, 235 S.W.3d at 216. The issue 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.” *Ashley*, 293 S.W.3d at 179 (citations omitted). The question of the plaintiff’s diligence in obtaining service is generally “one of fact” to be “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.” *Proulx*, 235 S.W.3d at 216. However, a plaintiff’s explanation of its efforts to obtain service may demonstrate a lack of diligence “as a matter of law” when “one or more lapses between service efforts are unexplained or patently unreasonable.” *Id.*

A plaintiff must bring a suit for personal injuries within two years from the time the cause of action accrued. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2010). Here, the accident occurred on May 5, 2005, and Ibrahim timely filed her petition on January 24, 2007. However, Dixon established that she was not served until March 21, 2009, which was approximately twenty-

two months after the expiration of the limitations period. Thus, the burden shifted to Ibrahim to explain her diligence in procuring service on Dixon.

The summary-judgment record establishes multiple “lapse[s] in effort or period[s] of delay” by Ibrahim in her efforts to serve Dixon. *See Proulx*, 235 S.W.3d at 216. It is undisputed that, in February 2007, a deputy had already reported that the 3719 Wyoming Street service address was a “bad address” and, on March 2, 2007, the deputy returned the citation to the court, noting that there was “no address from attorney to serve.” Ibrahim’s counsel testified that in May 2007, he retained a private investigator, who prepared a report identifying Dixon’s residence address as 3714 Wyoming Street, not 3719 Wyoming Street. Nevertheless, on May 23, 2007, Ibrahim’s counsel requested a second citation and used the 3719 Wyoming Street address. The same deputy again attempted to serve Dixon at that same address, but reported on June 4, 2007 that 3719 Wyoming Street remained a “bad address” for Dixon. Although we recognize that the private investigator had also stated in her report that 3719 Wyoming Street was one of Dixon’s seven previous addresses, the evidence demonstrates that the investigator identified Ibrahim’s current address as 3714 Wyoming Street, and this address was consistent with the police accident report.

Even if Ibrahim’s counsel’s decision to request a second citation with the same previously identified “bad address” could be found to be reasonable,

Ibrahim's counsel conceded that he did not become aware that the second citation had been returned until September 2007, approximately three months after the deputy reported it, for the second time, as a "bad address." Ibrahim's counsel, in September 2007, requested a citation using the 3714 Wyoming Street address, but he offered no evidence of any efforts to serve this citation until he forwarded it, approximately six months later, to the process server in February 2008. Ibrahim's counsel does not suggest that any other deputies or process servers made efforts to serve the citation before it was forwarded to the process server. Ibrahim's counsel did, in his affidavit, generally testify that he had "continued attempting to use online resources" to locate Dixon's address, he believed that "[a]t all times" he had an outstanding citation for what he "believed" to be "a good address" or he "was attempting to get a good address," and there was "never a time" that he "definitely" concluded that 3714 Wyoming Street was a correct address until his process server concluded this in "early 2008." But none of his testimony accounts for the significant delays identified above and, most obviously, the lapse between obtaining the September 2007 citation and forwarding it to Hoxie in February 2008.

As noted above, in determining diligence, we examine "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." *Proulx*, 235 S.W.3d at 216; *see also Mauricio v.*

Castro, 287 S.W.3d 476, 479 (Tex. App.—Dallas 2009, no pet.) (“Texas courts have consistently held that lack of diligence may be shown based on unexplained lapses of time between the filing of the suit, issuance of the citation, and service of process.”). We conclude that the record before us establishes, as a matter of law, that Ibrahim failed to exercise diligence in securing and serving the citation on Dixon. See *Boyattia v. Hinojosa*, 18 S.W.3d 729 (Tex. App.—Dallas 2000, pet. denied) (holding that plaintiff’s failure to take any action during clerk’s three-month delay in delivering citation constituted lack of diligence as matter of law); *Webster v. Thomas*, 5 S.W.3d 287, 289–90 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding plaintiff failed to use due diligence as matter of law, in part, because evidence showed that during three month period from filing of petition to issuance of citation, plaintiff called wrong clerk’s office when inquiring about issuance of citation); *Butler v. Ross*, 836 S.W.2d 833, 836 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding five-and-one-half months of no service efforts between failed attempts at wrong address and proper service at correct address constituted lack of due diligence as matter of law). Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Dixon.

Finally, we address Ibrahim’s comparison of the facts present in the instant case with those considered by the supreme court in *Proulx*, in which the plaintiff utilized two process servers and two investigators in attempting to locate a correct

address and, over the course of nine months, made thirty service attempts at five different addresses. *Proulx*, 235 S.W.3d at 217. When one of the investigators located three possible alternative addresses, the investigator made twelve unsuccessful service attempts at the alternative addresses. *Id.* at 215. An investigator stated that throughout the nine months of service attempts, the defendant was “moving from relative to relative and doing his best to avoid service from the courts and creditors.” *Id.* The plaintiff, after nine months of unsuccessful efforts and approximately eight months after the statute of limitations expired, changed course and obtained substituted service on the defendant. *Id.* at 215.

In contrast, here, Ibrahim did not serve Dixon until twenty-two months after the expiration of the statute of limitations. Ibrahim’s counsel’s private investigator, in May 2007, determined Dixon’s residence address to be 3714 Wyoming Street. Ibrahim’s counsel did not obtain the third citation with the 3714 Wyoming Street address until September 2007. Once he obtained the third citation, Ibrahim’s counsel waited approximately six months to forward the citation to Hoxie. Additionally, there is no evidence of efforts for substituted service. *See Ashley*, 293 S.W.3d at 179 (stating that if plaintiff was unable to locate defendant, or if plaintiff thought defendant was evading service, “other methods of service were available” and “[i]n particular, no substitute service such as service by publication was attempted”). The evidence of Ibrahim’s counsel’s overall efforts

in this case establishes lack of diligence as a matter of law.¹ *See id.* (stating that courts “must consider overall effort expended over the gap in service, and whether the search ceased to be reasonable, especially when other methods of service were available”).

We overrule Irbahim’s sole issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.

¹ Ibrahim’s allegation that Dixon was “avoiding service” is based upon Hoxie’s testimony that Dixon evaded her service efforts during the thirteen month period between February 2008 and March 2009. Because we conclude that the evidence established lack of diligence arising from lapses and periods prior to Hoxie receiving the citation in February 2008, we need not directly address whether Ibrahim, through the process server Hoxie, exercised diligence after February 2008.