Opinion issued March 3, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00328-CV

DAVID J. DAVIS, Appellant

V.

NORA ROBERTS, Appellee

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Case No. 2007-73431

MEMORANDUM OPINION

David Davis appeals a summary judgment entered in favor of Nora Roberts. The trial court granted Roberts's summary judgment motion on limitations grounds, holding that Davis failed to exercise reasonable diligence in obtaining service of process on Roberts. Davis contends that the trial court erred in granting

Roberts's motion because he raised a fact issue on the question of diligence of service. We agree that Davis did not raise a fact issue as to diligence in effectuating service. We therefore affirm.

Background

On December 18, 2006, Davis and Roberts were involved in a car accident. Davis filed suit about a year later, on December 4, 2007, but did not serve Roberts with the citation until May 11, 2009, about five months after the statute of limitations had run. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West Supp. 2005) (setting two-year statute of limitations period for personal injury actions).

Six months before Davis filed suit, in June 2007, Roberts moved from Seabrook, Texas to an Oak Park Court address in Baton Rouge, Louisiana. Roberts's daughter, Karen Bailor, filed a change of address form for her mother before leaving Seabrook and again shortly after arriving in Baton Rouge. The State of Louisiana issued a driver's license to Roberts on October 4, 2007. The license states Robert's Oak Park address in Baton Rouge. Before he filed suit, Davis knew that Roberts had sold her home in Seabrook and moved. He contacted the United States Postal Service for a forwarding address. He never received a response.

In his December 2007 suit, Davis requested that Roberts be served "anywhere she could be found." By the end of December, Davis located a possible address for Roberts at a UPS Store private postal drop in Baton Rouge. Davis sent a citation to this location on December 31, 2007. It was returned unsigned on January 30, 2008. Over the next seven months, Davis and his attorney made regular internet searches for information about Roberts's location, periodically called the UPS Store, and looked for a reasonably priced private investigator to locate Roberts. At some point during this period, a representative at the store informed his attorney that Roberts was using the postal drop.

More than a year and a half later, on August 27, 2008, Davis ordered citation on the Chairman of the Texas Transportation Commission, using the postal drop box to which he previously had sent a citation. Davis received a second returned citation on January 27, 2009. At some point, Davis retained a private investigator. In early April 2009, the private investigator obtained the Oak Park address for Roberts in Baton Rouge. On April 17, 2009, Davis requested citation at the address. On May 11, 2009, about five months after the statute of limitations had expired, Roberts was properly served.

Roberts sought summary judgment on a statute of limitations affirmative defense, arguing that Davis failed to exercise diligence in serving her after the

limitations period had run. In response, Davis argued that he had exercised diligence in attempting service.

Discussion

Standard of Review

We review de novo the trial court's ruling on a motion for summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). In a traditional motion for summary judgment, the movant must establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). When a defendant moves for summary judgment, it 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 its affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). To determine if the nonmovant raised a fact issue, we review the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

Diligence in 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, then 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). Thus, 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, if "one or more lapses between service efforts are unexplained or patently unreasonable," then the record demonstrates lack of diligence as a matter of law. *Id.* The reviewing court must consider the overall effort expended over the lapse in service, and whether the search ceased to be reasonable, especially when other methods of service were available. *Ashley*, 293 S.W.3d at 181 (citations omitted).

In *Ashley*, Ashley and Hawkins were involved in an automobile accident, after which Ashley moved to California without leaving a forwarding address. *Id.* at 177. Hawkins sued Ashley prior to the expiration of the statute of limitations, but served her almost a year after the limitations period had run. Hawkins attempted service twice, once in Texas and once in California, before she successfully served Ashley. *Id*. Ashley maintained that Hawkins failed to exercise diligence in serving her. *Id*. The Texas Supreme Court held that, as a matter of law, Hawkins did not raise a fact issue as to her diligence because an eight–month lapse between service efforts existed, during which time Hawkins spent twenty hours searching for Ashley's whereabouts on several internet websites. *Id*. at 180–81.

In contrast with *Ashley*, in *Proulx*, the Texas Supreme Court held that a plaintiff's thirty-seven attempts at five different addresses over the course of nine

months showed diligence sufficient to preclude summary judgment. 235 S.W.3d at 217. After numerous unsuccessful attempts, the plaintiff in *Proulx* sought substitute service because it was clear the defendant was attempting to evade service by repeatedly moving. *Id*; *see also Holstein v. Fed. Debt Mgmt. Inc.*, 902 S.W.2d 31, 36 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding that three–month delay in service did not show lack of diligence because clerk's error caused delay, and trial counsel for plaintiff sought to correct error through repeated calls and letter to clerk's office); *Hodge v. Smith*, 856 S.W.2d 212, 215–17 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (finding diligence was not lacking as matter of law where plaintiff requested service by publication four months after suit was filed and after counsel made two phone calls in attempt to locate defendant).

Here, the facts resemble those in *Ashley*, not *Proulx*. The car accident between Davis and Roberts occurred in December 2006. Davis filed suit in December 2007, before the expiration of the two–year limitations period. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West Supp. 2009). Davis did not, however, serve Roberts with the citation until May 2009, almost five months after the statute of limitations had run and a year and a half after he filed suit. Thus, Davis had the burden to explain his diligence in procuring service on Roberts. *See Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216.

Like the plaintiff in *Ashley*, Davis attempted service twice, with lengthy periods of service inactivity, before he successfully served her. In late December 2007, Davis sent citation to a UPS Store drop in Baton Rouge. In August 2008, he ordered citation on the Chairman of the Texas Transportation Commission, using the same store drop. Both citations were returned unsigned. From the end of January 2008 until August 2008, about seven months, Davis made regular internet searches, repeatedly called the UPS Store, and looked for a reasonably priced private investigator, but made no attempts at service. From late August 2008 until late January 2009, about five months, Davis continued searching for a private investigator and using internet sources while he waited for service by the Texas Transportation Commission, at the same address, but made no interim attempts at service. Lastly, from late January 2009 until April 2009, about three months, Davis continued to search the internet while waiting for a report from a private investigator. The summary judgment evidence does not denote the time spent conducting internet searches.

The Texas Supreme Court found in *Ashley* that twenty hours spent searching the internet in between attempts at service did not raise a fact issue as to reasonable diligence. Here, we follow *Ashley* and conclude that Davis's internet searches, intermittent phone calls to the UPS Store, and search for an investigator are not enough to raise a fact issue as to diligence during the three gaps in attempted

service. *See Ashley*, 293 S.W.3d at 180–81. Davis does not specify the amount of time, or frequency with which, he searched for Roberts or a private investigator. *See Webster v. Thomas*, 5 S.W.3d 287, 290 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that four–month delay in service amounted to lack of due diligence because although plaintiff made some efforts at service they were not persistent). Also, he offers no explanation how the phone calls to the UPS store, where he already sent a fruitless citation, could have assisted him in locating Roberts. *See Carter v. MacFadyen*, 93 S.W.3d 307, 314–15 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) ("A flurry of ineffective activity does not constitute due diligence if easily available and more effective alternatives are ignored."). Notably, Davis does not controvert the summary judgment evidence that Roberts resided at the Oak Park address in Baton Rouge continuously since before Davis filed suit, and that she used that address in obtaining a Louisiana driver's license in October 2007. Nothing in the summary judgment evidence reveals that the UPS store address was valid or that Roberts made any attempt to avoid service.

Conclusion

We conclude that the trial court properly ruled that the summary judgment evidence fails to raise a fact issue as to reasonable diligence. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.