**Opinion issued February 1, 2018**

**In The**

# Court of Appeals

**For The**

# First District of Texas

**NO. 01-17-00388-CV**

**CONRADA ZAMORA AND RYAN ALVARADO, Appellants**

**V.**

**JAQUELIN CRUZ, Appellee**

**On Appeal from County Civil Court at Law No. 2**
**Harris County, Texas**
**Trial Court Case No. 1066845**

## MEMORANDUM OPINION

Appellants Conrada Zamora and Ryan Alvarado challenge a summary judgment rendered in favor of Jaquelin Cruz. The trial court granted Cruz's summary judgment motion on limitations grounds, holding that Appellants had failed to exercise reasonable diligence in obtaining service of process on Cruz.

In two issues, Appellants contend that the trial court erred in granting Cruz's motion for summary judgment because the evidence raised a fact issue on the question of diligence of service. Because we conclude that the summary-judgment evidence established conclusively that Appellant failed to exercises reasonable to effectuate service on Cruz, we affirm the trial court's judgment.

## Background

On August 31, 2013, Appellants and Cruz were involved in a car accident. Claiming to have suffered damages from the car accident, Appellants sued Cruz on August 31, 2015, the last day to file suit before expiration of the statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West 2017) (establishing two-year statute of limitations for personal-injury actions).

Appellants retained a private process server to serve Cruz with the suit papers. Between September 14 and 18, 2015, the process server made several unsuccessful attempts to serve Cruz at the address provided in the car-accident report. The tenant, who had resided at the address for two months, told the process server that Cruz did not live there and that he did not know Cruz.

Four months later, on January 11, 2016, the trial court signed an order dismissing the case for want of prosecution. At that time, Appellants had not yet served Cruz with process. Appellants filed a motion to reinstate the case, which

was granted. The trial court signed an order reinstating the case on February 2, 2016.

After they obtained a current address for her, Appellants served their petition and citation on Cruz by certified mail on March 15, 2016. Cruz answered and filed a traditional motion for summary judgment on January 24, 2017. In her motion, she asserted that the statute of limitations barred Appellants' suit because they had not exercised diligence in serving her.

Cruz attached evidence to her motion establishing that suit was filed on August 31, 2015 but that she was not served until March 15, 2016. She also offered (1) the order dismissing the suit for want of prosecution on January 11, 2016, (2) Appellants' January 21, 2016 motion to reinstate the suit, (3) the order reinstating the suit on February 2, 2016, and (4) Appellants' discovery responses. Cruz pointed out that nearly seven months had elapsed between filing of suit and service of process. She asserted that Appellants had provided no explanation for "the several month gap" of service.

Cruz pointed out that, in written discovery, when asked to "[p]roduce any and all documents evidencing why service was not accomplished before March 15, 2016," Appellants had responded that they had used the address listed for Cruz in the accident report but were unable to effectuate service at that address. Appellants then stated, "After a few months, attorney for Plaintiff was able to

locate an address that matched the name and DOB [of] Defendant [Cruz] and service was effectuated[.]" In her motion, Cruz asserted, "Plaintiffs have not shown constant and continuous attempts at service of [her] nor explained why there is a gap in attempts at service."

Appellants responded to the motion. They attached the affidavit of the process server, who testified that, between September 14 and September 18, 2015, he attempted to serve Cruz at the address provided by Appellants' counsel. He explained that, after he had made several attempts to serve Cruz, the person residing at the provided address informed him that he had lived there for two months, Cruz did not reside there, and he did not know Cruz.

The process server indicated that he later received a new address for Cruz from Appellants' counsel. He testified that, "upon receiving [the] new address," he mailed a copy of the "original petition citation" to Cruz by certified mail on March 8, 2016. The process server stated that Cruz was served with process when she signed the green card for the certified mailing on March 15, 2016.

Appellants also offered their attorney's affidavit. The attorney provided testimony similar to that of the process server regarding the failed attempts at service in mid-September 2015. The attorney's affidavit also stated,

> [The process server] then returned the service package to me, where I discussed with him that I wanted to try and maybe track [Cruz] down at the criminal building if she was still on probation, because based on past experiences, it's extremely hard to collect on a default judgment.

> Therefore, I wanted to try and serve [Cruz] if possible so that I could give my clients a chance to collect on any likely judgment. I had to file a motion to reinstate the case on the docket at one point because there had been no service and the case was DWOP'd. After the reinstatement, I would often check public data to see if there was a new address for [Cruz]. In March of 2016, I noticed a new address listed for [Cruz] that matched her [birthdate], and therefore contact[ed] [the process server] to attempt service again at the new address. Service was effectuated on [Cruz] on March 15, 2016.

Cruz replied to Appellants' response, asserting that Appellants had offered no proof to show that they acted diligently to serve her. Cruz averred that Appellants provided "no explanation . . . for the lack of effort in locating [Cruz] from the time [the process server] returned the service package due to inability to serve [her] to actually serving [her]." And Appellants "failed to show diligence when they choose not to locate and serve Ms. Cruz between September and March. . . . [Appellants] have not provided any explanation for the six month gap of no activity."

The trial court granted Cruz's motion for summary judgment, and this appeal followed. In two issues, Appellants assert that the trial court erred by granting summary judgment.

**Appellants Failed to Proffer Evidence of Diligent Effort to Serve Cruz**

On appeal, Appellants argue that they exercised diligence in attempting to serve Cruz. They point out that they "timely filed their suit on the two-year anniversary of the injury caused by [Cruz's] negligence." They further point out

that, 14 days after suit was filed, they made several attempts, between September 14 and 18, 2015, to serve Cruz at the address listed on the accident report and in "public data," which turned out to be "an incorrect address." Appellants claim that they presented summary-judgment evidence showing that they then "diligently searched for a correct address by checking the public data system on a frequent basis to monitor when a new address would be entered to locate [Cruz]." And, "[w]hen a viable address was located, then service was effectuated promptly."

## A. 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). 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. TEX. R. CIV. P. 166a(c); *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641 (Tex. 2015). 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). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). To

determine whether there is a fact issue in a motion for summary judgment, we review the evidence in the light most favorable to the non-movant, 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*, 168 S.W.3d at 827).

**B. Diligence in Service**

"Summary judgment on a limitations affirmative defense involves shifting burdens of proof." *Perez v. Efurd*, No. 01–15–00963–CV, 2016 WL 5787242, at *2 (Tex. App.—Houston [1st Dist.] Oct. 4, 2016, no pet.) (mem. op.) (citing *Proulx v. Wells*, 235 S.W.3d 213, 215–16 (Tex. 2007)). When 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. *Davis v. Roberts*, No. 01–10–00328–CV, 2011 WL 743198, at *2 (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.) (citing *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009)); *see also Proulx*, 235 S.W.3d at 215 (providing 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. But, 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 215.

Diligence is determined by asking "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." *Proulx*, 235 S.W.3d at 216. The plaintiff must present evidence regarding the efforts made to serve the defendant and "explain every lapse in effort or period of delay." *Id.* 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." *Id*. 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.*

Appellants alleged that the car accident occurred on August 31, 2013, setting August 31, 2015 as the date the two-year statute of limitations expired. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). In her motion for summary judgment, Cruz proved that she was not served until March 15, 2016, nearly seven months after the limitations period expired. As a result, the burden shifted to Appellants to show that they exercised diligence in attempting to serve Cruz. *See Ashley*, 293

S.W.3d at 179; *Proulx*, 235 S.W.3d at 216. That is, Appellants then had 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." *Proulx*, 235 S.W.3d at 216.

Appellants assert that they offered evidence of due diligence sufficient to create an issue of material fact. They point out that their evidence showed that they hired a process server, who first attempted service 14 days after suit was filed. Between September 14 and 18, 2015, the process server made several attempts to serve Cruz at the address provided in the accident report and in the public record. After he learned that Cruz did not reside at the address, the process server returned the service papers to Appellants' attorney.

In his affidavit, Appellants' attorney testified that he then "discussed with [the process server] that [he] wanted to try and maybe track [Cruz] down at the criminal building if she was still on probation." However, no evidence was presented indicating that counsel actually took any action in this regard to locate Cruz nor was evidence offered indicating that such action would have been effective. *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.").

The case was dismissed for want of prosecution on January 11, 2016. Appellants' counsel acknowledged in his affidavit that the trial court dismissed the case because "there had been no service."

Appellants' counsel also testified that *after* the case's reinstatement, which occurred on February 2, 2016, he "would often check public data to see if there was a new address for Defendant." He stated that, in March 2016, he found a new address listed for Cruz. He then contacted the process server, who then successfully served Cruz by certified mail on March 15, 2016.

In their brief, Appellants intimate that their summary-judgment evidence showed that they proactively took steps to locate Cruz throughout the entirety of the attempted-service gap between September 18, 2015 and March 15, 2016. However, that contention is not supported by the record. The testimony of Appellants' counsel indicates that, once they found out on September 18, 2015 that Cruz did not live at the address listed in the accident report, Appellants took no steps to locate Cruz until *after* the case was reinstated on February 2, 2016. No evidence was presented showing what if any effort Appellants made during the four and one-half month gap period between September 18, 2015 and February 2, 2016. Nor did Appellants offer any explanation or justification regarding the lack of service efforts during that period.

Appellants also intimate that not enough time had elapsed between attempted service in September 2015 and actual service in March 2016 to negate the diligence of their service efforts. We disagree. "We have held that unexplained delays of a few months negate due diligence as a matter of law." *Perez*, 2016 WL 5787242, at *2 (citing *Taylor v. Thompson*, 4 S.W.3d 63, 65–66 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (four months); *Butler v. Ross*, 836 S.W.2d 833, 835–36 (Tex. App.—Houston [1st Dist.] 1992, no writ) (five months)). "[W]hile the time period is important, it is not necessarily determinative of the question of diligence." *Ashley*, 293 S.W.3d at 181.

We conclude that Appellants' summary-judgment evidence did not create a fact issue regarding diligence because the four and one-half month gap in service efforts is left unexplained.[1] *See id.* (holding unexplained eight-month gap fatal to

[1] Appellants cite the following two cases to support their assertion that their summary-judgment evidence created a material fact issue regarding diligence of service: *Tate v. Beal*, 119 S.W.3d 378 (Tex. App.—Fort Worth 2003, pet. denied) and *Trice v. Tentzer*, No. 03–99–00775–CV, 2000 WL 1125246 (Tex. App.—Aug. 10, 2000, no pet.) (not designated for publication). However, these cases are distinguishable from this case. In *Tate*, the court held that the plaintiff's summary-judgment evidence created a fact issue on diligence, despite the three-month delay in service, because the plaintiff had "spent some of this time obtaining [the defendant's] correct address, requesting issuance of a second citation, and hiring a private process server." 119 S.W.3d at 381. In *Trice*, the court found that the plaintiffs' evidence raised a fact issue regarding diligence of service. 2000 WL 1125246, at *4. The summary-judgment evidence there showed that the plaintiffs had made continuous efforts over a number of months, such as contacting telephone information, searching the Internet, traveling to the town where defendants resided, and hiring a private investigator, in order to locate the defendants for service. *Id.* In neither case did the evidence show, as it does

plaintiffs' showing that they acted diligently); *see also Villanueva v. McCash Enters.*, No. 03–13–00055–CV, 2013 WL 4487520, *4 (Tex. App.—Austin Aug. 15, 2013, no pet.) (mem. op.) (concluding four-month delay in service showed a lack of due diligence as a matter of law). We hold that Appellants failed to meet their summary-judgment burden. *See Ashley*, 293 S.W.3d at 181. The trial court properly granted summary judgment in Cruz's favor.

We overrule Appellants' two issues.

## Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

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

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here, an unexplained gap in service efforts by the plaintiffs. Thus, these cases are of little relevance to our determination in this case.