

Opinion issued July 10, 2018



In The
Court of Appeals
For The
First District of Texas

NO. 01-17-00620-CV

YOLANDA CARRIERE, Appellant
V.
ALEXANDRA RILEY, Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2014-01958-7

MEMORANDUM OPINION

Appellant Yolanda Carriere sued appellee Alexandra Riley for injuries sustained in a car accident. The lawsuit was served on Riley over four years after the accident, and the trial court rendered a take-nothing summary judgment based on limitations. On appeal, Carriere challenges the trial court's failure to grant

additional time for her to file a response to the motion for summary judgment, and she argues that the court erred by granting the summary judgment because Riley's absence from the state tolled the limitations period.

Regardless of whether it would have been error to disregard Carriere's late-filed summary-judgment response, that response was inadequate to raise fact issues about her diligence in attempting to serve the lawsuit or the time period when Riley was absent from the state. Accordingly, we affirm.

Background

On July 21, 2012, Yolanda Carriere was driving when her car was struck by a car driven by Alexandra Riley. On January 16, 2014, Carriere filed an original petition alleging that she had suffered personal injuries due to Riley's negligence.

According to an affidavit attached to Carriere's motion for new trial, in January 2014 a process server attempted to serve Riley in Houston at the address on her Texas driver's license. The process server averred that he made attempts to serve her between February and May 2014. In July 2014, he ascertained Riley's parents' address and provided it to Carriere's attorney. About two months later, his "research" determined that Riley had been living in Omaha, Nebraska and attending a community college since 2013. The affidavit did not disclose the basis for this factual assertion, and in another part of the affidavit, the process server

stated that “[b]ased on information and beliefs, Ms. Riley was a college student in Omaha . . . from at least 2013 until October of 2016.”

The process server did not provide any information about his efforts, if any, to serve Riley with the petition from September 2014 through January 2016. In January 2016, he obtained a possible address for Riley in Omaha, Nebraska. This was not a valid address. The process server continued his search despite flooding that impacted his office in April and May 2016. In October 2016, he obtained another address in Omaha, where Riley was served the same month.

Meanwhile, in April 2015, Carriere sued Riley’s parents, alleging that they owned the car that Riley was driving at the time of the collision and that they had negligently entrusted it to their daughter. In October 2015, in response to a request for disclosure, the parents provided Riley’s address, which was the same Omaha, Nebraska address where she eventually was served in October 2016. In response to a motion for summary judgment, Carriere later nonsuited her claims against the parents.

On October 24, 2016, Riley filed an answer asserting a general denial and a limitations defense. She also moved for summary judgment based on limitations, arguing that although Carriere had filed suit timely, she did not act with diligence in serving it.

A hearing on the summary-judgment motion was scheduled for April 24, 2017. On April 25, just before midnight, Carriere attempted to file electronically a motion for leave to file an out-of-time response to the motion for summary judgment. This filing was rejected as “illegible/unreadable.” The next day, April 26, the trial court granted Riley’s motion for summary judgment. That same day, Carriere refiled the motion for leave to file a late response. She asserted that her counsel had been out of town when the summary-judgment motion was filed and that his staff mistakenly recorded the submission date. No substantive response to the summary-judgment motion was attached to the motion for leave, which requested an extension until May 8, 2017 to respond to the summary-judgment motion.

The court did not expressly rule on the motion for leave to file a late response, and Carriere filed a motion for new trial a month later. She explained the calendaring mistake and asked the court to allow a late filing. She asserted that Riley would “suffer no prejudice,” and that she was “prepared to reimburse” reasonable expenses associated with obtaining the prior summary judgment.

The motion for new trial also responded to the limitations defense presented in the motion for summary judgment. Carriere argued that Riley’s absence from the state from 2013 through October 2016 tolled limitations under section 16.063 of the Civil Practice and Remedies Code. Because of the tolling statute, Carriere

maintained that limitations did not bar her suit, and the court erred by granting the motion for summary judgment. Carriere's counsel attached to the new-trial motion his own affidavit and an affidavit from the process server regarding his efforts to locate Riley.

The motion for new trial was denied by operation of law, and Carriere appealed.

Analysis

Carriere raises three issues, challenging the trial court's failure to allow her to file an out-of-time response to the motion for summary judgment and asserting that the grant of summary judgment was erroneous in light of the tolling statute. In her first issue, Carriere asserts that the court abused its discretion by granting the summary judgment without allowing her "leave of court for a meaningful opportunity to file a late response," when her tardiness in responding was accidental. In her second and third issues, Carriere asserts that the court erred by granting summary judgment because Riley's absence from the state tolled the limitations period. We conclude that Carriere's evidence did not raise a question of fact sufficient to defeat summary judgment, so we need not resolve the separate question of whether it would have been error to disregard the response as untimely.

"The limitations period for a personal-injury claim is two years from the date the cause of action accrued. TEX. CIV. PRAC. & REM. CODE § 16.003. "If a

party files its petition within the limitations period, service outside the limitations period may still be valid if the plaintiff exercises diligence in procuring service on the defendant.” *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009). When a defendant has pleaded the defense of limitations and shown that she was served after limitations expired, “the burden shifts to the plaintiff . . . 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 v. Wells*, 235 S.W.3d 213, 216 (Tex. 2007). One or more unexplained lapses between service efforts demonstrates lack of diligence. *Id.*; see *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (unexplained delay in service for total of 38 months conclusively established lack of diligence); *Butler v. Ross*, 836 S.W.2d 833, 836 (Tex. App.—Houston [1st Dist.] 1992, no writ) (unexplained delay in service and lack of attempted service for five-and-a-half months constituted a lack of due diligence).

The automobile collision which gave rise to this lawsuit occurred on July 21, 2012. Absent some demonstration that the limitations period was tolled, it expired two years later on July 21, 2014. TEX. CIV. PRAC. & REM. CODE § 16.003. Carriere filed suit against Riley within the limitations period. But Riley was not served with citation until October 13, 2016, more than two years after the expiration of the limitations period.

Riley's motion for summary judgment argued that Carriere failed to exercise diligence in effecting service. Because Riley pleaded limitations and showed that she was served after the expiration of the limitations period, the burden shifted to Carriere to present evidence regarding the efforts that were made to serve her, and to explain every lapse in effort or period of delay. *See Proulx*, 235 S.W.3d at 216. Carriere's evidence, which was attached to her motion for new trial, included an affidavit from the process server, which explained his efforts to effect service. However, the affidavit was silent about service attempts for over a year, between September 2014 and January 2016.

Carriere also argues that because Riley was temporarily absent from the state, the limitations period was tolled. *See* TEX. CIV. PRAC. & REM. CODE § 16.063 (“The absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence.”). Carriere's evidence showed that Riley was absent from the state on the day that she was served, but it was not competent evidence to establish any other time periods when she was absent from the state. *See* TEX. R. CIV. P. 166a(c), (f); *Humphreys v. Caldwell*, 888 S.W.3d 469, 470 (Tex. 1994) (“An affidavit which does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally insufficient.”). Thus Carriere did not satisfy her burden to

raise a fact question about Riley's absence from the state that would defeat summary judgment. *See Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Because there was an unexplained lapse in service efforts of more than a year, we conclude that Carriere did not demonstrate diligence. *See Proulx*, 235 S.W.3d at 216; *Gant*, 786 S.W.2d at 260; *Butler*, 836 S.W.2d at 836. And because she also did not raise a fact question on her affirmative defense of tolling under section 16.063, even if Carriere had been granted leave to file a late response the trial court would not have erred by granting summary judgment in favor of Riley.

We overrule all of Carriere's issues.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Bland, and Massengale.