Opinion issued September 20, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00325-CV

ANDREW MUNOZ, Appellant

V.

SARABETH CARDONA, Appellee

On Appeal from the 312th District Court
Harris County, Texas
Trial Court Case No. 2020-74090

MEMORANDUM OPINION

This is an appeal from a summary judgment order dismissing with prejudice the petition to adjudicate parentage filed by Andrew Munoz. We reverse and remand.

Background

In November 2020, appellant Andrew Munoz filed a petition to adjudicate parentage claiming that he was the biological father of two children born to appellee Sarabeth Cardona. The children, Ivan and Julia,[1] were born on May 12, 2014 and November 9, 2015 respectively. Cardona was married to Jose Pineda at the time of each child's birth. Therefore, Pineda was presumed to be the father of each child. *See* TEX. FAM. CODE § 160.204(a) (defining presumed father as man married to the mother when child is born).

Cardona moved for traditional summary judgment contending that the statute of limitations governing suits to adjudicate parentage of children with a presumed father barred Munoz's suit and that none of the exceptions that would toll the statute of limitations applied. *See* TEX. FAM. CODE § 160.607. As summary-judgment evidence, Cardona attached her own affidavit and an affidavit from her then-husband Jose Pineda.

The associate judge granted Cardona's motion. Munoz requested a de novo hearing before the district court. Following that hearing, the district court granted Cardona's motion and dismissed the case. Munoz appealed.

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[1] We identify the minors by aliases. TEX. R. APP. P. 9.9(a)(3).

Summary Judgment

Munoz argues that Cardona did not meet her summary-judgment burden. He argues that she did not establish that the suit was barred by the Family Code or the statute of limitations. Munoz maintains that a statutory exception applied and tolled the statute of limitations. He argues that Cardona did not demonstrate that the statutory exceptions did not apply. He also argues that the affidavits she submitted were conclusory. Finally, he argues that even if she met her burden as the summary judgment movant, his own summary judgment evidence created a fact issue that precluded summary judgment. We hold that the trial court erred in granting summary judgment in favor of Cardona because she did not conclusively prove that the suit was barred as a matter of law.

A. Standard of Review

We review a summary judgment de novo. *Erikson v. Renda*, 590 S.W.3d 557, 563 (Tex. 2019). In a de novo review, we give no deference to the trial court's ruling. *McFadin v. Broadway Coffeehouse, LLC*, 539 S.W.3d 278, 282 (Tex. 2018).

A party moving for traditional summary judgment has the burden to show that there is no genuine issue as to any material fact and that she is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 131 (Tex. 2019). The movant must conclusively disprove at least

one element of each of the nonmovant's claims or conclusively prove each element of an affirmative defense. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). Proof is conclusive if reasonable people could not differ in their conclusions. *Helix Energy Sols. Grp. Inc. v. Gold*, 522 S.W.3d 427, 431 (Tex. 2017).

If the movant carries her burden, then the burden shifts to the nonmovant to come forward with evidence that raises a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). In deciding whether a disputed issue of material fact precludes summary judgment, we credit evidence favorable to the nonmovant if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *Erikson*, 590 S.W.3d at 563. We indulge every reasonable inference and resolve all doubts in the nonmovant's favor. *Lujan*, 555 S.W.3d at 84.

"To obtain traditional summary judgment on the ground that the limitations period expired before the plaintiff brought suit, the defendant must conclusively negate any tolling doctrines asserted." *Draughon v. Johnson*, 631 S.W.3d 81, 92 (Tex. 2021).

B. Statute of Limitations

Munoz argues that the trial court erred in granting summary judgment because Cardona did not meet her burden of proof regarding the statute of limitations and its tolling exceptions. We agree.

1. Applicable Law

A man married to the mother of a child born during the marriage is presumed to be the father of the child. TEX. FAM. CODE § 160.204(a). When unrebutted, this presumption establishes the parent-child relationship between the child and the man presumed to be the father. *Id.* § 160.201(b)(1). A man who is a "presumed father" is recognized as the father of the child "until that status is rebutted or confirmed in a judicial proceeding." *Id.* § 160.102(13). The presumption may be rebutted only by (1) a proceeding to adjudicate parentage under the Texas Family Code, or (2) the filing of a valid denial of paternity by the presumed father in conjunction with the filing by another person of a valid acknowledgment of paternity. *Id.* § 160.204(b).

When a child has a presumed father, a proceeding "brought by a presumed father, the mother, or another individual" to adjudicate parentage must be commenced "not later than the fourth anniversary of the date of the birth of the child." TEX. FAM. CODE § 160.607(a). However, a proceeding seeking to

adjudicate the parentage of a child having a presumed father may be maintained at any time if the court determines that:

> (1) The presumed father and the mother of the child did not live together or engage in sexual intercourse with each other during the probable time of conception; or
>
> (2) The presumed father was precluded from commencing a proceeding to adjudicate the parentage of the child before the expiration of the time prescribed by Subsection (a) because of the mistaken belief that he was the child's biological father based on misrepresentations that led him to that conclusion.

TEX. FAM. CODE § 160.607(b).

2. Procedural History

Cardona moved for summary judgment alleging that the statute of limitations had run and that as a matter of law, the exceptions to the statute of limitations did not apply. Her summary judgment evidence included her own affidavit and Pineda's affidavit in which they each stated that they had sexual intercourse during the probable time of conception of each child. The affidavits are silent as to whether they lived together during the same periods.

At the hearing in the district court, Cardona argued that the summary-judgment standard and the proper interpretation of section 160.607(b)(1) required her to prove that either she and Pineda lived together or that they were having sexual relations at the time of each child's probable conception, not both. She argued that she met her burden to show that the suit was barred as a matter of law

with the affidavits that state that she and Pineda were having sexual relations at the probable conception times. Cardona cited to *In re K.M.T.* from the Texarkana Court of Appeals, which states that the only exception to the four-year statute of limitations for children with a presumed father "requires proof that the married couple is not living together and that they are not having sexual relations during the probable time of conception." *In re K.M.T.*, 415 S.W.3d 573, 578 (Tex. App.—Texarkana 2013, no pet.). Cardona argued that she negated one part of the statutory exception with her evidence, and therefore, Munoz could not succeed as a matter of law.

Munoz argued that the summary judgment standard required Cardona, as the movant, to negate both portions of section 160.607(b)(1) in order to prove as a matter of law that the suit could not proceed based on the statute of limitations. He argued that the statute is not ambiguous. In order to succeed on summary judgment, Cardona, as the movant, needed to prove the affirmative defense of limitations, including both parts of the exception.

Munoz argued that section 160.607(b)(1) allows the suit to proceed if either (1) the couple was not living together or (2) the couple was not having sexual relations at the probable time of conception. He argued that Cardona did not produce any evidence that she lived with the presumed father at the relevant times. Therefore, Cardona did not meet her summary judgment burden to conclusively

negate the statute of limitations and its exceptions. Munoz also argued that the affidavits Cardona offered were conclusory. Finally, he argued that if Cardona met her burden as a summary-judgment movant, summary judgment was still erroneous because he met his burden as the nonmovant to produce evidence to create a fact issue. Munoz submitted his own affidavit that he believed, when considered in the light most favorable to him as nonmovant, created a fact issue about whether Cardona and Pineda lived together at the relevant times.

3. Analysis

Cardona did not meet her summary-judgment burden to prove that the suit was barred as a matter of law. In order to succeed on her motion for summary judgment, Cardona was required to conclusively prove each element of the statute of limitations affirmative defense. *Frost Nat'l Bank*, 315 S.W.3d at 508. She also needed to conclusively negate the exception found in 160.607(b)(1). *See cf. Draughon*, 631 S.W.3d at 92.

Cardona did not negate the exception because she did not offer any summary-judgment evidence regarding whether she and the presumed father were living together at the time of each child's probable conception. The exception states that the lawsuit may proceed at any time if the court determines that the presumed father and mother did not live together or engage in sexual intercourse at the time of probable conception. TEX. FAM. CODE § 160.607(b)(1). While

Cardona's summary-judgment evidence attempts to address the second part of this requirement, she did not present any evidence regarding whether she lived with Pineda at the relevant times.

In interpreting the statute, we read section 160.607(b)(1) to be unambiguous, and therefore, we apply its plain meaning as the statute is written. *See City of Hous. v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006). "[T]he Legislature's use of the disjunctive word 'or' is significant when interpreting statutes." *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 642 (Tex. 2013). The use of "or" between two words or phrases "signifies a separation between two distinct ideas." *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 49 (Tex. 2015) (quoting *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000)). "Or" is a disjunctive that "separates words or phrases in the alternate relationship, indicating that either of the separated phrases may be employed without the other." *Jones v. State*, 175 S.W.3d 927, 932 (Tex. App.—Dallas 2005, no pet.); *see City of Dall. v. TCI W. End, Inc.*, 463 S.W.3d 53, 58 (Tex. 2015) (construing statute authorizing recovery of civil penalties and concluding that "[t]he statute's use of 'or,' a disjunctive, identifies two alternative bases for recovering civil penalties").

In section 160.607(b)(1), the Legislature chose to separate the two phrases with the word "or." The exception states that a lawsuit may proceed at any time if the district court makes a finding that "the presumed father and the mother of the

child did not live together *or* engage in sexual intercourse with each other during the probable time of conception." TEX. FAM. CODE § 160.607(b)(1) (emphasis added). This identifies two alternatives under either of which the lawsuit may proceed.

As the summary-judgment movant, Cardona needed to conclusively prove that the exception did not apply. In order to do so, she needed to prove that Munoz could not be successful as a matter of law because he neither could prove that she was not living with Pineda nor could he prove that she was not having sexual relations with Pineda during the relevant time periods.

Cardona cites to *K.M.T.* to support her argument that in order for the suit to proceed, the presumed father and mother must neither be living together nor having relations at the time of probable conception. We need not analyze the Texarkana court's holding in this case because the procedural posture is different. In *K.M.T.*, the Texarkana appellate court reviewed a trial on the application of section 160.607. In this case, Cardona, as a summary judgment movant, had a different evidentiary burden than the parties in *K.M.T. See* TEX. R. CIV. P. 166a(c). Cardona needed to conclusively negate the tolling exception. *See Draughon*, 631 S.W.3d at 92. She did not meet her burden to do so because she did not provide any evidence of whether she and the presumed father lived together during the relevant times.

In the absence of summary-judgment evidence that Cardona and Pineda lived together in the relevant timeframes, Cardona could not prove that the tolling exception did not apply as a matter of law.[2] *Id.*

Having concluded that Cardona did not meet her burden due to the absence of evidence regarding her living situation, we need not address Munoz's argument that he met his burden as nonmovant to create an issue of material fact on that point.

Conclusion

We reverse the judgment of the trial court and remand for further proceedings.

Peter Kelly
Justice

Panel consists of Justices Kelly, Countiss, and Rivas-Molloy.

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[2] Not only did Cardona fail to establish that she was living with Pineda, but the facts she provided in her affidavit to establish she engaged in sexual intercourse with Pineda are conclusory. Conclusory statements in affidavits are not competent evidence to support a summary judgment. *Rizkallah v. Conner*, 952 S.W.2d 580, 582 (Tex. App.—Houston [1st Dist.] 1997, no pet.). A conclusory statement is one that does not provide the underlying facts to support the conclusion. *Id.* at 587. Cardona states that she and Pineda were married and engaged in sexual intercourse "at the time of the children's probable conception." The affidavit does not provide facts to support this conclusion. As such, the trial court erred in considering the affidavit.