Opinion issued August 30, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00418-CV

EDUARDO RIVERA, Appellant

V.

STEFANI NICOLE HENDERSON, Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Case No. 2019-44592

MEMORANDUM OPINION

This case arises from a motor vehicle accident. Appellant Eduardo Rivera filed suit against appellee Stefani Nicole Henderson one day before the statute of limitations expired, and he served Henderson with notice of the suit eighteen months

later. The trial court granted summary judgment in Henderson's favor on her affirmative defense of limitations.

On appeal, Rivera raises three issues: (1) whether the trial court erred by granting Henderson's amended motion for summary judgment filed without leave of court; (2) whether the trial court erred by denying Rivera's motion for new trial; and (3) whether the trial court erred by granting summary judgment when the delay in service was caused by the trial court's failure to rule on Rivera's motion for substitute service for sixteen months. We affirm.

Background

Rivera alleges in his petition that Henderson caused a three-car motor vehicle accident on June 29, 2017. According to Rivera, Henderson was travelling behind him on the Katy Freeway when he suddenly stopped due to heavy traffic. Henderson's car hit Rivera's car from behind causing Rivera's car to hit the car in front of him.[1] Rivera filed suit against Henderson on June 28, 2019, asserting claims for negligence and negligence per se. The suit was filed one day before the statute of limitations expired on June 29, 2019. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a) (prescribing two-year statute of limitations for personal injury suits).

[1] The appellate record indicates that the third driver is not a party to this litigation.

Within ten days of filing suit, Rivera obtained a citation from the trial court clerk, hired a process server, and attempted to serve notice of the lawsuit on Henderson. When his attempts at service were unsuccessful, Rivera filed a motion for substitute service on August 22, 2019. He set the motion for submission on September 2, 2019, and he later reset the submission date to September 16, 2019. From this reset submission date through March 2020, Rivera's counsel and his staff contacted the trial court coordinator numerous times in person, by phone, and by email inquiring about the status of the motion for substitute service. Rivera's counsel's wife also contacted the court coordinator about the status of Rivera's pending motion sometime in the beginning of March 2020. Counsel's wife contacted the court coordinator again during the first week of May 2020. She called the court coordinator a final time on May 26, 2020, and she followed up the same day with an email.

On May 29, 2020, Rivera filed a motion requesting that the trial court rule on his motion for substitute service that had been pending for eight months since its submission date. Rivera set this motion for submission on June 8, 2020. Rivera's counsel sent an email to the court coordinator on July 27, 2020, inquiring about the status of both pending motions.

On December 15, 2020, the court granted Rivera's motion for substitute service and ordered Rivera to serve Henderson by attaching a copy of the citation,

the petition, and the court's order for substitute service to the front door of Henderson's house. Rivera finally served Henderson three days later.

Henderson filed an answer on January 4, 2021. She asserted numerous affirmative defenses, including that Rivera's lawsuit was barred by the statute of limitations because Rivera did not use diligence in serving her process. The same day, Henderson filed a motion for summary judgment based solely on her limitations defense. She attached a copy of the return of citation and a photograph dated December 18, 2020, depicting a package taped to what appears to be the front door of a residence. She set the motion for a hearing on February 3, 2021. Rivera filed a response arguing that a genuine issue of material fact existed concerning his diligence in effecting service. Among other documents, Rivera attached the affidavits of his counsel and his counsel's wife concerning efforts to serve Henderson. The appellate record references a summary judgment hearing on February 3, 2021, but a transcript of this hearing does not appear in the appellate record.

On February 11, 2021, Henderson filed a supplemental brief in support of her motion for summary judgment. In it, she advised the trial court of a recent order from another Harris County District Court purportedly dismissing a separate case with similar facts. When the trial court had not ruled on Henderson's summary judgment

motion by March 4, Henderson filed a motion requesting a status conference on her pending summary judgment motion.

On March 17, 2021, before the trial court ruled on her original motion for summary judgment, Henderson filed an amended motion for summary judgment. She did not seek leave of court to file the amended motion. Her amended motion combined the arguments raised in her original motion for summary judgment and the supplement to the original motion. Henderson set the amended summary judgment motion for a hearing on April 9, which was reset to May 5, 2021.

Rivera filed a motion to strike Henderson's amended motion for summary judgment because it was "not proper" before the court. Rivera alternatively responded to the amended motion, arguing that Henderson was "attempting to have as many bites of the apple as she could get" and the legal authority she relied upon was distinguishable from this case.

The trial court held a hearing by telephone on May 5, but neither Rivera nor his counsel appeared at the hearing. During the hearing, Henderson reiterated her argument that Rivera had not used diligence in serving her with notice of suit. The trial court noted Rivera's complaint that Henderson's amended motion was not proper before the court, construing the argument as contending that the amended motion was filed out of time. But the court stated that no scheduling order had been entered in the case and the amended motion reset the time to hold a hearing. The

court stated that no basis existed to strike the amended motion or the supplement to the original motion, and it noted that the two motions for summary judgment were "not very different" from each other. After the hearing, the trial court signed an order granting Henderson's amended motion for summary judgment and dismissing Rivera's claims.

Rivera filed a motion to vacate the summary judgment order and for new trial on June 4, 2021. In the motion, Rivera made the same arguments he had asserted in his motion to strike. He also argued that his failure to appear at the summary judgment hearing was due to his counsel's mistakenly calendaring the hearing for the wrong day, although he did not support this argument with any evidence. Rivera set the motion for a hearing on July 7, 2021.

At the hearing, Rivera argued that he was entitled to a new trial because the trial court improperly ruled on Henderson's amended motion for summary judgment. Rivera argued that the amended motion was not properly before the court under Rule of Civil Procedure 166a(c). Rivera contended that after a hearing on a motion for summary judgment, a party may not file an amended motion for summary judgment but may only file a new summary judgment motion at that time. Rivera's counsel also explained that he did not appear for the May 5 summary judgment hearing because his office mistakenly calendared the hearing date.

Henderson responded that these arguments were irrelevant to Rivera's use of diligence in attempting to serve her, and the parties' arguments were fully addressed at the hearing despite Rivera not appearing at it. The trial court noted that if Rivera was correct, then the court would grant his motion for new trial and re-notice and address Henderson's amended summary judgment motion, which would lead to the same result and lead to judicial inefficiency. The motion for new trial was overruled by operation of law. *See* TEX. R. CIV. P. 329b(c). This appeal followed.

Dismissal of Appeal for Late Filing of Brief

We first address Henderson's contention that we should dismiss this appeal for want of prosecution because Rivera filed his brief three days late. After his initial briefing deadline passed, Rivera filed a motion to extend time to file his brief. This Court granted the motion and extended Rivera's briefing deadline to December 20, 2021. The Clerk of Court's notice of this extension stated that there would be "no further extensions." Rivera filed his brief on December 23, 2021, three days after the extended deadline. He did not file another motion to extend time.

Henderson relies in part on Rule of Appellate Procedure 38.8(a), which states in relevant part:

> *Civil Cases*. If an appellant fails to timely file a brief, the appellate court may:
>
> (1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure and the appellee is not

> significantly injured by the appellant's failure to timely file a brief; [or]
>
> (2) decline to dismiss the appeal and give further direction to the case as it considers proper; . . .

TEX. R. APP. P. 38.8(a). Henderson argues that subsection (a)(1) requires dismissal of Rivera's untimely brief.

The term "may" in this rule is not mandatory but rather "creates discretionary authority or grants permission or a power." TEX. GOV'T CODE § 311.016; *see Brown v. Health & Med. Prac. Assocs., Inc.*, No. 09–13–00192–CV, 2013 WL 5658605, at *1 n.1 (Tex. App.—Beaumont Oct. 17, 2013, no pet.) (mem. op.) (declining to dismiss one appellant's appeal for failure to file brief because arguments in other appellants' timely filed briefs applied to non-filing appellant); *Kastner v. Tex. Bd. of Law Exam'rs*, No. 03-10-00355-CV, 2011 WL 3659146, at *4 n.6 (Tex. App.—Austin Aug. 18, 2011, no pet.) (mem. op.) (declining to dismiss appellant's appeal in one cause number for failure to file brief because appellant filed brief in another related appellate cause number and arguments applied to both appeals). In addition to the discretionary "may dismiss" language of the rule, subsection (a)(1) *prohibits* dismissal when the appellant reasonably explains the failure to timely file a brief and the appellee is not significantly injured. TEX. R. APP. P. 38.8(a)(1). This language confirms the non-mandatory nature of the rule. Furthermore, subsection (a)(2) provides an alternative to subsection (a)(1) and states that the appellate court may

decline to dismiss the appeal. TEX. R. APP. P. 38.8(a)(2). Thus, dismissal under rule 38.8(a) is discretionary, not mandatory.

Rivera has not reasonably explained his failure to timely file a brief. *See* TEX. R. APP. P. 38.8(a)(1). But neither has Henderson explained how she is significantly injured by Rivera's three-day-late brief. *See id.* To the contrary, Henderson was able to file her brief, and the parties' arguments on appeal are substantially similar to those made in the court below. Moreover, Henderson also requested and was granted an extension of her briefing deadline. While we do not condone parties failing to comply with the Rules of Appellate Procedure and court orders, Rivera's three-day delay in the filing of his appellate brief and the lack of any significant injury to Henderson militates against dismissing this appeal for want of prosecution.

Henderson also relies on *Miller v. Lucas*, No. 02-18-00266-CV, 2019 WL 3819503 (Tex. App.—Fort Worth Aug. 15, 2019, no pet.) (per curiam) (mem. op.). In *Miller*, our sister appellate court extended an appellant's briefing deadline on the appellant's motions six times for a total of seven months beyond the original briefing deadline. The second extension order warned the appellant that "no further extensions [would] be granted." *Id.* at *1. The third extension order warned that the appellant's failure to file a brief by the extended deadline would result in dismissal for want of prosecution. *Id.* The sixth and final extension order warned the appellant that "no further extensions [would] be granted." *Id.* When the appellant requested a

seventh extension three days after the sixth-extended deadline, the court denied the motion and dismissed the appeal for want of prosecution. *Id.*

Miller is distinguishable from the facts in this case. Miller never filed a brief despite obtaining six extensions of his briefing deadline for a total of seven months. *See id.* Rivera, on the other hand, obtained one extension of time for seventy-five days and then filed his brief three days late. Thus, the facts in *Miller* do not support dismissal under the facts presented here. We therefore deny Henderson's request to dismiss Rivera's appeal for want of prosecution.

Summary Judgment

In his first and third issues, Rivera argues that the trial court erred by granting summary judgment in Henderson's favor.

A. Standard of Review

We review a trial court's grant of summary judgment de novo. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018); *Vertex Servs., LLC v. Oceanwide Houston, Inc.*, 583 S.W.3d 841, 848 (Tex. App.—Houston [1st Dist.] 2019, pet. denied). A party moving for traditional summary judgment must establish that no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lujan*, 555 S.W.3d at 84. If the movant meets this burden, the burden shifts to the nonmovant to raise a genuine issue of material fact

precluding summary judgment. *Lujan*, 555 S.W.3d at 84; *Vertex Servs.*, 583 S.W.3d at 848.

In conducting our review, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Lujan*, 555 S.W.3d at 84; *Vertex Servs.*, 583 S.W.3d at 848. When the trial court does not specify the grounds upon which it granted summary judgment, we will affirm the ruling if any ground asserted in the motion is meritorious. *Vertex Servs.*, 583 S.W.3d at 848.

B. Leave of Court to File Amended Motion for Summary Judgment

In his first issue, Rivera argues that Henderson was required to obtain leave of court to file her amended motion for summary judgment while a ruling was pending on her original summary judgment motion.

1. Preservation of Error

We first address Henderson's contention that Rivera did not preserve error on his first issue. Henderson argues that, before the trial court entered its summary judgment ruling, Rivera's only complaint regarding the filing of the amended summary judgment motion was that it was "not proper" before the court, which is too general to preserve error.

Rule of Appellate Procedure 33.1(a) governs preservation of error for appellate review. To preserve a complaint for appellate review, the record must show

that (1) the complaint was timely made to the trial court and stated "the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context"; and (2) the trial court ruled or refused to rule on the complaint. TEX. R. APP. P. 33.1(a).

After Henderson filed her original motion for summary judgment and the trial court held a hearing on it, Henderson filed an amended motion for summary judgment. Rivera filed a motion to strike the amended motion for the briefly stated reason that it was "not proper" before the court. Rivera alternatively responded to the merits of Henderson's amended summary judgment motion. Rivera argued that Henderson was "attempting to have as many bites of the apple as she could get" and that she relied on distinguishable case law.

The trial court held a hearing by telephone on Henderson's amended motion for summary judgment on May 5, 2021. Rivera and his counsel did not appear at this hearing. Nevertheless, the trial court addressed Rivera's motion to strike Henderson's amended motion, stating, "In his absence, I wanted to make sure we covered" the motion to strike. The court construed Rivera's motion to strike as arguing that "the amended motion was out of time," but the court noted that no scheduling order had issued and the deadlines for holding a hearing on the amended motion had been reset. The court stated there was "no basis for striking the amended

motion," which the court noted was "not very different" from the original motion and its supplement.

After the trial court entered summary judgment, Rivera filed a motion to vacate the summary judgment and for new trial. Rivera argued that Rule of Civil Procedure 166a required Henderson to obtain leave of court to file an amended summary judgment motion after a hearing on the original motion but before the court ruled on the original motion. Because the trial court granted the amended motion for summary judgment, Rivera requested a new trial. Rivera made these same arguments at the new trial hearing.

We disagree with Henderson that Rivera's objection was too vague to comply with Rule 33.1. While Rivera's complaint lacks specificity, the complaint need not be specific if the grounds are apparent from the context in which the complaint is made. *See* TEX. R. APP. P. 33.1(a). At the hearing on the amended summary judgment motion, the trial court addressed Rivera's motion to strike in Rivera's absence. The court stated that it understood Rivera's complaint to be that the amended summary judgment motion was filed out of time, which broadly comports with Rivera's issue on appeal that the amended motion was filed too late and without leave of court. The trial court reasoned through this complaint on the record, ultimately rejecting it because no scheduling order had issued in the case and the deadlines for holding a hearing on the amended motion had been reset. The record indicates Henderson also

understood this to be Rivera's complaint, as well as that Henderson was not entitled to argue the statute of limitations issue multiple times. Thus, because the appellate record indicates that Rivera's complaint was apparent from the context, the complaint satisfied Rule 33.1(a)(1).

Henderson relies on *Martinez v. State*, in which the court stated that an objection to a comment or argument as improper is too general in nature to preserve error. 833 S.W.2d 188, 192 (Tex. App.—Dallas 1992, pet ref'd). But *Martinez* recognizes an exception "under circumstances reflecting that the trial judge and prosecutor are aware of the substance of the objection." *Id.* As discussed above, the appellate record indicates that both the trial court and Henderson understood Rivera's objection, and therefore *Martinez* supports our conclusion that Rivera preserved error.

We also disagree with Henderson that Rivera did not preserve error because he "did not object to the trial court's presumed failure to rule on the Motion to Strike" the amended summary judgment motion. Rule 33.1(a)(2)(A) states that error is preserved by either an express or implied ruling. TEX. R. APP. P. 33.1(a)(2)(A) (stating that trial court must rule on complaint "either expressly or implicitly"). A "ruling may be implied only if the implication was clear[.]" *FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 837 (Tex. 2022) (quoting *Seim*

v. Allstate Tex. Lloyds, 551 S.W.3d 161, 166 (Tex. 2018) (per curiam)) (internal quotation marks omitted).

The thrust of Rivera's challenge to Henderson's amended summary judgment motion is that Henderson filed it late without leave of court, and therefore the trial court could not properly consider and rule on the amended motion. As discussed above, the trial court recognized Rivera's objection and rejected it, but the trial court did not expressly rule on the motion to strike. However, the trial court ultimately granted the amended motion notwithstanding Rivera's motion to strike it because it was not proper before the court. By granting the amended motion, the trial court unequivocally though implicitly overruled Rivera's motion to strike. *See id.* at 837; *cf. Seim*, 551 S.W.3d at 166 (holding that appellate record did not indicate trial court implicitly ruled on evidentiary objections to summary judgment motion because, even absent objections, trial court could have granted summary judgment if no genuine issue of material fact existed).

Henderson relies on *PopCap Games, Inc. v. MumboJumbo, LLC*, in which the court held that MumboJumbo did not preserve error on its objection to improper jury argument because it did not obtain a ruling, "either expressly or implicitly," on the objection. 350 S.W.3d 699, 721 (Tex. App.—Dallas 2011, pet. denied). Here, by contrast, we have determined that the trial court implicitly denied Rivera's motion to strike Henderson's amended summary judgment by granting the amended

summary judgment motion. Thus, *PopCap Games* is inapposite. We therefore conclude that Rivera preserved error on his first issue.

2. Merits

In his first issue, Rivera argues that Rules of Civil Procedure 63 and 166a required Henderson to obtain leave of court before filing her amended motion for summary judgment after the court held a hearing on her original summary judgment motion but before it ruled on the original motion. Henderson responds that motions for summary judgment are not "pleadings" within the meaning of Rules 63 and 166a, and she was not required to seek leave before amending her motion.

Rule 63 addresses a party's amendment of their pleadings, while Rule 166a governs summary judgment proceedings. As relevant here, Rule 63 allows a party to amend its "pleadings" without leave of court unless the amendment occurs within 7 days before "trial" or after "trial." TEX. R. CIV. P. 63. Rule 166a(c), in turn, requires a trial court to render summary judgment if, among other things, the "pleadings" and evidence on file at the time of the hearing satisfy the movant's summary judgment burden. TEX. R. CIV. P. 166a(c).

A summary judgment hearing is considered a "trial" under Rule 63, and therefore the rule applies to summary judgment proceedings. *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988); *Mensa-Wilmot v. Smith Int'l, Inc.*, 312 S.W.3d 771, 778 (Tex. App.—Houston [1st Dist.] 2009, no pet.). However,

"pleadings," as used in Rule 63, is defined by Rule 45: "Pleadings in the district and county courts shall (a) be by petition and answer[.]" TEX. R. CIV. P. 45(a); *see Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 305 n.11 (Tex. 2004) (noting that "pleadings" are by petition and answer under Rule 45) (quoting TEX. R. CIV. P. 45). Pleadings define the issues for trial. *Gordon v. S. Tex. Youth Soccer Ass'n, Inc.*, 623 S.W.3d 25, 36 (Tex. App.—Austin 2021, pet. denied).

A motion, on the other hand, is an "application requesting a court to make a specified rule or order." *Exito Elecs.*, 142 S.W.3d at 305 n.11 (quoting BLACK'S LAW DICTIONARY 1031 (7th ed. 1999)); *see Jobe v. Lapidus*, 874 S.W.2d 764, 765–66 (Tex. App.—Dallas 1994, writ denied) ("A motion is not at the same level as a pleading."). Motions are not functionally equivalent to pleadings because they lack sufficient similarities to afford them the same legal significance. *Rupert v. McCurdy*, 141 S.W.3d 334, 339 (Tex. App.—Dallas 2004, no pet.).

It is well established that motions for summary judgment are not pleadings. TEX. R. CIV. P. 45; *In re S.A.P.*, 156 S.W.3d 574, 576 & n.3 (Tex. 2005) (per curiam) (holding that error regarding estoppel was not preserved because estoppel was never pleaded, and disagreeing that estoppel was pleaded in summary judgment motion because "a motion for summary judgment is not a pleading") (citing TEX. R. CIV. P. 45(a)); *Jones v. Ignal*, 798 S.W.2d 898, 900 n.1 (Tex. App.—Austin 1990, writ denied) ("By definition, then, the rules of civil procedure applicable to 'pleadings,'

such as Rule 63 authorizing the amendment of 'pleadings,' cannot apply *as such* to 'motions.'"). Thus, the requirement in Rule 63 to obtain leave to amend pleadings within seven days of the summary judgment hearing did not apply to the filing of Henderson's amended summary judgment motion. *See MacKenzie v. Farmers Tex. Cnty. Mut. Ins. Co.*, No. 05-20-00214-CV, 2022 WL 951028, at *7 (Tex. App.—Dallas Mar. 30, 2022, no pet.) (mem. op.) (holding that Rule 63 does not require party to seek leave of court to amend summary judgment motion).

Rule 166a, which specifically applies to summary judgment motions, does not mention amending summary judgment motions or impose a temporal requirement on such amendments. *See generally* TEX. R. CIV. P. 166a. Rule 166a does require a summary judgment motion to be on file at least twenty-one days before a hearing on the motion except on leave of court. TEX. R. CIV. P. 166a(c). The rule also requires the summary judgment response to be filed no later than seven days before the hearing. *Id.* But there is no dispute that the trial court held a hearing on Henderson's amended summary judgment motion more than twenty-one days after she filed it, and therefore Henderson complied with Rule 166a. *See id.*

Rivera argues that the amended motion for summary judgment was not on file at the time of the hearing on Henderson's *original* motion for summary judgment. However, Rule 166a does not require an amended motion for summary judgment to be on file when a court hears an original summary judgment motion. *See id.* Rather,

the rule requires that pleadings and evidence on file at the time of the hearing establish the movant's entitlement to summary judgment. *Id.* As discussed above, a summary judgment motion is not a pleading. Nor is it any of the evidence contemplated by Rule 166a, such as deposition transcripts, discovery responses, or affidavits. *See id.* After Henderson filed her amended summary judgment motion, the trial court held a hearing on it. Therefore, the trial court was not prohibited from granting the amended summary judgment motion even though it was not on file during the first hearing on the original summary judgment motion. *See id.* (stating that "judgment sought shall be rendered forthwith if" pleadings and evidence "on file at the time of the hearing" or filed thereafter with leave of court show that no genuine issue of material fact exists and movant is entitled to judgment as matter of law).

The purpose of the Rule 166a notice provision is to provide the nonmovant with an opportunity to respond and a deadline for a response. *Id.* (stating that nonmovant must file summary judgment response within seven days prior to hearing); *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) ("The hearing date determines the time for response to the motion [for summary judgment]; without notice of hearing, the respondent cannot know when the response is due."); *Winn v. Martin Homebuilders, Inc.*, 153 S.W.3d 553, 556 (Tex. App.—Amarillo 2004, pet. denied) ("The notice provisions of Rule 166a are

intended to prevent rendition of summary judgment without the non-movant having full opportunity to respond on the merits of the motion."). Rivera was able to file a response more than seven days before the hearing, and he does not complain that he was deprived of a sufficient opportunity to be heard. *See* TEX. R. CIV. P. 166a(c); *Winn*, 153 S.W.3d at 556.

Rivera relies on *Prater v. State Farm Lloyds* to support his argument that a motion for summary judgment is a "pleading" that cannot be amended without leave of court after a summary judgment hearing. *See* 217 S.W.3d 739 (Tex. App.—Dallas 2007, no pet.). Prater filed a second amended petition after the trial court granted summary judgment in State Farm's favor but before it entered final judgment. *Id.* at 741. The final judgment stated that the trial court refused to consider any new allegations in Prater's amended petition, and Prater challenged this refusal on appeal. *Id. Prater* does not mention or construe Rule 63, but it does cite to Rule 166a for the proposition that a party must obtain leave of court to file an amended *pleading* after a summary judgment hearing has passed but before the court signs a judgment. *Id.* (citing TEX. R. CIV. P. 166a(c)).[2] The court held that the trial court did not err in

[2] Rule of Civil Procedure 63 requires leave of court in the circumstance described by the court in *Prater*, that is, within seven days of a summary judgment hearing. TEX. R. CIV. P. 63. However, the *Prater* court's reliance on Rule 166a rather than Rule 63 to support this proposition is clarified in its holding that the trial court did not err in refusing to consider the second amended petition because it was not on file at the time of the summary judgment hearing, which is a requirement of Rule 166a. TEX.

refusing to consider Prater's second amended petition. *Id.* The issue in this case is not whether Henderson was required to seek leave to amend her pleadings, but whether she was required to seek leave to amend her summary judgment motion. Because summary judgment motions are not pleadings, *Prater* does not support Rivera's position. *See* TEX. R. CIV. P. 45; *In re S.A.P.*, 156 S.W.3d at 576 & n.3; *Jones*, 798 S.W.2d at 900 n.1.

Finally, even if the trial court erred by considering Henderson's amended motion, Rivera is not entitled to reversal unless the error "probably caused the rendition of an improper judgment." *See* TEX. R. APP. P. 44.1(a)(1). As Rivera acknowledges on appeal, Henderson's amended motion was substantially similar to her original motion and the supplement to it. The amended motion was based on the same facts as those contained in her original motion, and the amended motion included the law cited in Henderson's supplement. Rivera does not explain how the filing of Henderson's amended motion probably caused the trial court to render an improper judgment. *See id.* As the trial court recognized, even if Rivera correctly argued that Henderson improperly filed the amended motion without leave of the court, the remedy would be to re-notice and address the amended motion, which

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R. CIV. P. 166a; *Prater v. State Farm Lloyds*, 217 S.W.3d 739, 741 (Tex. App.—Dallas 2007, no pet.).

would lead to the same result. Thus, any error in considering Henderson's amended motion for summary judgment is harmless. *See id.*

We conclude that the trial court did not err by considering and ruling on Henderson's amended summary judgment motion. Alternatively, if the trial court did err, such error is harmless. We overrule Rivera's first issue.

C. Limitations

In his third issue, Rivera argues that a fact issue exists regarding Henderson's affirmative defense of limitations. Specifically, Rivera argues that he used diligence in serving Henderson, but the trial court caused a "major delay" in service by taking sixteen months to rule on his motion for substitute service.

1. Governing Law

Texas law requires a person to bring a personal injury suit within two years after the cause of action accrues. TEX. CIV. PRAC. & REM. CODE § 16.003(a). To meet an applicable limitations period, a plaintiff must both file suit within the limitations period and use diligence to serve the defendant with process. *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990); *Auten v. DJ Clark, Inc.*, 209 S.W.3d 695, 698 (Tex. App.—Houston [14th Dist.] 2006, no pet.). If a plaintiff files a petition within the limitations period but obtains service on the defendant outside of the limitations period, then service will be valid if the plaintiff exercised diligence in procuring service. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *see Proulx v. Wells*,

235 S.W.3d 213, 215 (Tex. 2007) (per curiam) (holding 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 uses diligence in serving a defendant after the limitations period expires, 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 occurred after limitations expired, the burden shifts to the plaintiff to prove diligence in service. *Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216. The plaintiff must present evidence showing his efforts to serve the defendant and "explain every lapse in effort or period of delay." *Proulx*, 235 S.W.3d at 216. "[T]he relevant inquiry 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." *Id.*

Whether a plaintiff used diligence in effecting service is generally a question of fact to be determined by considering the time it took to secure the citation and service and the type or lack of effort spent by the plaintiff in procuring service. *Id.* However, a plaintiff's explanation of his 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.* If the plaintiff's explanation for the delay raises a material fact issue concerning the plaintiff's diligence in effecting

service, then the burden shifts back to the defendant to conclusively show why, as a matter of law, the plaintiff provided an insufficient explanation. *Id.*

2. Analysis

Henderson moved for summary judgment on the ground that limitations barred Rivera's lawsuit because he failed to use diligence in serving her with process even though he filed suit within the limitations period. *See Ashley*, 293 S.W.3d at 175. Henderson affirmatively pleaded the defense of limitations due to Rivera's lack of diligence in serving process. The parties do not dispute that Rivera served Henderson with process on December 18, 2020, nearly eighteen months after limitations expired on June 30, 2019. Accordingly, the burden shifted to Rivera to prove that he diligently attempted to serve Henderson such that the date of service related back to the date the lawsuit was filed. *See id.* at 179; *Proulx*, 235 S.W.3d at 215.

Henderson does not dispute that Rivera diligently attempted to serve her from the time he filed suit in June 2019 until September 17, 2019, the day after Rivera's motion for substitute service was reset for submission. The record evidence shows that Rivera requested and obtained a citation from the trial court clerk on July 5, 2019, about a week after he filed suit and only days after limitations expired. On July 8, Rivera hired a process server and sent the citation to the server to effect service on Henderson. The process server unsuccessfully attempted to serve

Henderson at her home address every day from July 9 to July 13. At that time, Rivera discovered that Henderson had moved to a new address. The process server unsuccessfully attempted to serve Henderson at her new address six times and called her one time between July 16 and August 5. There is no evidence of any attempt to personally serve Henderson after August 5, 2019.

On August 22, 2019, Rivera filed a motion for substitute service, stating that attempts to serve Henderson had been unsuccessful and requesting service by attaching the petition to the front door of Henderson's home. *See* TEX. R. CIV. P. 106(b)(2) (authorizing substitute service in any manner shown by plaintiff's verified motion to be reasonably effective to notify defendant of suit). The following day, Rivera set the motion for submission on September 2, 2019, which he reset to September 16, 2019. The parties dispute whether Rivera diligently attempted to serve Henderson between September 17, 2019—the day after submission of the motion for substitute service—and December 15, 2020—the day the trial court ruled on the motion.

Rivera argues that the trial court's failure to rule on his motion for substitute service caused the delay in serving Henderson, not Rivera. Generally, a "trial court has a ministerial, non-discretionary duty to consider and rule on a motion that is properly filed and brought before the court." *In re GTG Sols., Inc.*, 642 S.W.3d 47, 50 (Tex. App.—El Paso 2021, orig. proceeding). The trial court must issue a ruling

on a properly filed motion within a reasonable time. *Id.* If the trial court does not rule on a motion within a reasonable time, the movant may seek a writ of mandamus compelling the trial court to rule. *Id.*

We acknowledge that the trial court did not rule on either Rivera's motion for substitute service or his motion requesting a ruling on the motion for substitute service within a reasonable time. *See id.* (citing cases granting mandamus relief where trial court delayed ruling on motion for three, five, six, and seven months, respectively). Sixteen months is an unreasonable amount of time to determine a routine motion for substitute service. *See id.* Rivera requested the order for substitute service because he was unsuccessful in personally serving Henderson, and we therefore agree with Rivera that the trial court's lengthy delay in ruling on the motion contributed in part to the delay in serving Henderson. *See id.*

But our limitations inquiry is concerned with whether Rivera acted as an ordinarily prudent person would have acted under the same or similar circumstances in using diligence to serve a defendant. *See Proulx*, 235 S.W.3d at 216. Rivera argues he was giving "some respectful deference" to the trial court to issue a ruling. He derives this term from *Auten v. DJ Clark, Inc.*, a case in which a trial court clerk overlooked a motion for substitute service for three months and "at least several months" passed between the filing of the motion and the trial court's signing it. *See* 209 S.W.3d at 704. *Auten* relied on the reasoning in another opinion, *Boyattia v.*

Hinojosa. *See id.* at 705 (citing *Boyattia v. Hinojosa*, 18 S.W.3d 729, 732–34 (Tex. App.—Dallas 2000, pet. denied)). *Auten* acknowledged that a party may ordinarily rely on a clerk's office to perform its duty and issue and deliver citations on time, and parties have limited control over a clerk's actions even if the party is "vigilant and vigorous in urging the clerk to issue and deliver a citation to no avail." *Id.* (citing *Boyattia*, 18 S.W.3d at 734). But when a party learns or should have learned by exercising diligence that the clerk had failed to fulfill this duty, "it is incumbent on the party to ensure the job is done." *Id.* (citing *Boyattia*, 18 S.W.3d at 734). Three months is an unreasonable time for a clerk to deliver citation, and a plaintiff waiting that long is "obligated to make an effort to ensure delivery" of the citation because the clerk's office is not fulfilling its duty. *Id.* (citing *Boyattia*, 18 S.W.3d at 734).

In applying the reasoning of *Boyattia* to the facts in *Auten*, the court stated that the plaintiff was not just waiting on the clerk to deliver citations that had been issued, but the plaintiff was also waiting on the trial court to authorize substitute service before the citations could issue. *Id.* The court stated that the plaintiff "certainly had limited control over the trial court's timing with respect to signing" the motions for substitute service, and the plaintiff could not be penalized "for giving some respectful deference to the trial court with respect to ruling on the motions on its own timing." *Id.* The court held that waiting two-and-a-half months before

following up with the trial court clerk regarding the pending motions was not so unreasonable that it constituted a lack of diligence as a matter of law. *Id.*

Although this case does not involve the delay of a trial court clerk in issuing citation, the reasoning in *Auten* is instructive. A trial court has a ministerial duty to consider and rule on a properly filed motion within a reasonable time, but if the trial court does not comply with this duty, Rivera must ensure the job is done. *See In re GTG Sols.*, 642 S.W.3d at 50; *Auten*, 209 S.W.3d at 704. A party's respectful deference to a trial court's determination of a motion can only extend as far as the trial court determines the motion within a reasonable time. *See In re GTG Sols.*, 642 S.W.3d at 50. After a reasonable time passed, Rivera could no longer rely on the filing of his long-pending motion for substitute service to show diligence. Rather, he bore the obligation to ensure that the trial court fulfilled its duty. *See Auten*, 209 S.W.3d at 704; *Boyattia*, 18 S.W.3d at 734.

To his credit, when the trial court did not rule on the motion for substitute service, Rivera followed up with the court and eventually filed a motion requesting a ruling on the motion for substitute service eight months after it was set for submission. But Rivera also had other options. He could have filed a petition for a writ of mandamus to compel the trial court to issue a ruling on the motion. *See In re GTG Sols., Inc.*, 642 S.W.3d at 50. He could have made additional attempts to serve Henderson personally or by mail. *See* TEX. R. CIV. P. 106(a); *Proulx*, 235 S.W.3d at

217 (stating that plaintiff used due diligence in attempting to serve defendant because, over course of nine months before trial court authorized substitute service, plaintiff used two process servers to attempt service on defendant thirty times at five addresses). If those attempts were unsuccessful, he could have conducted additional investigation into Henderson's place of work or any other addresses where she may be found and attempt to serve her there. But Rivera did none of these things. *See Ashley*, 293 S.W.3d at 181 (stating that, in determining whether plaintiff used diligence in serving defendant, "we must consider the overall effort expended over the gap in service, and whether the search ceased to be reasonable, especially when other methods of service were available"). His sole reliance on the trial court's ruling on his motion for substitute service does not raise a fact issue regarding his diligence in serving Henderson.

But this does not mean, as Henderson contends, that Rivera left unexplained any effort to serve Henderson for two months-long periods between September 2019 and December 2020. Rivera supported his service attempts with the two affidavits from his counsel and his counsel's wife. Rivera's counsel averred that he called the court coordinator "at least three times" between September 2019 and February 2020. The COVID-19 pandemic hampered service efforts, but counsel enlisted his wife's assistance in March 2020. Counsel's wife began making "unsuccessful calls" in March 2020 and sent an email to the court coordinator. Counsel sent an email to the

court coordinator on July 27, 2020, requesting the status of the motion for substitute service, and the court coordinator responded the following day. Between the time when counsel sent the email on July 27 and when the court signed the order on December 15, counsel's affidavit states only that his "office continued to monitor the court's progress."

Counsel's wife averred that she was assigned to monitor the progress of the motion for substitute service. She called the court coordinator regarding the status of the motion in March and May 2020, but she was told that the judge had not signed the order. She contacted the court coordinator by phone on May 26, 2020, and followed up with an email the same day, but she received no response.

These affidavits offer many conclusory allegations lacking detailed information regarding service attempts, and such allegations do not prove due diligence. *See Muhammad v. Chuc-Rosales*, No. 14-18-00965-CV, 2020 WL 3527744, at *4 (Tex. App.—Houston [14th Dist.] June 30, 2020, no pet.) (mem. op.). However, the affidavits provide competent explanations for the periods of delay in serving Henderson between September 2019 and February 2020 and in March, May, and July of 2020. Rivera also filed a motion requesting the trial court to rule on his motion for substitute service in May 2020 and set it for submission in June 2020. We are unaware of any legal authority establishing that one or two months between service efforts constitutes lack of diligence as a matter of law, and Henderson does

not cite any such authority. Thus, Rivera has raised a fact issue regarding whether he used diligence in serving Henderson between September 2019 and July 2020. *See Proulx*, 235 S.W.3d at 216 (stating that plaintiff's use of sufficient diligence in serving defendant is generally fact question unless plaintiff does not explain one or more lapses in service).

Nevertheless, there is no record evidence of any effort by Rivera to serve Henderson in the four-and-one-half months between the time when he last contacted the court on July 27, 2020, and when he finally served Henderson on December 18, 2020. *See Ashley*, 293 S.W.3d at 179 (stating that plaintiff has burden to explain every lapse in service if defendant affirmatively pleads limitations defense and proves service occurred after limitations expired). The affidavit by Rivera's counsel stated that counsel continued to monitor the court's progress in ruling on Rivera's pending motions, but as we discussed above Rivera was not entitled to rely on his pending motion for substitute service when the trial court failed to rule on it within a reasonable time. This allegation is also conclusory and lacks the detailed information required to constitute competent evidence of Rivera's diligence in serving Henderson. *See Muhammad*, 2020 WL 3527744, at *4.

Courts have held that unexplained delays of similar time periods show a lack of due diligence as a matter of law. *Zamora v. Cruz*, No. 01-17-00388-CV, 2018 WL 650269, at *4 (Tex. App.—Houston [1st Dist.] Feb. 1, 2018, no pet.) (mem. op.)

(four and one-half months); *Boyattia*, 18 S.W.3d at 733–34 (three months); *Holt v. D'Hanis State Bank*, 993 S.W.2d 237, 241 (Tex. App.—San Antonio 1999, no pet.) (three months); *Webster v. Thomas*, 5 S.W.3d 287, 290–92 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (four months and ten days); *Taylor v. Thompson*, 4 S.W.3d 63, 65–66 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (four months). Although Rivera undisputedly used diligence in attempting to serve Henderson during a majority of the time the suit was on file, his lack of any explanation of service efforts for the nearly five months before he served Henderson negates diligence as a matter of law. *See Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216. Therefore, we hold that the date of service did not relate back to the date Rivera filed the lawsuit, and consequently the trial court did not err by granting summary judgment in Henderson's favor because Rivera's claims were barred by limitations.

We overrule Rivera's third issue.

Motion for New Trial

Finally, we address Rivera's second issue, in which he contends that the trial court erred by denying his motion for new trial because (1) his failure to appear at the hearing on the amended motion for summary judgment was not intentional or due to conscious indifference, but was due to a mistake; (2) Rivera has a meritorious defense in that he used diligence in serving Henderson; and (3) Henderson did not

properly respond to Rivera's motion for new trial and therefore "acquiesced to the allegations."

"After a court grants a summary judgment motion, the court generally has no obligation to consider further motions on the issues adjudicated by the summary judgment." *Macy v. Waste Mgmt., Inc.*, 294 S.W.3d 638, 651 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). We review the trial court's denial of a motion for new trial for abuse of discretion. *In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006) (per curiam); *St. Mina Auto Sales, Inc. v. Al-Muasher*, 481 S.W.3d 661, 664 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). A trial court abuses its discretion if its decision is arbitrary, unreasonable, and without reference to guiding rules and principles. *Al-Muasher*, 481 S.W.3d at 664.

We have already concluded that the trial court did not err by granting summary judgment based on Rivera's lack of due diligence in serving Henderson. This issue was squarely presented in Henderson's amended summary judgment motion, and therefore the trial court had no obligation to reconsider the issue. *See Macy*, 294 S.W.3d at 651. Accordingly, the trial court did not abuse its discretion in denying Rivera's motion for new trial on the ground of limitations.

Rivera also argues that the trial court abused its discretion by not granting his motion for new trial because his failure to appear at the hearing on the amended summary judgment motion was due to a mistake and was not intentional. Rivera

cites *Craddock v. Sunshine Bus Lines, Inc.* to support this argument. *See* 133 S.W.2d 124 (Tex. [Comm'n Op.] 1938). *Craddock* held that a trial court should set aside a no-answer default judgment against a defendant who proves that the failure to answer was not intentional, but due to a mistake, and the defendant has a meritorious defense. *See id.* at 126. Rivera filed an answer and the trial court did not enter a default judgment, so *Craddock* does not apply to the facts in this case.

"Mistake by a party or the attorney for the party, not induced by the opposing party, is not a reason for granting a new trial." *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); *Clarke v. Hunters Glen Cmty. Ass'n*, No. 14–03–00971–CV, 2004 WL 1313294, at *2 (Tex. App.—Houston [14th Dist.] June 15, 2004, no pet.) (mem. op.) (holding that trial court did not abuse its discretion by denying motion for new trial on ground that appellant's failure to appear for trial was due to mistake). We acknowledge that the record indicates Rivera and his counsel did not appear at the hearing on the amended summary judgment motion due to a mistake rather than an intentional failure to appear. But even so, Rivera's or his counsel's mistaken failure to attend the hearing is not a reason to grant a new trial. *See Malooly Bros.*, 461 S.W.2d at 121.

Finally, Rivera relies on a local district court rule to argue that Henderson did not properly respond to the motion for new trial and therefore "acquiesced to the allegations." Local Rule 3.3.2 of the Civil Trial Division of the Harris County

District Courts provides, "Failure to file a response [to a motion] may be considered a representation of no opposition." Harris (Tex.) Civ. Dist. Ct. Loc. R. 3.3.2. Henderson did file a response to Rivera's motion for new trial, and therefore the plain language of Local Rule 3.3.2 concerning a "*[f]ailure* to file a response" does not apply to the response that Henderson filed. *See id.* (Emphasis added.)

But even if Henderson's response fell within the scope of Local Rule 3.3.2, the rule did not require the trial court to consider her response as a representation of no opposition to the new trial motion. Rather, its "may" language "creates discretionary authority" in the trial court to construe no response to a motion as no opposition to it. *See id.*; TEX. GOV'T CODE § 311.016 (stating that "may," when used in rule, "creates discretionary authority or grants permission or a power"). Henderson clearly opposed Rivera's request to vacate the summary judgment and grant a new trial as shown by her motions for summary judgment and new trial response. The trial court did not abuse its discretion in reaching the same conclusion and declining to consider any deficiencies in Henderson's new trial response as a representation of no opposition to Rivera's new trial motion.

We hold that the trial court did not abuse its discretion in denying Rivera's motion to vacate the summary judgment order and for new trial. Accordingly, we overrule Rivera's second issue.

Conclusion

We affirm the judgment of the trial court.

April L. Farris
Justice

Panel consists of Justices Landau, Guerra, and Farris.