Affirmed and Memorandum Opinion filed March 20, 2018.

In The

Fourteenth Court of Appeals

NO. 14-16-00858-CV

CHRISTINA MOLINA, Appellant

V.

JOHN GEARS, INDIVIDUALLY AND AS AN AGENT FOR ALL-STAR TIRE COMPANY, INC., ALL-STAR TIRE COMPANY, INC., AND ROBERT MORIN, Appellees

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2013-52282

M E M O R A N D U M O P I N I O N

In this personal injury lawsuit, appellant Christina Molina sued appellee John Gears, individually, during the applicable two-year statute of limitations, but did not achieve service on Gears until over ten months after limitations expired. Molina did not sue appellees All-Star Tire Company, Inc. or Robert Morin during the applicable limitations period; instead, Molina amended her petition to add these appellees twenty-one months after limitations had expired. Gears, All-Star Tire, and Morin

moved for summary judgment on limitations grounds. Molina responded, attaching evidence purportedly showing diligence in achieving service. Gears moved to strike Molina's summary judgment response as untimely. The trial court granted Gears's motion to strike and signed summary judgment orders in favor of all of the appellees.

On appeal, Molina challenges the judgment in favor of the appellees in four issues: (1) the trial court erred in granting summary judgment in favor of Gears and striking Molina's summary judgment response; (2) the trial court abused its discretion by denying Molina's motion for leave to file a late response; (3) the trial court erred in granting summary judgment on limitations because All-Star Tire and Morin failed to negate the applicability of the out-of-state tolling rule; and (4) there are genuine issues of material fact and more than a scintilla of evidence regarding due diligence.

Because we conclude that, as a matter of law, Molina did not exercise due diligence in effecting service after limitations expired, we overrule Molina's issues and affirm the judgment in favor of the appellees.

Background

On November 8, 2011, Gears was driving a vehicle owned by Morin. Gears and Molina were involved in a car accident. On September 5, 2013, Molina sued Gears for negligence arising out of the automobile accident. Molina requested that service "by attorney pick-up" be issued on Gears at "14810 Weil Pl. Houston, Texas 77060," on October 17, 2013. The Harris County District Clerk's office notified Molina that the process papers were ready for pick-up on October 23, 2013. According to the Harris County clerk's notation on its "Civil Process Pick-Up Form," Molina's counsel picked up the process papers on January 27, 2014.

Molina retained Jon Manning, a licensed process server, to locate and serve Gears. According to Manning's affidavit, Molina's counsel informed Manning that the address on the citation was incorrect and that Gears possibly could be served at 14223 Eagle Pass, Houston, Texas 77015. Manning first attempted service on Gears at the Eagle Pass address on November 25, 2013.[1] Manning attempted to serve Gears there another fourteen times between November 25, 2013 and March 27, 2014.

Manning then attempted service twelve times at a different address, 12800 Woodforest Blvd. Apt. 1001, Houston, Texas 77015, beginning in April 2014.[2] Manning then "skip traced" Gears and found the Eagle Pass address, as well as two other possible addresses, for Gears. Manning attempted service on Gears another ten times, although he did not say at which address he made these attempts. Manning informed Molina's counsel that the Eagle Pass address was the correct address, that other process servers, including Reginald Branch, would continue to attempt to serve Gears, and that "Gears was served on September 22, 2014," purportedly at Gears's home on Eagle Pass.

According to Branch's affidavit, Branch received a copy of Molina's original petition on August 8, 2014. Branch attempted to serve Gears on "August 8, 2014, August 18, 2014, August 22, 2014, September 5, 2014, September 10, 2015 [sic],

[1] Our record contains no explanation for the disparity between this evidence and the evidence showing that Molina's counsel picked up the process papers on January 27, 2014.

[2] The dates for these alleged service attempts are inconsistent, with some attempts apparently occurring after service allegedly had been achieved on Gears. For example, Manning claims he attempted service at the 12800 Woodforest address on April 11, 20**15**, April 29, 20**15**, and May 6, 20**15**, yet later in his affidavit he claims Gears "was served on September 22, 20**14**." We assume that the 2015 dates listed in Manning's affidavit are typographical errors.

and September 27, 2014" at the Eagle Pass address. Branch executed service on Gears on September 22, 2014 at 11:30 a.m.[3]

In the meantime, on April 21, 2015, Molina amended her pleadings to name two additional defendants, Gears's employer, All-Star Tire Company, Inc., and All-Star Tire's owner, Robert Morin. Molina alleged that All-Star Tire and Morin were negligent in entrusting, hiring, training, supervising, and retaining Gears. Molina again amended her petition in August 2015, adding allegations that All-Star Tire and Morin "knowingly concealed": (1) "the fact that one or either was the owner of the vehicle operated" by Gears; (2) "the fact that they knew that [Gears] was a convicted drug user"; (3) that "they negligently entrusted a vehicle to a convicted drug user, without regard to the safety of others on public highways"; and (4) "the results of a mandatory drug test required by the Department of Transportation for any CDL driver involved in an accident."

All-Star Tire and Morin answered Molina's suit, generally denying Molina's allegations and, as is relevant here, pleading the affirmative defense of limitations. Following brief discovery, All-Star Tire and Morin filed a traditional motion for summary judgment on limitations grounds on November 4, 2015.[4] Molina responded to All-Star Tire's and Morin's summary judgment motion on December 9, 2015, and attached, among other things, affidavits of process servers Jon Manning and Reginald Branch detailing the actions they had undertaken to achieve service on Gears, described above.

[3] It is unclear why Branch would have attempted service on Gears on September 27 when he averred he achieved service on him on September 22.

[4] All-Star Tire and Morin first filed a Rule 91a motion to dismiss based on limitations. Molina's response alleged that Morin and All-Star Tire fraudulently concealed their ownership and entrustment of the vehicle operated by Gears. The trial court denied the motion.

Our record contains no return of service on Gears, and Gears did not answer Molina's suit until February 2016. In his answer, Gears generally denied Molina's allegations, denied that he was served with Molina's suit, and pleaded the affirmative defense of limitations. On April 14, 2016, Gears moved for summary judgment on the grounds that (1) Molina failed to serve him, or (2) Molina failed to exercise diligence in serving him "on or before the expiration of the statute of limitations." Gears attached evidence to his motion indicating that Molina's attorney did not pick up the process papers in this case until January 27, 2014. Gears also identified numerous inconsistencies and errors in Manning's and Branch's affidavits. Finally, Gears provided his own affidavit.

In his affidavit, Gears stated that he had lived with his parents at the Eagle Pass address at the time of the accident in November 2011 and continued to live there until about two years after the accident. At that time, he moved to an apartment at 6160 E. Sam Houston Parkway in Houston in 2013. He lived in that apartment for about a year, then moved to another apartment at 13155 Woodforest Blvd. in Houston, where he has lived since 2014. Gears never lived at any of the addresses that Manning identified, other than the Eagle Pass home of his parents. He averred that he had never been served with process in this suit and stated, "Reginald Branch did not personally serve me with this lawsuit on September 22, 2014 or any other date by any other means." Gears stated that he was at work at All-Star Tire from 8:00 a.m. until after 5:00 p.m. on September 22, 2014, when Gears was purportedly served at his parents' home. According to Gears, he voluntarily appeared in this lawsuit to "protect" himself after Molina produced an affidavit claiming he had been served. Gears set his summary judgment motion for submission without an oral hearing on May 9, 2016.

On the submission date, Molina filed a motion for leave to file an untimely response to Gears's summary judgment motion. In Molina's motion for leave, she acknowledged that Gears's summary judgment motion was set for submission on May 9, but stated that her counsel "miscalendared" the submission date for May 19, 2016. She requested that the trial court grant her leave until May 12, 2016, to respond to Gears's motion. But Molina did not file her response to Gears's summary judgment motion until May 13. Further, in this response, Molina admitted "that the documentation of the service of John Gears is replete with errors of mythic proportions" and that Branch's affidavit was "wrought with mistakes." Nonetheless, she claimed that Gears "attempted to evade service," and she presented evidence purportedly showing due diligence in achieving service, including affidavits from Manning and Branch.

Gears objected and moved to strike Molina's summary judgment response because it was untimely filed. Gears explained that he had provided proper notice of the May 9, 2016 submission date with service of his summary judgment motion, yet Molina had not filed her response until after this date passed. The trial court granted Gears's motion to strike on July 28, 2016 and signed orders granting summary judgment in favor of Gears, All-Star Tire, and Morin that same day.

Molina's motion for reconsideration/motion for new trial was overruled by operation of law. She timely appealed the trial court's judgment.

Analysis

Molina raises four challenges to the summary judgments: (1) the trial court erred in granting summary judgment in favor of Gears and striking Molina's summary judgment response; (2) the trial court abused its discretion by denying Molina's motion for leave to file a late response to Gears's summary judgment motion; (3) the trial court erred in granting summary judgment on limitations

because the appellees failed to negate the applicability of the out-of-state tolling rule; and (4) there are genuine issues of material fact and more than a scintilla of evidence regarding due diligence.

As to each of Molina's issues that challenge the summary judgments in favor of Gears on the merits, we conclude that the record conclusively negates due diligence as a matter of law.[5]

A. Standard of Review and Governing Law

We review the trial court's grant of summary judgment de novo. *Lopez v. Ensign U.S. S. Drilling, LLC*, 524 S.W.3d 836, 841 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009)). In the traditional summary judgment context, as here, the movant has the burden to show there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Lopez*, 524 S.W.3d at 841. A defendant seeking summary judgment on the basis of an affirmative defense, such as limitations, bears the burden to conclusively establish that defense, including the accrual date of the cause of action. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005); *see also Sharp v. Kroger Tex. L.P.*, 500 S.W.3d 117, 119 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

[5] To the extent that Molina's brief also may be construed to challenge the summary judgment in favor of All-Star Tire and Morin, we reject this argument. It is undisputed that Molina amended her pleadings to add these defendants well after limitations had expired. "Unless an exception applies, an amended pleading adding a new party does not relate back to the original pleading." *Chavez v. Anderson*, 525 S.W.3d 382, 387 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey*, 332 S.W.3d 395, 400 (Tex. 2011)). Here, Molina has not identified or briefed any applicable exception to this rule. Accordingly, we do not disturb the summary judgment granted to All-Star Tire and Morin on limitations ground.

A plaintiff must bring suit for personal injury within two years from the date the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.003(a); *Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007). To "bring suit" within the applicable limitations period, a plaintiff must both file suit within that period and use due diligence to serve the defendant with process. *See, e.g.*, *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *Proulx*, 235 S.W.3d at 215-16; *Sharp*, 500 S.W.3d at 119. When, as here, a defendant affirmatively pleads the defense of limitations and shows that service was not achieved within the applicable limitations period, the burden shifts to the plaintiff to prove diligence. *Sharp*, 500 S.W.3d at 119 (citing *Proulx*, 235 S.W.3d at 216). To show diligence, the plaintiff must present evidence of the efforts made to serve the defendant and explain every lapse in effort or period of delay. *Id.* If the plaintiff's explanation for the delay raises a material fact issue concerning the diligence of service efforts, the burden shifts back to the defendant to show why, as a matter of law, the explanation is insufficient. *Id.*

A. No Due Diligence in Serving Gears

Molina does not dispute that the statute of limitations for her personal injury suit against Gears expired on November 8, 2013, two years after the date of the accident. *See* Tex. Civ. Prac. & Rem. Code § 16.003(a); *Proulx*, 235 S.W.3d at 215. Likewise, it is undisputed that Molina filed suit against Gears before the statute of limitations expired, but did not effect service on him until after the statute of limitations expired. Molina claims she exercised diligence in achieving service on Gears. Gears pleaded the affirmative defense of limitations; thus the burden shifted to Molina to demonstrate due diligence as to every period of delay in effecting service. *See Sharp*, 500 S.W.3d at 120. For purposes of our analysis, we will consider the evidence attached to Molina's untimely summary judgment response, assuming its truth and construing it in Molina's favor even though Molina

acknowledges that the affidavits of Manning and Branch are "replete with errors of mythic proportions" and "wrought with mistakes."[6] *See, e.g.*, *Lopez*, 524 S.W.3d at 841 ("We take as true all evidence favorable to the nonmovant, accepting all reasonable inferences therefrom, and resolving doubt in the nonmovant's favor."). Even so, we conclude that the evidence conclusively establishes that Molina failed to exercise due diligence as a matter of law for the following reasons.

Although a plaintiff is not required to use the highest degree of diligence to procure service, she is required to use the degree of diligence that an ordinarily prudent person would have used under the same or similar circumstances. *Sharp*, 500 S.W.3d at 120 (citing *Auten v. DJ Clark, Inc.*, 209 S.W.3d 695, 698-99 (Tex. App.—Houston [14th Dist.] 2006, no pet.)). Diligence is generally a question of fact, but if a plaintiff offers no excuse for a delay in service or if the lapse of time and the plaintiff's acts conclusively negate diligence, courts will find a lack of diligence as a matter of law. *Id.* (citing *Belleza-Gonzalez v. Villa*, 57 S.W.3d 8, 12 (Tex. App.—Houston [14th Dist.] 2001, no pet.)). Courts consistently have held that due diligence is lacking as a matter of law when there are unexplained lapses of time between filing suit, issuance of citation, and service. *Id.* (citing *Li v. Univ. of Tex. Health Sci. Ctr. at Houston*, 984 S.W.2d 647, 652 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)).

The measure of diligence begins from the time suit is filed and an explanation is needed for every period of delay, not just from the expiration of the statute of limitations. *Id.* Molina filed her original petition on September 5, 2013, but first attempted service on Gears eighty-one days later on November 25, 2013. This first

[6] Because we are considering Molina's summary judgment response and evidence, we need not reach her second issue in which Molina complains that the trial court erred in striking her untimely response.

service attempt occurred seventeen days after limitations expired on November 8, 2013. Molina provides no explanation for either delay.[7]

Courts, including ours, have held that similar unexplained delays in effecting service show a lack of due diligence as a matter of law. *Cf. id.* at 118, 121 (plaintiff who filed suit five months before limitations expired, requested citation twelve days after limitations expired, and effected service nearly one month after limitations expired did not exercise due diligence as a matter of law); *id.* at 122 (Christopher, J., concurring) ("Sharp offered no reasonable excuse for her complete failure to even attempt service before limitations ran. Her belated service after limitations had run did not show due diligence."); *Slagle v. Prickett*, 345 S.W.3d 693, 698-99 (Tex. App.—El Paso 2011, no pet.) (plaintiff failed to exercise due diligence when he took no action for three months after he filed his original petition); *Mauricio v. Castro*, 287 S.W.3d 476, 480 (Tex. App.—Dallas 2009, no pet.) (plaintiff failed to exercise due diligence when he filed suit two weeks before limitations expired but offered no explanation for effecting service thirty-one days after limitations expired); *Carter v. MacFadyen*, 93 S.W.3d 307, 314 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (plaintiff failed to exercise due diligence in part due to failure to explain two and one-half month gap between the timely filing of the plaintiff's petition and first service attempts after limitations expired); *Rodriguez v. Tisman & Houser, Inc.*, 13 S.W.3d 47, 51-52 (Tex. App.—San Antonio 1999, pet. denied) (plaintiff failed to exercise due diligence even though service was accomplished a few weeks after limitations period expired).

Moreover, assuming Molina's initial delay in attempting service, standing alone, did not establish a lack of due diligence, she failed to effect service on Gears

[7] Molina did not actually achieve service on Gears until September 22, 2014, which was over a year after filing suit and over ten months after the limitations expired.

for over a year without seeking more effective alternatives, such as substituted service. Gears was employed by All-Star Tire on the date of the accident on November 8, 2011, and remained employed through the date of purported service nearly three years later on September 22, 2014. Repeated unsuccessful service attempts do not establish diligence. *See Carter*, 93 S.W.3d at 314 ("A flurry of ineffective activity does not constitute due diligence if easily available and more effective alternatives are ignored."); *see also Ashley*, 293 S.W.3d at 181 ("Notably, the record does not indicate that Hawkins attempted any form of service other than service by mail or delivery. If Hawkins was unable to locate Ashley, or if Hawkins thought Ashley was evading service, other methods of service were available. In particular, no substitute service such as service by publication was attempted.").

In sum, Molina provided no summary judgment evidence explaining the delay in waiting until November 25, 2013 to first attempt service. *See Sharp*, 500 S.W.3d at 121. She further repeatedly attempted service on Gears through the same method without attempting any sort of substitute service. Molina's "flurry of ineffective activity" does not constitute due diligence, especially when other methods of service were available to Molina. *See Ashley*, 293 S.W.3d at 181; *Carter*, 93 S.W.3d at 314.

For the foregoing reasons, we conclude that, as a matter of law, Molina did not exercise due diligence in effecting service on Gears over ten months after limitations had expired. Thus, we overrule Molina's first and fourth issues.

B. Out-of-State Tolling

As noted above, in her third issue, Molina also challenges the summary judgment in favor of Morin on the ground that Morin failed to negate the applicability of the out-of-state tolling rule. We construe this issue broadly as a challenge to the summary judgments in favor of all the appellees on this basis.

"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." Tex. Civ. Prac. & Rem. Code § 16.063. Molina provided no evidence that Gears was ever absent from Texas or, if so, how long and during what time period. *E.g.*, *Ahrenhold v. Sanchez*, 229 S.W.3d 541, 543 (Tex. App.—Dallas 2007, no pet.) (explaining that burden of pleading and proving absence from state to avoid running of statute of limitations is on person seeking to avoid limitations). Thus, Molina's reliance on the out-of-state tolling rule is misplaced.

Under these circumstances, we overrule Molina's third issue.

Conclusion

Having overruled Molina's issues, we affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Christopher, Donovan, and Jewell.