Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00536-CV

Romeo **LONGORIA**, Arnold Alvarez, Gerardo Alvarez, Humberto H. Alvarez, Arturo Alvarez Jr., Rita Barrera, Jo Marie Cano, Rebecca Hilda Casso, Joaquin Codina III, Dora Elva Dovalina, Diana Gilda Fernandez, Sylvia Guerra, Jose E. Gutierrez, Anna Dolores Hinojosa, Arnold Hinojosa, Lucas Hinojosa, Romeo Omar Hinojosa, Rosa Maria C. Huerta, Noemi Kolek, Mateo Longoria III, Abel Longoria, Anita L. Longoria, Beverly Longoria, David King Longoria, Henry J. Longoria, Homero Longoria, Isaac Longoria, James Andrew Longoria, James Richard Longoria, Jose Maria Longoria Jr., Laurie Longoria, Roberto C. Longoria Jr., M.A. (Andy) Longoria, Renee Longoria, Roberto Longoria, Roy Longoria, Xavier Longoria, Edna Nora Longoria-Rothwell, Thelma Lopez, Guadalupe Raquel Mares, Ida Martinez, Alicia McFarland, Susana Navarro, Adolph Olgine Jr., Juan G. Olgine, Rosa Marie Olgine, Noelia Hinojosa Pena, Jacob Reyes, James Reyes, John G. Reyes, Belia Rock, Juan D. Saenz, Maria L. Segina, Henrietta Sweet, Humberto Vera, Jesus Vera, Jose Esteban Vera, Gloria Lee Vera, and Miguel Vera,
Appellants

v.

EXXON MOBIL CORPORATION; Exxon Mobil Corporation; Dominion Oklahoma Texas Exploration and Production, Inc.; Cody Energy, L.L.C.; Shell Oil Company; BHP Billiton Petroleum (TXLA Operation) Company; Oxy USA, Inc.; Gloria Garcia Lopez, Individually and as Independent Executrix of the Estate of Hector S. Lopez, Deceased; Gary Glick; Michael Glick; Robert Glick; Roger Glick; Steven Glick; William E. York Jr; Beverly Diane York; Dan Wiederhold York; and John Carleton York;
Appellees

From the 79th Judicial District Court, Brooks County, Texas
Trial Court No. 13-12-16488-CV
Honorable Richard C. Terrell, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: July 27, 2016

AFFIRMED

In four issues, Romeo Longoria and fifty-eight other individuals[1] ("appellants") challenge the trial court's judgment dismissing their claims with prejudice. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the underlying lawsuit, appellants claim that their ancestor, Jose M. Longoria, acquired an undivided one-half interest in 9,200 acres of land in Brooks County, Texas, in the 1800s. In their petition, appellants allege that Longoria's ownership interest was not recognized in subsequent conveyances and judgments. Appellants further allege that the defendants,[2] who either hold or have held record title to the mineral estate in part of the acreage, engaged in oil and gas exploration and production and refused to recognize appellants' ownership rights and to provide them an accounting. Appellants seek damages for conversion of their share of the net production of minerals extracted from the land as well as a declaration of their ownership interest in the mineral estate, the quieting of title, and the removal of all clouds on their title.

[1]Arnold Alvarez, Gerardo Alvarez, Humberto H. Alvarez, Arturo Alvarez Jr., Rita Barrera, Jo Marie Cano, Rebecca Hilda Casso, Joaquin Codina III, Dora Elva Dovalina, Diana Gilda Fernandez, Sylvia Guerra, Jose E. Gutierrez, Anna Dolores Hinojosa, Arnold Hinojosa, Lucas Hinojosa, Romeo Omar Hinojosa, Rosa Maria C. Huerta, Noemi Kolek, Mateo Longoria III, Abel Longoria, Anita L. Longoria, Beverly Longoria, David King Longoria, Henry J. Longoria, Homero Longoria, Isaac Longoria, James Andrew Longoria, James Richard Longoria, Jose Maria Longoria Jr., Laurie Longoria, Roberto C. Longoria Jr., M.A. (Andy) Longoria, Renee Longoria, Roberto Longoria, Roy Longoria, Xavier Longoria, Edna Nora Longoria-Rothwell, Thelma Lopez, Guadalupe Raquel Mares, Ida Martinez, Alicia McFarland, Susana Navarro, Adolph Olgine Jr., Juan G. Olgine, Rosa Marie Olgine, Noelia Hinojosa Pena, Jacob Reyes, James Reyes, John G. Reyes, Belia Rock, Juan D. Saenz, Maria L. Segina, Henrietta Sweet, Humberto Vera, Jesus Vera, Jose Esteban Vera, Gloria Lee Vera, and Miguel Vera.

[2]The defendants are Exxon Mobil Corporation; Exxon Mobil Corporation; Dominion Oklahoma Texas Exploration and Production, Inc.; Cody Energy, L.L.C.; Shell Oil Company; BHP Billiton Petroleum (TXLA Operation) Company; Oxy USA, Inc.; Gloria Garcia Lopez, Individually and as Independent Executrix of the Estate of Hector S. Lopez, Deceased; Gary Glick; Michael Glick; Robert Glick; Roger Glick; Steven Glick; William E. York Jr; Beverly Diane York; Dan Wiederhold York; and John Carleton York (collectively, "appellees").

Appellees consist of three groups: (1) past and present oil and gas lessees ("the energy companies"); (2) interest owners Gary Glick, Michael Glick, Robert Glick, Roger Glick, Steven Glick, William E. York Jr., Beverly Diane York, Dan Wiederhold York, and John Carleton York ("the Glicks"); and (3) interest owner Gloria Lopez, individually, and as representative of the Estate of Hector S. Lopez ("the Lopezes").

The record title owners of at least part of the surface and mineral estates comprising the 9,200 acres are descendants of Ponciano Longoria and their assigns ("the absent interest owners"). Some of these owners are mineral interest lessors of the acreage covered by oil and gas leases within the 9,200 acres, who retain the surface estate, a royalty interest, and a possibility of reverter. Others are non-participating royalty interest owners or own portions of the 9,200 acres that have never been leased or are no longer under lease.

The claims in appellants' present lawsuit are similar to claims brought in a prior lawsuit. The prior lawsuit was dismissed without prejudice by the trial court. The judgment dismissing the prior lawsuit was appealed to this court. We affirmed the dismissal, holding the claims required joinder of all of the interest owners for the 9,200 acres in accordance with Rule 39 of the Texas Rules of Civil Procedure. *See Longoria v. Exxon Mobil Corp.*, 255 S.W.3d 174, 181-83 (Tex. App.—San Antonio 2008, pet. denied) (*Longoria I).*

Appellees responded to the present lawsuit by filing motions to dismiss with their answers. The motions to dismiss were based on appellants' failure to join absent interest owners as defendants as required in *Longoria I.* Appellants then amended their pleadings to list eighty-two of the absent interest owners under the heading of "Necessary, Nominal Parties and Non-Aligned Parties;" however, the pleadings did not list these absent interest owners as defendants.

Several months later, appellees filed amended motions to dismiss, or alternatively, pleas in abatement, based on appellants' failure to join all of the absent interest owners. In their amended motion, the energy companies argued that if the trial court quieted title in half of the minerals to appellants, it would also be making a determination that the absent interest owners owned only half of what they believed they owned without giving them an opportunity to defend their interests. Attached to this amended motion to dismiss were lists including the names and addresses of additional interest owners not named in appellants' petition. Similarly, in their amended motions,

the Glicks and the Lopezes claimed that the declaration and the relief sought by appellants would reduce by one-half the royalty and reversionary interests of the absent interest owners.[3]

The trial court granted the pleas in abatement and ordered appellants to join all of the absent interest owners identified by appellees as party defendants and serve them within thirty days. Appellants moved for an extension of time to serve the absent interest owners, and the trial court granted the extension. Appellants moved for a second extension of time to serve the absent interest owners, but never obtained a ruling on this motion. After the extended deadline for serving the absent interest owners had passed, appellants filed a motion for substituted service, asking the trial court to authorize service of process by publication. The motion for substituted service was not supported by an affidavit as required by the Texas Rules of Civil Procedure.

Thereafter, appellees renewed their motions to dismiss. In these motions, appellees urged the trial court to dismiss, with prejudice, appellants' claims because they had failed to amend their pleadings to join some of the absent interest owners as defendants and failed to serve some of the absent interest owners in accordance with the trial court's order.[4] The trial court denied appellants'

[3]The energy companies' amended motion to dismiss relied on *Longoria I*. The Glicks and the Lopezes' amended motion to dismiss adopted the arguments made in the energy companies' motion and also cited Rule 39 of the Texas Rules of Civil Procedure and Section 37.006(a) of the Texas Civil Practice and Remedies Code, the Uniform Declaratory Judgments Act. Section 37.006(a) requires all persons who have or claim any interest that would be affected by the declaration be made parties. TEX. CIV. PRAC. & REM. CODE ANN. §37.006(a) (West 2015).

[4]Specifically, appellees argued:

> More than six months after being ordered by this Court to join all the Absent Interest Owners as party defendants, Plaintiffs have still failed to do so. Of the 64 Absent Interest Owners previously identified . . . Defendants are able to confirm that 25 have been served with process because they have filed answers in this lawsuit. Plaintiffs have not filed a return of service for any of the remaining 39 Absent Interest Owners, or any other evidence indicating that those individuals and entities have been served; none of the 39 have appeared. The Court's electronic docket information and Plaintiffs' Request for Citation Issuance indicate no citation was even requested by Plaintiffs for ten of these 39 Absent Interest Owners. Of these ten, Plaintiffs purport to join nine of them as plaintiffs, **despite the court's order that they be joined as party defendants, not plaintiffs.** As for the tenth—John H. Espinoza—he has neither been issued citation nor joined as a plaintiff or defendant.

(Emphasis in original; internal citations omitted).

motion for substituted service, granted the renewed motions to dismiss, and dismissed appellants' claims with prejudice. Appellants filed a motion for new trial, which was overruled by operation of law. This appeal followed.

DISMISSAL FOR FAILURE TO JOIN PARTY DEFENDANTS

Trial courts have broad discretion in matters involving joinder of parties, and we review a trial court's joinder decision for an abuse of that discretion. *Royal Petroleum Corp. v. Dennis*, 332 S.W.2d 313, 317 (Tex. 1960). Joinder decisions are guided by Texas Rule of Civil Procedure 39, which mandates the joinder of persons whose interests would be affected by the judgment. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 162 (Tex. 2004). No precise formula exists to determine whether a particular person falls within this provision. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 204 (Tex. 1974); *Longoria*, 255 S.W.3d at 180. However, when an absent person falls within the provisions of the rule, the trial court has a duty to effect the person's joinder. *Longoria*, 255 S.W.3d at 180; TEX. R. CIV. P. 39(a) ("If he has not been so joined, the court shall order that he be made a party."). When a trial court determines a person falls within the provisions of Rule 39(a) and is subject to service of process, he must be joined. *Longoria*, 255 S.W.3d at 184.

Rule 39(b) provides a basis for determining whether an action should proceed in the absence of parties described in Rule 39(a). *Clear Lake City Water Auth. v. Clear Lake Util. Co.*, 549 S.W.2d 385, 390 (Tex. 1977). If a person required to be joined under Rule 39(a) cannot be joined, the trial court then decides whether "in equity and good conscience" the action should proceed among the parties before it or should be dismissed after considering certain factors listed in Rule 39(b). TEX. R. CIV. P. 39(b); *Longoria*, 255 S.W.3d at 180.

The Texas Uniform Declaratory Judgments Act provides that "all persons who have or claim any interest that would be affected by the declaration must be made parties." TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(a) (West 2015). The purpose of this provision is to avoid a

multiplicity of suits because a declaratory judgment does not prejudice the rights of a person not a party to the proceeding. *Dahl v. Hartman*, 14 S.W.3d 434, 436 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In determining whether to require joinder of parties in a declaratory judgment action, the trial court applies Rule 39. *Brooks*, 141 S.W.3d at 162; *Longoria*, 255 S.W.3d at 180.

In their first and second issues, appellants argue the trial court abused its discretion by dismissing their lawsuit. Because appellants' briefing on these issues overlaps, we address the first and second issues together. Appellants essentially argue (1) the absent interest owners were not parties to be joined if feasible under Rule 39(a) of the Texas Rules of Civil Procedure; and (2) they made a showing that seven of the absent interest owners were not subject to service of process, and therefore, the trial court was required to proceed with the parties already before it under Rule 39(b) of the Texas Rules of Civil Procedure.

Rule 39(a)

We first address appellants' arguments that the absent interest owners were not persons required to be joined under Rule 39(a). Appellants argue that even though this court concluded in *Longoria I* that the absent interest owners had to be joined, the absent interest owners were not required to be joined in the present case because of the way appellants have pled their claims. In their brief, appellants argue:

> Appellants' current pleadings do not plead any relief against the landowners. [Appellants] can only recover against the oil companies. [Appellants] cannot under these pleadings obtain a judgment against the absent owners, and so they are not necessary.

We are not persuaded by this argument. Appellants' live pleadings state:

> [p]laintiffs seek declaratory relief against [d]efendants under the Uniform Declaratory Judgment[s] Act . . . requesting the [c]ourt to clear the cloud from [p]laintiffs' title to the mineral estate . . . .
>
> The [c]ourt is being asked to "[q]uiet [t]itle" as that term is known in [r]eal [e]state and [o]il and [g]as law, since the partition that is alleged to have created

> title is void . . . and cannot serve as the basis for creating title. . . . [p]laintiffs are entitled to the court clearing up any mistakes regarding the title. The partition of 1924 is void on its face as to creation of title, therefore, the court should GRANT [p]laintiffs[’] “[q]uiet [t]itle” action holding that no title was created, effected or passed by the partition or the partition was “void.”

As their pleadings show, appellants sought relief under the Uniform Declaratory Judgments Act. Furthermore, appellants’ claims are based on an allegation that the interests of the other interest owners arise out of a void partition judgment.

Rule 39(a)(2) provides that a person who is subject to service of process shall be joined as a party to an action if he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (i) as a practical matter impair or impede his ability to protect that interest; or (ii) leave persons already parties subject to substantial risk of incurring double, multiple, or inconsistent obligations by reason of his claimed interest. TEX. R. CIV. P. 39(a). Here, the absent interest owners claim interests in the subject of appellants’ lawsuit and their interests would be affected by the judgment sought by appellants. As we stated in *Longoria I*, it was within the trial court’s discretion to conclude that the record interest owners should have the opportunity to defend their title in this case and that disposition of the case in their absence could, as a practical matter, impair their ability to protect their interests. 255 S.W.3d at 182. Additionally, as we stated in *Longoria I*, the effect of the judgment appellants sought would be to diminish the energy companies’ ownership in the minerals, and then the energy companies would be entitled to proportionately reduce the royalties they pay the lessors. *Id*. at 182-83. However, because the absent interest owners would not be bound by the judgment, they could continue to look to the energy companies for payment of 100% of the royalty on production. *Id*. at 183. Thus, it was well within the trial court’s discretion to conclude that, if appellants had obtained the relief they sought, the energy companies would have been subjected to a substantial risk of incurring double, multiple, or inconsistent obligations.

Appellants assert that the trial court could have shaped a judgment greatly reducing any prejudice to the unserved interest owners. In their brief, appellants offer to pay the remaining unserved interest owners an amount equal to the royalty paid by the energy companies for as long as production continues. In *Longoria I*, the appellants made a similar offer to make up the difference in royalty payments; however, there the appellants' offer did not alter our conclusion that proceeding without the absent interest owners would leave the defendants at risk of incurring multiple or inconsistent obligations, and it does not alter our conclusion here. *See id*. at 182-83.

The trial court did not abuse its discretion in concluding that the absent interest owners were parties required to be joined under Rule 39(a). *See Brooks*, 141 S.W.3d at 162 (providing that Rule 39(a) mandates the joinder of persons whose interests would be affected by the judgment); *see also Veal v. Thomason*, 159 S.W.2d 472, 477 (Tex. 1942) (concluding royalty owners under other lease contracts in a unitized block were necessary parties in a trespass to try title action).

Rule 39(b)

Appellants also argue that the trial court abused its discretion because it did not apply Rule 39(b) of the Texas Rule of Civil Procedure and allow their lawsuit to proceed without the absent interest owners. Appellants assert that they demonstrated that the seven unserved interest owners were not subject to service of process.

Rule 39(b) provides that if a person required to be joined under Rule 39(a) cannot be joined, the trial court must then decide "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed" by considering factors listed in Rule 39(b). TEX. R. CIV. P. 39(b). However, Rule 39(b) requires a trial court to consider the factors listed in Rule 39(b) only when a person described in Rule 39(a) *cannot* be made a party. *Longoria*, 255 S.W.3d at 184; TEX. R. CIV. P. 39(b). A person cannot be made a party when he is not subject to

service of process. *Miller v. Gann*, 822 S.W.2d 283, 287 (Tex. App.—Houston [1st Dist.] 1991), *writ denied*, 842 S.W.2d 641 (Tex. 1992).

We conclude Rule 39(b) does not apply here. Contrary to appellants' arguments, they did not establish that the unserved interest owners were not subject to service of process or could not be made a party to this lawsuit. At most, the record shows that appellants made a single attempt to serve the absent interest owners by certified mail. This does not establish that the unserved interest owners were not subject to service of process, or that they could not be made parties to this lawsuit for some other reason.

Other Arguments

Appellants finally argue the trial court abused its discretion in dismissing their lawsuit because they were able to serve fifty-seven out of sixty-four of the absent interest owners.[5] Appellants claim the only reason they were unsuccessful in serving the remaining absent interest owners was because appellees provided them with bad addresses and the trial court did not give them enough time to serve the absent interest owners. We disagree.

Appellants were well aware of the issue concerning the absent interest owners and had adequate time to join and serve them. Appellees raised the joinder issue early in the case in motions to dismiss filed with their answers. Then, nine months after the suit was filed, the trial court abated the case, giving appellants thirty days to join and serve the absent interest owners. Thereafter, the trial court granted an extension of time to serve the absent interest owners. The trial court also told appellants that they could request an additional thirty-day extension of time to serve the absent interest owners, but warned them that no other extensions would be granted. Appellants filed a second motion for extension of time, but they did not obtain a ruling on this motion. Additionally,

[5]Appellees dispute this assertion, claiming appellants actually served far fewer of the absent interest owners.

appellants did not file a motion for substituted service until after the deadline for serving the absent interest owners had passed. Appellants simply were not diligent in pursuing service on the unserved interest owners.

The trial court did not abuse its discretion in dismissing appellants' claims for failure to join and serve the absent interest owners in accordance with its order. Appellants' first and second issues are overruled.

DISMISSAL WITH PREJUDICE

In their third issue, appellants argue the trial court abused its discretion in dismissing their claims with prejudice. To support their argument, appellants rely on *Martinez v. Benavides*, No. 01-14-00269-CV, 2015 WL 1501793, at * 3 (Tex. App.—Houston [1st Dist.] 2015, no pet.), which was an appeal from a dismissal for want of prosecution. *Id*. In *Martinez*, the plaintiff failed to serve a number of defendants over a ten-year period. *Id*. at *4. The trial court dismissed, with prejudice, the plaintiff's suit for want of prosecution, and the plaintiff appealed. *Id*. at *2. The appellate court concluded that because dismissal for want of prosecution was not a trial on the merits, the trial court's dismissal with prejudice was improper. *Id*. at *4 (citing *Maldonado v. Puente*, 694 S.W.2d 86, 92 (Tex. App.—San Antonio 1985, no writ)).

Appellees assert the trial court properly dismissed the underlying lawsuit with prejudice, focusing on appellants' failure to amend their pleadings as ordered. Appellees argue that dismissal with prejudice is proper when plaintiffs are given an opportunity to cure their deficient pleadings but fail to do so. *Lentworth v. Trahan*, 981 S.W.2d 720, 722-23 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 832 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)). Appellees cite cases in which the trial court properly dismissed claims with prejudice after the plaintiff failed to cure various defects in their pleadings. *See, e.g., Solis v. Texas Dept. of Criminal Justice*, No. 10-09-00065-CV, 2009 WL 4357259, at *2

(Tex. App.—Waco Dec. 2, 2009, pet. denied) (concluding trial court did not abuse its discretion in dismissing cause with prejudice when the plaintiff was given a reasonable opportunity to amend his pleadings and still did not allege facts that would constitute a waiver of immunity); *Perry v. Cohen*, 285 S.W.3d 137, 147-48 (Tex. App.—Austin 2009, pet. denied) (concluding trial court did not abuse its discretion in dismissing shareholders' claims with prejudice when the trial court granted special exceptions, ordered shareholders to replead to identify harm specific to them, and shareholders failed to do so); *Gallardo v. TCI Cablevision of Texas, Inc.*, No. 13-02-00460-CV, 2004 WL 1932662, at *4 (Tex. App.—Corpus Christi 2004, no pet.) (concluding the trial court did not abuse its discretion in dismissing claims with prejudice when the pleadings failed to state a cause of action and the appellants refused to amend the deficient pleadings).

In the present case, the trial court ordered appellants to amend their pleadings to join particular individuals as defendants and gave appellants an opportunity to amend their pleadings. Appellants failed to amend their pleadings as ordered. Under these circumstances, we cannot say the trial court abused its discretion in dismissing appellants' lawsuit with prejudice. Appellants' third issue is overruled.

MOTION FOR NEW TRIAL

In their fourth issue, appellants argue the trial court should have granted their motion for new trial, in which they claimed that they cured their defective motion for substituted service. We review the trial court's denial of a motion for new trial for an abuse of discretion. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010).

Texas Rule of Civil Procedure 106 allows the trial court to sign an order authorizing a substitute method of service, provided the plaintiff files a motion supported by proper affidavit. TEX. R. CIV. P. 106(b); *State Farm Fire & Cas. Co. v. Costley*, 868 S.W.2d 298, 298-99 (Tex. 1993). The supporting affidavit must state (1) the location of the defendant's usual place of

business or usual place of abode or other place where the defendant can probably be found, and (2) the specific facts showing that traditional service has been attempted at the location named in such affidavit but has not been successful. TEX. R. CIV. P. 106. Service by publication is a form of substituted service. *In the Interest of E.R.*, 385 S.W.3d 552, 558 (Tex. 2012).

Texas Rule of Civil Procedure 109, which governs service by publication, provides:

> When a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant, and to such party when the affidavit is made by his agent or attorney, or that such defendant is a transient person, and that after due diligence such party and the affiant have been unable to locate the whereabouts of such defendant, or that such defendant is absent from or is a nonresident of the State, and that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule 108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service.

TEX. R. CIV. P. 109.

The Texas Supreme Court has recognized that service by publication is a poor substitute for actual service of notice. *E.R.*, 385 S.W.3d at 561. Therefore, a party must conduct a diligent search before resorting to service by publication. *Id.* 564-65. "A diligent search must include inquiries that someone who really wants to find the defendant would make, and diligence is not measured by the quantity of the search but by its quality." *Id.* at 565. If the plaintiff does not file an affidavit verifying the unsuccessful efforts to serve the defendants, the trial court cannot order substituted service. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990).

In the present case, the trial court ordered the plaintiffs to amend their suit to join as party defendants the absent interest owners and serve process on each person joined by October 2, 2014. The trial court granted an extension to November 4, 2014. After this deadline, on December 5, 2014, appellants filed a motion for substituted service of process, asking the trial court to authorize

the service of certain defendants by publication. However, the motion for substituted service was defective because it was not supported by an affidavit. The trial court denied the motion for substituted service.

Thereafter, appellants filed a motion for new trial and two supplemental motions for new trial. In their motion for new trial, appellants asked the trial court to reconsider its order dismissing their claims and its order denying their motion for substituted service. Appellants attached seven affidavits to their second supplemental motion for new trial; however, none of these affidavits showed appellants exercised due diligence in trying locate the whereabouts of the absent interest owners as required. *See E.R.*, 385 S.W.3d at 564-65 (providing a party must conduct a diligent search before resorting to service by publication); TEX. RULE CIV. P. 109. In one affidavit, appellants' lead trial counsel stated that he was told by the process server that the necessary documents for substituted service had been provided to his office. Counsel further stated that he assumed the affidavit for substituted service had been provided to his office and was filed with the trial court. In seven other affidavits, the process server stated that he attempted to serve each person by certified mail at an address provided by the appellees, but was unsuccessful "[d]espite my reasonable and diligent attempt to secure service."

Substituted service may not properly issue on a motion supported by an affidavit that is conclusory or otherwise insufficient. *Wilson*, 800 S.W.2d at 836. Here, the trial court could have reasonably concluded that appellants' late-filed affidavits in support of their motion for substituted service were conclusory or otherwise insufficient to support substituted service. *See Beach, Bait & Tackle, Inc., Store No. 2 v. Holt*, 693 S.W.2d 684, 686 (Tex. App.—Houston [14th Dist.] 1985, no writ) (concluding that an affidavit would not support substituted service without a showing of the actual diligence used); *Mackie Constr. Co. v. Carpet Serv., Inc.*, 645 S.W.2d 594, 596 (Tex. App.—Eastland 1982, no writ) (holding affidavit submitted in support of substituted service was

insufficient when it contained only conclusions and not facts). We conclude the trial court did not abuse its discretion in denying the motion for new trial. Appellant's fourth issue is overruled.[6]

CONCLUSION

The trial court's judgment is affirmed.

Karen Angelini, Justice

[6]Appellants also argue the trial court should have given them an opportunity to cure their defective motion for substituted service before dismissing their claims. The cases appellants cite to support this argument do not involve motions for substituted service and are inapplicable here. *See Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 559 (Tex. 2002) (affording plaintiffs an opportunity to amend their pleadings when pleadings failed to plead an element necessary to prove a premises-defect claim); *M&M Constr. Co, Inc. v. Great Am. Ins. Co.*, 747 S.W.2d 552, 555 (Tex. App.—Corpus Christi 1988, no writ) (concluding the trial court should have given the plaintiff a reasonable opportunity to amend its pleadings to cure a lack of capacity).