



**Fourth Court of Appeals
San Antonio, Texas**

MEMORANDUM OPINION

No. 04-17-00739-CV

Edward R. **MEZA**, Jr.,
Appellant

v.

Gloria **BURNS**,
Appellee

From the County Court at Law No. 3, Bexar County, Texas
Trial Court No. 2015CV00380
Honorable Karen Crouch, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: January 23, 2019

AFFIRMED

Edward Meza, Jr. appeals from a judgment awarding Gloria Burns damages against him on her counterclaim for breach of contract. In a single issue on appeal, Meza asserts that “[t]he trial court erred in granting judgment in favor of Burns for her counterclaim because her counterclaim was barred by the statute of limitations.” Meza did not, however, timely plead the affirmative defense of limitations. We affirm the judgment of the trial court.

Facts

Edward Meza, Jr., Sylvia Meza, and New Braunfels Home Health, Inc., d/b/a N.B. Home Health, filed suit against Gloria Burns for breach of contract, unjust enrichment, fraud, and securities fraud (“Burns Case”). They then filed a motion requesting that the Burns Case be consolidated or jointly tried with a related case, Cause No. 37606, styled, Honorcare Home Health, Inc. v. Edward R. Meza, Jr. and Sylvia Meza, Individually and New Braunfels Home Health, Inc. d/b/a N.B. Home Health (“Honorcare Case”). Burns opposed the motion on the ground that it was filed for the sole purpose of circumventing the trial court’s order in the Honorcare Case denying Meza’s motion to add Burns as a third-party defendant. The court denied the motion to consolidate and granted Burns’ request to impose sanctions. Burns subsequently filed a counterclaim in the Burns Case, alleging breach of contract and breach of fiduciary duty.

The Burns Case and the Honorcare Case were called for trial on May 30, 2017. The parties informed the court that a motion to consolidate had previously been denied but that the parties had thereafter agreed to a joint bench trial.

Prior to opening remarks, Meza asserted that Burns’ counterclaim in the Burns Case was not timely filed and should be dismissed. Burns countered that, if Meza was raising the statute of limitations, that defense was not pleaded and was waived. Burns expressly refused to try the issue by consent. The joint bench trial then proceeded.

Burns rested her case on May 31, 2017, at which time Meza began to present his case. The following day, Meza requested leave to file an amended petition containing affirmative defenses including the statute of limitations. Burns objected, arguing that it would be prejudicial to allow the addition of affirmative defenses during trial because “we haven’t prepared for those defenses.” The court denied leave to amend to add affirmative defenses.

The court ultimately entered judgment in the Burns Case ordering that Edward Meza, Jr., Sylvia Meza, and New Braunfels Home Health, Inc. take nothing on their claims against Burns, and that Burns have judgment against Edward Meza, Jr. A joint notice of appeal was filed on behalf of Edward Meza, Jr., Sylvia Meza, and New Braunfels Home Health, Inc., but only Edward Meza, Jr. has filed a brief, and the only judgment complained of is the judgment against him, individually. We therefore consider any appeal Sylvia Meza and New Braunfels Home Health, Inc. may have had to have been abandoned.

Discussion

In one issue on appeal, Meza states that the judgment on Burns' counterclaim is in error because that counterclaim was barred by limitations. Limitations is an affirmative defense. TEX. R. CIV. P. 94. "Rule 94 requires that affirmative defenses be raised before trial." *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 136-37 (Tex. 2014). "It is a rule of fairness that requires the defendant to identify affirmative defenses, involving facts distinct from the elements of the plaintiff's claim, so that the plaintiff may reasonably prepare to rebut or explain them." *Id.* at 136. It is undisputed that Meza did not plead limitations as an affirmative defense in the Burns Case prior to trial.

Meza recognizes in his brief that the trial court combined the Burns Case and the Honorcare Case for trial. But he then asserts, without any authority, that "[w]hen the trial court consolidated the cases, it consolidated all of the facts, issues, pleadings, and other documents incorporated in each case up until that point." Meza is mistaken. The trial court denied Meza's motion to consolidate, clearly and in writing. While the two cases were jointly *tried* by agreement of the parties, that joint trial did not constitute a consolidation of the cases into one. Indeed, we note that the two cases retained their separate cause numbers, separate judgments were entered, and those separate judgments have been separately appealed.

Meza apparently urges that the two cases were fully consolidated in an effort to take advantage of a pleading in the Honorcare Case raising the affirmative defense of limitations. That pleading is legally of no benefit to Meza because it was filed in a separate cause. *See Buttery v. Betts*, 422 S.W.2d 149, 150-51 (Tex. 1967) (consolidation only for trial is not a merger of two cases; motion for new trial filed in one case is of no effect in the other). A limitations defense raised in the Honorcare Case does not bar a counterclaim filed only in the Burns Case.

Meza also makes passing reference to his “Second Amended Petition With Affirmative Defenses,” which he states was *filed* on June 1, 2017. Meza is again mistaken. While he sought *leave to file* the amended petition on that date, the trial court denied that request. Meza does not assign as error the court’s refusal to permit the amendment.

“When amendments which introduce new substantive matter have been refused by the trial court under Rule 63, the burden of showing an abuse of discretion is on the complaining party, rather than on the opposite party to show surprise.” *Hardin v. Hardin*, 597 S.W.2d 347, 349 (Tex. 1980). “On appeal, the trial court’s ruling will not be disturbed unless the complaining party clearly shows an abuse of discretion.” *Id.* at 349-50.

Meza’s proposed amendment introduced new substantive matter—a new affirmative defense. It was Meza’s burden to clearly show that the trial court’s refusal to allow that amendment was an abuse of discretion. *See id.* at 349-50. Meza has presented no argument at all to demonstrate any abuse of discretion.

While Meza contends on appeal that Burns’ counterclaim was barred by limitations, the affirmative defense of limitations was never properly raised in the trial court. It was not raised in Meza’s live pleading, it was not raised by virtue of any consolidation with the Honorcare Case, and the trial court did not abuse its discretion by denying leave to file an amended petition raising that defense after Burns had rested her case.

Conclusion

Meza has not demonstrated any error or abuse of discretion in this case. The judgment of the trial court is affirmed.

Irene Rios, Justice