

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-10-00025-CV**

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**EROS INVESTMENT, INC., Appellant**

**V.**

**ATOFINA PETROCHEMICALS, INC. D/B/A FINA OIL AND CHEMICAL CO.,  
Appellee**

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**On Appeal from the 60th District Court  
Jefferson County, Texas  
Trial Cause No. B-169,426**

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**MEMORANDUM OPINION**

Eros Investment, Inc. sued Atofina Petrochemicals, Inc., d/b/a Fina Oil and Chemical Co., for breach of contract, negligent misrepresentation, common law fraud, real estate fraud, violation of the Deceptive Trade Practices Act, and fraud in the inducement. The trial court signed an order granting summary judgment from which Eros Investment has appealed.

Eros Investment and Fina entered into a contract for the sale of certain commercial real property. The property included a convenience store and retail gasoline facility. The

special warranty deed and a bill of sale reflect Fina sold the property to Eros Enterprises, Inc., not appellant Eros Investment, Inc.

Eros Investment, Inc., not Eros Enterprises, Inc., sued Fina to recover remediation costs and other damages associated with environmental contamination of the property. The original petition did not assert an assignment of causes of action from Eros Enterprises to Eros Investment. More than six years later, Fina<sup>1</sup> filed a motion for summary judgment. Eros Investment filed an untimely response. The trial court in its discretion considered the response.

On the day of the hearing on the summary judgment motion, and without the trial court's permission, Eros Investment filed an amended petition alleging for the first time that Eros Enterprises was a successor-in-interest to Eros Investment, and that Eros Enterprises, Inc., was an assignor to Eros Investment, Inc. The trial court granted Fina's motion for summary judgment, and subsequently signed a modified order. In both the original order and the modified order, the trial court stated it reviewed the "original petition" in arriving at its decision to grant Fina's motion for summary judgment.

In three issues, Eros Investment asserts the trial court erred by granting summary judgment. Fina responds that Eros Investment had no standing to sue. Fina argues that at the time of the summary judgment hearing, there was no pleading of assignment, Eros

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<sup>1</sup>Total Petrochemicals USA, Inc. filed the motion for summary judgment. Total states that it was formerly known as Atofina Petrochemicals, Inc. and formerly known as Fina Oil and Chemical Company.

Investment was not the property owner, and Eros Investment did not incur and was not responsible for any remediation costs.

An assignment transfers a right or interest from one person to another. *MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc.*, 179 S.W.3d 51, 57 (Tex. App.—San Antonio 2005, pet. denied). To recover on an assigned cause of action, a party must first plead that a cause of action capable of being assigned existed and was assigned to the party. *Pape Equip. Co. v. I.C.S., Inc.*, 737 S.W.2d 397, 399 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). Eros Investment's original petition did not reflect the assignment of a cause of action. Eros Investment cites *Seiter v. Marschall*, 147 S.W. 226, 228 (Tex. 1912) and *Camden Fire Insurance Association v. Eckel*, 14 S.W.2d 1020, 1021-22 (Tex. Comm'n App. 1929, judgment adopted) for the proposition that the petition need not show that it is brought for the benefit of another if, as Eros Investment states, "the beneficial owner instituted the suit in the name of the assignor." See also *Ins. Network of Tex. v. Kloesel*, 266 S.W.3d 456, 465 (Tex. App.—Corpus Christi 2008, pet. denied). In this case, suit was instituted in the name of the alleged assignee, Eros Investment. An allegation of the assignment was necessary. See *Esco Elevators, Inc. v. Brown Rental Equip. Co., Inc.*, 670 S.W.2d 761, 764 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) ("Esco is precluded from recovering judgment based upon the assignment because of its failure to allege the same.").

Rule 63 requires “leave of the judge” to file a pleading within seven days of the date of trial. Tex. R. Civ. P. 63. A summary judgment proceeding is considered a “trial” as that term is used in Rule 63. *Goswami v. Metro. Sav. & Loan Ass’n*, 751 S.W.2d 487, 490 (Tex. 1988). Eros Investment did not ask, nor did the trial court give, permission to file the amended petition. The trial court’s orders reflect that the court granted summary judgment based on the original petition, not the amended petition filed the day of the hearing. Eros Investment does not argue that the trial judge abused his discretion in not considering the amended petition when he granted the summary judgment. The trial judge did consider an unexecuted document titled “assignment,” and an affidavit that asserted the assignment had been made “to allow for prosecution of this claim without interference by potential bankruptcy of Eros Enterprises, Inc. and/or the interference with the prosecution of said claim by third party creditors[.]” Nevertheless, in the absence of a timely pleading asserting the assignment, the trial court did not abuse its discretion in considering only the claims asserted by Eros Investment in the original petition.

A movant for summary judgment has the burden of showing that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Eros Investment was not the owner of the property and did not timely plead assignment of the owner’s claims. Fina established as a matter of law that it was entitled to summary judgment. We overrule Eros Investment’s issues and affirm the summary judgment.

AFFIRMED.

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DAVID GAULTNEY  
Justice

Submitted on November 23, 2010  
Opinion Delivered March 10, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.