In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00076-CV

H. VAN HELDORF, Appellant

V.

THE WOODLANDS TOWNSHIP, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 09-09-08407-CV

MEMORANDUM OPINION

H. Van Heldorf sued The Woodlands Township[1] for injuries he sustained while riding a bicycle on property allegedly maintained by the Township. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.021-.022 (West 2011). The Township filed a plea to the jurisdiction and a traditional motion for summary judgment. In a single order, the trial

[1] Heldorf originally sued "The Woodlands Corporation, a subsidiary of American Woodlands Community, Inc.," among others. In his third amended petition, Heldorf named "The Woodlands Township" as the sole defendant, effectively non-suiting the other defendants. Only the Township remained a defendant at the time the trial court dismissed Heldorf's lawsuit. In his appellate brief, Heldorf refers to the "Woodlands Corporation." The Township contends it has been mis-identified on appeal. Accordingly, we identify appellee as "The Woodlands Township."

court purported to grant both motions and dismissed Heldorf's lawsuit. On appeal, Heldorf's sole issue challenges the trial court's decision to grant the summary judgment motion, but he presents subsidiary issues that address the plea to the jurisdiction. We, therefore, construe Heldorf's appeal as a challenge to the trial court's order in its entirety. We affirm the trial court's judgment.

The Township's Traditional Motion for Summary Judgment

In his appellate brief, Heldorf challenges the trial court's order granting the Township's traditional motion for summary judgment. We address this issue first because, even if the trial court had erred by granting the Township's plea to the jurisdiction, it properly granted the Township's summary judgment motion.

We review a trial court's ruling on a traditional summary judgment motion *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We "must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). We "consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the motion." *Id.* at 756.

A person must bring suit for personal injury no later than two years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West Supp.

2010).[2] "If a party files its petition within the limitations period, service outside the limitations period may still be valid if the plaintiff exercises diligence in procuring service on the defendant." *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009). When a defendant affirmatively pleads the defense of limitations and shows that service was untimely, the burden shifts to the plaintiff to prove diligence. *Id*. The relevant question 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." *Proulx v. Wells*, 235 S.W.3d 213, 216 (Tex. 2007). "Although a fact question, a plaintiff's explanation may demonstrate a lack of diligence as a matter of law, 'when one or more lapses between service efforts are unexplained or patently unreasonable.'" *Ashley*, 293 S.W.3d at 179 (quoting *Proulx*, 235 S.W.3d at 216). The plaintiff bears the burden of presenting evidence regarding the efforts made to serve the defendant, and explaining every lapse in effort or period of delay. *Proulx*, 235 S.W.3d at 216.

Heldorf's cause of action accrued on September 5, 2007, the day of his alleged injury. *See Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006). He filed suit on September 1, 2009, before limitations expired, but he did not perfect service on the Township until August 11, 2010, long after limitations expired. In its summary judgment motion, the Township argued that Heldorf's lawsuit was untimely because he failed to exercise due diligence to perfect service before limitations expired. Once the Township

[2] Because amended section 16.003 contains no material changes applicable to this case, we cite to the current version of the statute.

established a lack of service within the limitations period, the burden shifted to Heldorf to present evidence regarding his efforts to perfect service and to explain every lapse in effort or period of delay. *See Proulx*, 235 S.W.3d at 216. The record does not show that Heldorf presented any such evidence to the trial court.[3] *See Ashley*, 293 S.W.3d at 180-81; *see also Kroemer v. Hartsfield*, No. 09-08-00462-CV, 2009 Tex. App. LEXIS 9233, at **5-7 (Tex. App.—Beaumont Dec. 3, 2009, pet. denied) (mem. op.).

Assuming without deciding that the trial court had subject matter jurisdiction and erred by granting the Township's plea to the jurisdiction, the trial court properly granted summary judgment on grounds that the statute of limitations barred Heldorf's lawsuit. We overrule Heldorf's sole issue and affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on May 5, 2011
Opinion Delivered May 26, 2011

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

[3] We also note that Heldorf does not address the Township's statute of limitations defense in his appellate brief.