

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00538-CV

AMERICAN AIR SYSTEMS, INC., Appellant

V.

JEFFERY BOOK AND VERONICA BOOK, Appellees

On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. A-191,364

MEMORANDUM OPINION

American Air Systems, Inc. (“American Air”) appeals the trial court’s final judgment in favor of appellees for American Air’s violations of the Texas Deceptive Trade Practices Act (“DTPA”). In four appellate issues, American Air challenges (1) the trial court’s denial of its motion for directed verdict and judgment notwithstanding the verdict as to its affirmative defense of statute of limitations; (2) the legal sufficiency of the evidence supporting the jury’s finding that false, misleading, or deceptive acts or practices were a producing cause of appellees’

damages; (3) the legal sufficiency of the evidence to sustain the jury's finding that American Air failed to perform repair services in a good and workmanlike manner, or that such failure was a producing cause of appellees' damages; and (4) the trial court's refusal of jury questions regarding the date appellees should have discovered that their injury was likely caused by American Air's wrongful acts. We reverse the trial court's judgment and render judgment that appellees take nothing.

PERTINENT BACKGROUND

Jeffery Book and Veronica Book ("the Books") filed suit against American Air regarding allegedly poor construction and air conditioning services American Air provided at the Books' home. According to the Books, the parties' course of dealing extended from 2004 until the Books sued American Air on November 17, 2011. The Books pleaded the discovery rule and the doctrine of fraudulent concealment "to toll any statute of limitations." According to the Books, "it took Plaintiffs a long time to find out the true nature of their problems caused by Defendant's culpable conduct . . . due to its prolonged misrepresentations to hide its own culpable conduct." The Books also pleaded that their lawsuit was "based upon not only the work performed, but also upon the lengthy course of dealing between the parties through which Defendant continued to engage in culpable misconduct." The Books asserted causes of action for negligence, negligent misrepresentation,

breach of contract, and DTPA violations. The Books sought treble damages because they asserted that American Air committed the alleged DTPA violations knowingly.

In its answer, American Air generally denied the Books' allegations. American Air also contended that the Books "maintained the air conditioning system at too low of a setting, thereby causing the condensation of which they complain[;]" asserted that the occurrence was caused by other parties for whose acts American Air is not responsible; argued that as a non-manufacturing seller, it is not liable for the Books' damages; and pleaded the affirmative defense that the Books' claims "are in all things barred by the applicable statutes of limitations."

Jeffery Book testified that he purchased his home, which was new construction, in 2004. According to Jeffery,¹ Carrier designed the home's air-conditioning unit, which was installed by American Air. Jeffery explained that he had asked American Air to install a unit with a higher efficiency rating a few days before he and his wife moved into the house. According to Jeffery, he and his wife usually kept the thermostat set at sixty-nine or seventy degrees at night and approximately seventy degrees during the day. Jeffery testified that when the weather began getting warm, in approximately April 2005, the air vents started

¹For the sake of clarity and brevity, we will use a first name when referring to either Jeffery Book or Veronica Book individually.

dripping and “[e]very air vent had condensation on it.” Jeffery explained that the problem occurred every day, and it continued into approximately October, when the weather became cooler. Jeffery testified that he and his wife had to use containers to catch the water, and he explained that they used stainless steel bowls that would hold at least one gallon of water. According to Jeffery, the bowls would fill with water every five to six hours. Jeffery testified that the dripping and condensation damaged the sheetrock around the vents and also ruined a mattress.

Jeffery explained that Don Potter owns American Air, and Don Potter planned for his son, Lee Potter, to take over the company.² According to Jeffery, his wife Veronica called American Air about the problem and was present during all of American Air’s repair attempts. Jeffery testified that he spoke to Don about the condensation and dripping, and Don assured him that American Air would fix the problem. Jeffery did not recall Don telling him what he believed the problem was. Jeffery explained that he had “very good” conversations with Lee, but although American Air “was real good about coming out[,]” and American Air seemed to be doing an excellent job, the problem was never resolved. Jeffery testified that Lee would say, “I sympathize with you. It’s not right. We’re [going to] get this problem

²We will refer to Don Potter and Lee Potter by their first names for clarity and brevity.

resolved. And I heard that for seven years, and that's what got us to where we are today.”

According to Jeffery, Lee once brought a Carrier representative to the house, and the Carrier representative advised the Books to keep the thermostat on seventy-eight degrees. Jeffery testified that American Air installed an ultraviolet light system because mold developed, causing a “horrible smell[.]” Jeffery explained that American Air also installed an AprilAire unit to help “remove the moisture out of the system in the house.” According to Jeffery, American Air never told him that the problem lay with the ductwork. Jeffery testified that he or Veronica called Thermacon Service Company (“Thermacon”) in 2013, and after performing tests, Thermacon replaced the ductwork in the attic, which solved the problem. According to Jeffery, the testing Thermacon performed revealed that cold air was going into the attic instead of the house. Jeffery also testified that the old ductwork was extensively rusted.

Jeffery explained that he “absolutely” believes American Air deceived him and Veronica because “they misrepresented.” When asked to explain the basis of his belief, Jeffery testified:

Well, we befriended Don And for them to just let me down like that, . . . thinking that they're our friends and they're not go[ing to] deceive us and put all the trust in [th]em; and then it's just like they closed the door on us. It's like: We can't wait until this warranty's over

with so we don't have to come out and mess with y'all anymore. That's the feeling I got, and it was hurtful.

During cross-examination, Jeffery admitted that when he was deposed in 2013, he said that he did not believe Don had made any false representations. He now believes that Don misrepresented that American Air could solve the problem and bragged about "what a superior unit . . . the Carrier Infinity unit was[.]" Jeffery testified that he believes Don tried to resolve the problem and that Don believed he could do so. Jeffery testified that he and Veronica still use the Carrier unit.

Veronica testified that she and Jeffery moved into the home on November 1, 2004, and she explained that American Air designed the HVAC air-conditioning system, and that Don also built the house through another company he owns. According to Veronica, she first noticed condensation and dripping from the air vents in spring to summer of 2005, "when the weather started getting real warm and the humidity would be high." Veronica testified that the problem occurred every day during the summer, and it continued for seven years and "got progressively worse as time went on." Veronica explained that she immediately contacted American Air because she had a one-year warranty on the house and a ten-year warranty on the air-conditioner for parts and one year on labor. According to Veronica, American Air responded but never resolved the problem.

Veronica testified that American Air never explained to her what measures they were taking, and Lee told her she would not understand. Veronica testified that at one point, she was told that “they wrapped something in the attic[,]” and they changed the vents from metal to plastic because the metal vents were rusting.

Veronica testified:

I don't know exactly what they did but they came out each time and would do, from what they told me, something different each time to try to correct the problem but it never corrected it and then they would make another appointment to come out again and again and again[,] and they tried many different things but just [were] unsuccessful.

Veronica explained that the problem got progressively worse, and she had to put bowls under every vent that leaked and then she would have to empty the bowls periodically. Veronica testified that the bowls held “[a]nywhere from probably a quart to a gallon.” In addition, Veronica explained that “[t]here was this God-awful smell coming out of the vents.” Veronica testified that she lost sleep worrying about the problem. Veronica explained that Don never told her what the problem was, but simply told her “they were just go[ing to] fix it.”

According to Veronica, a representative from Carrier went into the attic and looked around, but really did not explain anything. Afterwards, Lee told her that she needed to keep the temperature set on seventy-eight degrees. Veronica explained that since Thermacon replaced the ductwork, she and Jeffery are still using the same

air conditioning unit, and they keep it set on seventy-two degrees with no problems. Veronica testified that an American Air technician first told her about other customers with the same problem “early on when the problems began[,]” so she estimated that 2005 or 2006 “would be about right.” Veronica explained that she believed Lee tried to resolve the problem, “but it didn’t happen.” Veronica testified, “I didn’t want to sue them because we became friends; but after seven years, . . . enough is enough.”

During cross-examination, Veronica testified that she did not believe Lee was intentionally or knowingly trying to mislead her regarding whether he could solve the problem. Veronica also testified that the condensation was clearly visible and obvious in 2005. In addition, Veronica testified that American Air’s recommending of the Infinity air-conditioner to them constituted a false representation because several technicians told her that “they were trying to fix the same problem at three other residences[.]” Veronica testified that she and Jeffery had no knowledge that the problem lay with the ductwork until Thermacon performed testing, replaced the ductwork and insulation, and solved the problem. Veronica testified that she believed “the ductwork that was originally installed in the house was designed for the medium air-conditioner he had originally put in; and when I upgraded to the Infinity, I don’t think the ductwork was the proper ductwork for the Infinity unit.”

Don Potter testified that he currently owns American Air. Don testified that before the Books moved into the home, they chose to upgrade the air-conditioner to the Carrier unit. Don testified that the first time American Air made a service call to the Books' home regarding leaking vents and condensation was September 6, 2005. According to Don, American Air made sixteen attempts to resolve the problem with the Books' system. Don explained that if American Air had known there was a problem with the ductwork, American Air would have borne the cost of replacing it. Don testified that he does not believe Thermacon's work was the solution to the problem, and he opined that if the Books had raised their thermostat to seventy-two degrees, that would have solved the problem. Don denied telling the Books anything that was false or misrepresenting anything to them.

At the conclusion of the testimony, American Air moved for a directed verdict, stating that because the dripping was open and obvious from 2005 forward, the Books' claims are precluded by the two-year statute of limitations under the DTPA. The motion was denied. American Air presented two proposed jury questions pertaining to the statute of limitations issue, and the trial court refused to submit those questions. The first rejected question stated: "By what date should the Books, through the exercise of reasonable diligence, have discovered that their injury from the air conditioning system was likely caused by American Air

Systems?” The second rejected question inquired as follows: “By what date should the Books, through the exercise of reasonable diligence, have discovered that American Air Systems made a false, misleading, or deceptive act or practice?”

The jury found that American Air engaged in false, misleading, or deceptive acts or practices on which the Books relied to their detriment and that were a producing cause of damages to the Books and awarded damages for property damage, repair costs, and mental anguish. The jury also found that American Air failed to perform repair services in a good and workmanlike manner and awarded damages for property damage, repair costs, and mental anguish in the same amounts it had found in its answer regarding their DTPA claim. The trial court also awarded attorney’s fees to the Books. American Air filed a motion for judgment notwithstanding the verdict, in which it contended, among other things, that the applicable statute of limitations barred the Books’ recovery. The trial court denied American Air’s motion for judgment notwithstanding the verdict and signed a final judgment awarding the Books actual damages of \$22,903.51, as well as trial attorney’s fees in the amount of \$27,721.66 and attorney’s fees for representation at various potential appellate stages. American Air also filed a motion for new trial, which the trial court denied. American Air then filed this appeal.

ISSUE ONE

In its first issue, American Air asserts that the trial court erred by denying its motions for directed verdict and judgment notwithstanding the verdict based upon its affirmative defense of the statute of limitations. The DTPA's statute of limitations provides as follows:

All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. The period of limitation provided in this section may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

Tex. Bus. & Com. Code Ann. § 17.565 (West 2011). At the outset, we note that both of the theories of recovery on which the jury found in favor of the Books are based upon the DTPA. *See id.* § 17.46(a), (b) (West Supp. 2016);³ *Sw. Olshan Found. Repair Co. v. Gonzales*, 345 S.W.3d 431, 436-37 (Tex. App.—San Antonio 2011, *aff'd*, 400 S.W.3d 52 (Tex. 2013)) (holding that a consumer's cause of action based upon an implied warranty to repair tangible goods or property in a good and

³Because the amendments to section 17.46 of the Texas Business and Commerce Code are not material to this appeal, we cite to the current version of the statute.

workmanlike manner is governed by the DTPA, not the common law implied warranty scheme). Therefore, the DTPA's two-year statute of limitations applies. *See id.* at 437; *Foreman v. Pettit Unlimited, Inc.*, 886 S.W.2d 409, 412-13 (Tex. App.—Houston [1st Dist.] 1994, no writ); *see also* Tex. Bus. & Com. Code Ann. § 17.565. As discussed above, the Books pleaded both the discovery rule and fraudulent concealment to toll the running of the statute of limitations.

The date that a cause of action accrues is a question of law. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). “A cause of action generally accrues, and the statute of limitations begins to run, when facts come into existence that authorize a claimant to seek a judicial remedy.” *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514 (Tex. 1998). A cause of action for a DTPA violation accrues when the consumer discovered or in the exercise of reasonable diligence, should have discovered the occurrence of the allegedly false, misleading, or deceptive practice. Tex. Bus. & Com. Code Ann. § 17.565. The discovery rule is a very limited exception to the statute of limitations, and its application is generally restricted “to exceptional cases to avoid defeating the purposes behind the limitations statutes.” *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006). The discovery rule tolls the statute of limitations only if the nature of the injury was inherently

undiscoverable and evidence of the injury is objectively verifiable. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996). “An injury is not inherently undiscoverable when it is the type of injury that could be discovered through the exercise of reasonable diligence.” *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 66 (Tex. 2011).

The statute of limitations begins to run when the plaintiff discovers the injury and its general cause, not the exact cause in fact and the specific parties responsible. *See Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 344 n.3 (Tex. 1992). “[T]he discovery rule does not linger until a claimant learns of actual causes and possible cures. Instead, it tolls limitations only until a claimant learns of a wrongful injury.” *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P’ship*, 146 S.W.3d 79, 93 (Tex. 2004). The statute of limitations clock runs even if the plaintiff does not yet know the specific cause of the injury, the responsible party, the full extent of the injury, or the chances of avoiding the injury. *Id.* at 93-94. Attempts to repair do not constitute a continuous breach that tolls the statute of limitations, even if the plaintiff relies upon misrepresentations that the repairs would be successful. *Pako Corp. v. Thomas*, 855 S.W.2d 215, 219 (Tex. App.—Tyler 1993, no writ); *see also Bishop-Babcock-Becker Co. of Tex. v. Jennings*, 245 S.W. 104, 105 (Tex. Civ. App.—Austin 1922, no writ). In addition, pursuant to the statutory language contained in the

DTPA, the occurrence of fraudulent concealment tolls the statute of limitations only for 180 days. Tex. Bus. & Com. Code Ann. § 17.565.

Jeffery testified that he and Veronica began noticing condensation and dripping from the vents in April of 2005. Likewise, Veronica testified that the condensation and dripping from the vents began in spring or summer of 2005, that it was clearly visible and obvious in 2005, and that the problem got progressively worse over the years. Veronica testified that she immediately contacted American Air when she observed the problem in 2005, and that Don assured her that American Air would fix the problem.

On this record, we conclude that the Books discovered or, through the exercise of reasonable diligence, should have discovered their injury and right to seek a legal remedy more than two years before they filed suit. *See Gonzales*, 345 S.W.3d 431; *Foreman*, 886 S.W.2d at 412-13; *see also PPG Indus., Inc.*, 146 S.W.3d at 93; *Computer Assocs. Int'l, Inc*, 918 S.W.2d at 456; *Pako Corp.*, 855 S.W.2d at 219. Assuming without deciding that the alleged fraudulent concealment would have tolled the statute for 180 days, the Books' suit was still not timely filed. *See generally* Tex. Bus. & Com. Code Ann. § 17.565. Because the Books' claims are barred by the statute of limitations, the trial court erred by denying American Air's motion for directed verdict and motion for judgment notwithstanding the verdict. We sustain

issue one, and we need not address American Air's remaining issues, as they would not result in greater relief. *See* Tex. R. App. P. 47.1. We reverse the trial court's judgment and render judgment that the Books take nothing from American Air.

REVERSED AND RENDERED.

STEVE McKEITHEN
Chief Justice

Submitted on October 28, 2016
Opinion Delivered March 9, 2017

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