In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00300-CV

SIBEL ONASIS FERRER, APPELLANT

V.

MADALENA ELIZABETH ALMANZA, ISABELLA P. ALMANZA, AND ALBERT BOONE ALMANZA, APPELLEE

On Appeal from the 126th District Court
Travis County, Texas
Trial Court No. D-1-GN-19-000101, Honorable Karin Crump, Presiding

March 16, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Sibel Onasis Ferrer, appellant, appeals from a take nothing judgment in favor of Isabella P. Almanza (Isabella).[1] We affirm.[2]

[1] Ferrer nonsuited appellees Madalena Elizabeth Almanza and Albert Boone Almanza (the Almanzas) making the judgment appealed final.

[2] Because this appeal was transferred from the Third Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

Background

Ferrer was the passenger in a vehicle that was rear-ended by a vehicle driven by Isabella. This occurred on February 22, 2017. Ferrer filed suit on January 7, 2019, but did not name Isabella as a defendant, only her father and sister. Ferrer amended her petition on May 13, 2019, then naming Isabella as a defendant. Isabella moved for summary judgment based on the two-year statute of limitations. The trial court granted the motion and ordered that Ferrer take nothing from Isabella. Ferrer appealed.

The dispositive issue in this appeal is whether § 16.063 of the Civil Practice and Remedies Code tolled limitations. It provides that "[t]he absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence." TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 (West 2015). Isabella, being the defendant who moved for summary judgment on an affirmative defense, bore the burden to conclusively establish that the applicable statute of limitations barred the cause of action as a matter of law. *Martin-de-Nicolas v. Octaviano*, No. 03-19-00160-CV, 2020 Tex. App. LEXIS 9138, at *6–7 (Tex. App.—Austin Nov. 19, 2020, no pet.) (mem. op.). That burden included the obligation to negate the applicability of any tolling or suspension statute raised by the non-movant, such as § 16.063. *Id.*

Issue One – Claim Barred by Statute of Limitations

Ferrer claims that the statute of limitations was tolled pursuant to § 16.063 of the Texas Civil Practice and Remedies Code. Both parties agreed that the applicable limitations for the present cause of action was two years. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 2015). Furthermore, they agreed that Isabella was out of state

attending Harvard University in Massachusetts from August 2018 through February 22, 2019. However, she would return for holidays and in between semesters. Furthermore, Isabella considered herself a Texas resident living temporarily outside the state. Nor does Ferrer dispute here that her opponent remained a Texas resident during that period. Indeed, Isabella did not change her address on her driver's license or voter's registration. Nor did she inform the U.S. Post Office of a change in address. Given these circumstances, Isabella contends that § 16.063 was inapplicable because she remained amenable to personal jurisdiction and service of process in Texas. Being so amenable, she allegedly was not absent under the statute. We have little choice but to agree given precedent of the Austin Court of Appeals and our obligation to follow it.

The precedent of which we speak is *Martin-de-Nicolas*. It too dealt with an auto accident. Furthermore, the defendant, Octaviano, was a Texas resident who remained such until sued. In *Martin-de-Nicloas*, the reviewing court interpreted Texas Supreme Court precedent that had dealt with § 16.063 and, in so interpreting it, held that "one who is subject to personal jurisdiction in Texas courts, and amenable to service of process, is not 'absent' from the state for the purposes of section 16.063." *Martin-de-Nicolas*, 2020 Tex. App. LEXIS 9138, at *6. So too did it state that "because Octaviano ha[d] not ceased to be a Texas resident since the cause of action accrued . . . . Any intermittent excursions outside the territorial boundaries of Texas did not affect the ability of state courts to exercise personal jurisdiction over him since . . . 'residence in a state is a valid basis for the exercise of in personam jurisdiction.'" *Id.* at *7–8 (quoting *J.M.R. v. A.M.*, 683 S.W.2d 552 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). Also noted was that Octaviano being a Texas resident, he "was at all times amenable to service of process" under Texas Rules

of Civil Procedure 106 and 108. *Id.* Per those rules, according to the court, "it is not necessary that Texas resident[s] be personally served within the state." *Id.* "Thus . . . Octaviano was not 'absent' from Texas for the purposes of section 16.063 during the two years following the accident, and therefore section 16.063 did not toll the limitations period." *Id.*

Here, Isabella had not ceased to be a Texas resident since the cause of action accrued. Nor was it disputed that she remained amenable to service of process at all times while a Texas resident. Indeed, she was actually present in Texas and living in the same house as her father and sister from the date of the accident in February of 2017 to the time she left for college in August of 2018. She also returned to the same Austin residence during school holidays, between school semesters, and for summers. Thus, under the rule espoused in *Martin-de-Nicolas*, Isabella was not "absent" from Texas for the purposes of § 16.063 during the two years following the accident.[3] We overrule Ferrer's first issue.

Issue Two – Silence by other Defendants tolled the Statute of Limitations

In her second issue, Ferrer contends that limitations should be tolled because Isabella's involvement in the collision somehow was fraudulently concealed. We overrule the issue.

A defendant's fraudulent concealment of wrongdoing may toll the running of limitations. *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). Fraudulent concealment will not, however, bar limitations when the plaintiff discovers the wrong or could have discovered it through the exercise of reasonable diligence. *Id.; Velsicol Chem. Corp. v.*

[3] We caution that our decision is founded upon Austin precedent and the procedural rule obligating us to follow it.

Winograd, 956 S.W.2d 529, 530–31 (Tex. 1997); *Nichols v. Smith*, 507 S.W.2d 518, 519 (Tex. 1974).

Ferrer sued Isabella's father and sister and perfected service upon them on February 11, 2019, and February 4, 2019, respectively. The two-year anniversary date of the accident fell on February 22, 2019. Furthermore, neither father nor sister were obligated by the rules of civil procedure to file an answer to the suit before February 22nd. *See* TEX. R. CIV. P. 99(b) (stating that a defendant must answer the complaint by the first Monday after the expiration of 20 days from the date of service of citation). And, though Ferrer accompanied the complaint with a request for disclosure per Texas Rule of Civil Procedure 194.1, the response date stated therein was 50 days after service of the request. Consequently, neither father nor sister were obligated to even respond to Ferrer with any information until days or weeks after the second anniversary date (i.e., the two-year limitations period) lapsed.

So, what we have here is a plaintiff who knew of her cause of action upon occurrence of the accident on February 22, 2017, waited until January 7, 2019, to file suit, named the wrong defendants in the complaint, delayed in perfecting service on the wrong defendants for about another four to five weeks, perfected service on the wrong defendants at a time which failed to impose any duty to answer the suit until after limitations expired, sought discovery when the response to which would not be due until after limitations expired, and complained because the wrong defendants did not timely direct her to sue their daughter/sister before limitations expired. While their failure to reveal Isabella's identity may be deemed passive silence, that does not trigger fraudulent concealment when untwined with some duty to disclose. *Sky Station Holdings I, LP v.*

Fid. Nat'l Title Ins. Co., No. 03-18-00231-CV, 2019 Tex. App. LEXIS 702, at *9 (Tex. App.—Austin Aug.13, 2019, no pet.) (mem. op.) (stating that passive silence may be enough to sustain a fraudulent concealment defense only if there is a duty of disclosure). More importantly, Ferrer does not cite us to any authority imposing upon father or sister the duty to reveal Isabella's involvement prior to their being sued. The same is true of Isabella; Ferrer cited us to no authority indicating that she had a duty to confess involvement in the accident prior to suit or the expiration of limitations. Nor were we cited to anything of record suggesting that father, sister, or Isabella actively misrepresented Isabella's existence or involvement in the collision in any way. Without evidence of their having a duty to speak or otherwise engaging in active misrepresentation and given the delay Ferrer personally interjected into the process, we cannot say the trial court erred in rejecting the allegation of fraudulent concealment.

Accordingly, we affirm the judgment of the trial court.

Per Curiam