In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00060-CV

SHARLEEN WILSON ALLEN, Appellant

V.

BRYON WILSON, Appellee

On Appeal from the 6th District Court
Red River County, Texas
Trial Court No. CV03085

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

In a dispute between brother, Bryon Wilson, and sister, Sharleen Wilson Allen, related to a Grayson County mobile home that had been originally purchased and mortgaged by Allen,[1]

[1]In 1998, Allen and her then-husband, Paul Allen, purchased five acres of land in Grayson County, Texas. Soon thereafter, the Allens made a down payment on a manufactured home to place on the land, financed the remaining $20,697.06 balance on the home at 11.75% interest over thirty years with Green Tree Servicing, LLC (the Green Tree Note), and agreed that a lien on the manufactured home would secure their payment on the Green Tree Note.

In 2001, Wilson entered into an agreement with the Allens to purchase the five acres of land and the manufactured home for $57,000.00. The 2001 Agreement provided, as written:

> Paul Allen is selling Bryon Wilson 5 acres at 745 Yowell Hill Rd. and a 1998 Redman M[anufactured] home. . . . Bryon Wilson is to pay 600.00 dollers per month due on the first of each month, with a ten day grace period. For time not to exceed eight years. If Bryon is more than 60 days late this realstate goes back to Paul Allen. There is not to be any interest on this note. . . . The actual cash price of this realstate is 57,000 dollars.
>
> . . . .
>
> The payments on each of the morgages are Paul Allen's responsibility. . . .
>
> This realestate is for sell as is . . . .
>
> On the pay off of this contract Paul Allen agrees to sighn over any and all rights to this realestate to Bryon Wilson.

In 2007, Allen claimed that Wilson was merely a tenant on the property. After he allegedly failed to pay his May 2007 rent, Allen posted an eviction notice on the manufactured home's door and filed a forcible entry and detainer suit against Wilson in justice court. This action was subsequently dismissed for want of jurisdiction after the ownership of the property came into dispute.

By this time, Wilson had learned that the Allens had stopped paying Green Tree and were in default. On August 9, 2007, he sued the Allens in Grayson County District Court, asked for a declaratory judgment that the 2001 Agreement was to purchase (and not rent) the five acres and the manufactured home, and sought damages for the Allens' failure to pay Green Tree pursuant to the terms of the Green Tree Note. On August 24, 2007, Green Tree mailed to the Allens a notice of acceleration of their $20,509.44 debt on the manufactured home. In her deposition, Allen admitted that she received this notice in 2007.

In order to prevent the foreclosure of the manufactured home while the Grayson County case was pending, Wilson attempted to make payments to Green Tree on the Allens' behalf. His efforts were thwarted by the Allens' instructions to Green Tree not to communicate with Wilson because he was not a party to the Green Tree Note. On September 6, 2007, Wilson obtained a temporary injunction that allowed him to pay Green Tree on the Allens' behalf as necessary and to deduct the amount of these payments from his monthly rent obligation under the 2001 Agreement.

Wilson was awarded a March 8, 2008, judgment against Allen for $19,475.99 in Grayson County.[2] On March 27, 2008, Wilson abstracted that judgment and recorded the abstract in Red River County. During the ensuing few months, though some payments were made on the mortgage by or on behalf of Allen, a number were missed. As a result, in 2009, the mobile home was foreclosed on by the original lender.[3] Years passed. Finally, on April 8, 2013, Allen sued Wilson in Red River County claiming fraud, unjust enrichment, and restitution relating to the pre-existing mortgage on the mobile home and to Wilson's filing the abstract of judgment in Red River County.

From a take-nothing summary judgment that Allen's claims were barred by limitations, Allen appeals. We affirm the judgment of the trial court, because (1) Allen's fraud cause of action for Wilson's filing his abstract of judgment in Red River County is time-barred as a matter of law, (2) Allen's fraud cause of action for Wilson's failure to pay the mortgage is time-barred as a matter

[2]The Grayson County judgment (1) declared the 2001 Agreement "a valid and enforceable executory contract for the conveyance of the land and the manufactured home"; (2) found that the Allens' balance on the Green Tree note was $19,475.00; (3) awarded to Wilson (a) $19,475.00 "for anticipatory breach damages," (b) $8,623.56 in attorney fees, (c) $400.00 for reimbursement for mediation costs, and (d) post-judgment interest at 7.25% per annum; (4) found that Wilson's balance on the 2001 Agreement was $6,800.00 in rental payments; (5) found that Wilson could and had credited the Allens $6,800.00 against the $28,499.55 judgment, leaving a remaining balance on the judgment of $21,699.55; and (6) awarded Wilson all interests in the land and the manufactured home. This judgment was not appealed.

[3]After the Grayson County litigation, Wilson decided to abandon the manufactured home because the judgment did not order Wilson to pay the Allens' remaining debt on the manufactured home, and he was under no obligation to do so under the Green Tree Note executed by the Allens. Allen testified that, in April of 2008, she paid on the mobile home. She further testified that she "made a lot of payments" like that April 2008 payment, "[t]o keep [the mobile home] out of repossession" because Wilson was not making payments to Green Tree. On August 24, 2009, Green Tree sent a notice stating that they had already obtained possession of the manufactured home and planned to sell it within ten days, unless redeemed.

of law, and (3) Allen's causes of action for unjust enrichment and restitution are time-barred as a matter of law.[4]

In reviewing summary judgments, we use a de novo standard. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007); *Isaacs v. Schleier*, 356 S.W.3d 548, 555 (Tex. App.—Texarkana 2011, pet. denied). The summary-judgment movant must show that no genuine issue of material fact exists, so judgment must be rendered as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985); *Isaacs*, 356 S.W.3d at 555. A defendant can obtain a summary judgment by negating one or more elements of each theory of recovery or by establishing all elements of an affirmative defense. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *Stafford v. Allstate Life Ins. Co.*, 175 S.W.3d 537, 540 (Tex. App.—Texarkana 2005, no pet.). In evaluating the summary-judgment evidence, the court must accept the evidence favoring the nonmovant as true and must indulge reasonable inferences from the evidence against the movant's position. *Stafford*, 175 S.W.3d at 540.

Allen's original pleading against Wilson asserted that (1) Wilson defrauded her by (a) failing to pay the mortgage company and (b) by recording the Grayson County judgment and securing a lien against property owned by Allen in Red River County; (2) Wilson was unjustly enriched (a) by the Grayson County judgment's award since he did not pay off the Green Tree Note, (b) because he recorded a lien against Allen's Red River County property without paying

[4]Allen claims that the Grayson County judgment obligated Wilson to pay the Green Tree mortgage and that Wilson's filing the judgment in Red River County was actionable because Wilson did not intend to pay Green Tree when he recorded the judgment. We do not address the merits of Allen's claims or the seemingly incongruous claim that one can commit fraud by attempting to collect a valid and subsisting money judgment by taking recognized, standard collection efforts, such as filing an abstract of judgment in counties in which the judgment debtor may have non-exempt real property.

the Green Tree Note, and (c) by Allen's payments on the Green Tree Note following Wilson's abandonment of the manufactured home; and (3) she was entitled to restitution for Wilson's failure to pay the Green Tree Note.

In his answer to Allen's lawsuit, Wilson raised the affirmative defense of limitations and filed a motion for summary judgment on this defense. In support of his motion, Wilson attached Green Tree's notice of default, sent February 2, 2009, which gave the Allens thirty days to pay $564.31 to cure another default and provided that the full amount of the note would be accelerated if the default was not cured. Wilson argued that, as of the date of his notice, Allen was aware that Wilson was not making payments to Green Tree on their behalf. Wilson also attached a handwritten note, purporting to be in Allen's handwriting, "concerning her comments about Mr. Wilson's not having paid Green Tree during the third and fourth quarters of 2008." The note, which Wilson's attorney swore was produced by Allen in response to requests for production, stated:

> This makes 4 mobile home payments has [sic] not made. April is due and his last payment was in November 08. However, according to Mrs. Brown at Green Tree a Bryon Wilson calls once a month to check the balance. Bill Wilson whom [sic] has identified himself as "the land owner" has called 6 times since November 08 to request that the mobile home be repossessed off his land. [5]

In her response to the summary judgment motion, Allen argued that the statute of limitations on her causes of action did not accrue until the mobile home was actually repossessed because Wilson could have paid off the balance due on the Green Tree Note until that date. Allen

[5]Although the note was not dated, Wilson's counsel swore that it was stapled to Green Tree's "statement for her account showing transactions posted of February 21, 2009," which stated that a $287.54 payment was due on March 15, 2009.

also argued that she did not discover that Wilson had recorded the Grayson County judgment in the Red River County property records until September 2012 and that this action caused an ongoing injury.

In support of her summary judgment response, Allen attached her own affidavit, which swore that the 2001 Agreement was a rental agreement and attempted to raise the same arguments and issues that were finally resolved in the Grayson County litigation. She further claimed that Wilson "entered into a lease or contract to sell [the land and manufactured home] with [their] sister Monica Wilson" and claimed that Monica made payments on the manufactured home to Green Tree on Wilson's behalf. Allen attached Western Union slips showing that Monica had wired money to Green Tree April 4, 2008.[6] In an effort to demonstrate that she was unaware of Wilson's decision to abandon the mobile home, Allen filed documents demonstrating that Wilson used the land and the manufactured home in 2008 as security for an $8,991.84 debt owed to his counsel, of which Allen was ordered to pay $8,623.56 in the Grayson County judgment.[7]

Fraud is governed by the four-year statute of limitations, while claims of unjust enrichment and restitution are governed by the two-year statute of limitations. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West Supp. 2015), § 16.004(a)(4) (West 2002); *see Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 869–70 (Tex. 2007).

[6]Wilson asserted several objections to Allen's affidavit, including that Allen attached no evidence to support her statements that (1) Wilson made payments to Green Tree after entry of the Grayson County judgment, and (2) Wilson leased or sold the land and mobile home to Monica. It does not appear that the trial court ruled on these objections.

[7]Wilson's attorney released the lien on the land and manufactured home in 2010.

To prevail, Wilson must have "conclusively prove[n] that the cause[s] of action accrued before the commencement of the statute of limitations period," and "negate[d] the discovery rule, if it applies, by proving as a matter of law that there is no genuine issue of material fact about when [Allen] discovered, or in the exercise of reasonable diligence should have discovered the nature of [her] injury." *See Friddle v. Fisher*, 378 S.W.3d 475, 483 (Tex. App.—Texarkana 2012, pet. denied); *see also KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

"Generally, when a cause of action accrues is a question of law." *Id.* (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003)). "Causes of action accrue and statutes of limitations begin to run when facts come into existence that authorize a claimant to seek a judicial remedy." *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 202 (Tex. 2011). "'In most cases, a cause of action accrues when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur.'" *Friddle*, 378 S.W.3d at 483 (quoting *Knott*, 128 S.W.3d at 221).

(1) Allen's Fraud Cause of Action for Wilson's Filing His Abstract of Judgment in Red River County Is Time-Barred as a Matter of Law

Allen argues that the discovery rule applies to her claim that Wilson defrauded her by recording the Grayson County judgment and securing a lien against "the only other property owned by [Allen]" in Red River County.[8] She further contends that limitations did not begin to run until

[8]The Grayson County judgment stated that Wilson "shall have all writs of execution and other process necessary to enforce this judgment." Wilson's recording of this judgment in accordance with Chapter 52 of the Texas Property Code created "a lien that attaches to any real property of the defendant," other than exempt property, "that is located in the county in which the abstract is recorded and indexed." TEX. PROP. CODE ANN. § 52.001 (West 2007).

2012 because her uncontested affidavit stated that she was unaware of the Red River County judgment lien until 2012.

The discovery rule "defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action." *Id.* (citing *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996), *superseded by statute on other grounds*, Act of April 17, 1997, 75th Leg., R.S., ch. 26, §§ 1–4, 1997 Tex. Gen. Laws 68, *as recognized in Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 3 (Tex. 1999)). "In general, the discovery rule applies in those cases where the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Tanglewood Terrace, Ltd. v. City of Texarkana*, 996 S.W.2d 330, 337 (Tex. App.—Texarkana 1999, no pet.) (citing *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994)). "An injury is inherently undiscoverable if it is the type of injury that is not generally discoverable by the exercise of reasonable diligence." *Id.* (citing *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998)). "Thus, if the discovery rule has been pled or otherwise raised, and the defendant has conclusively shown that the nature of the injury is not inherently undiscoverable, or that the evidence of injury is not objectively verifiable, then the discovery rule does not apply and summary judgment is proper."[9] *Id.*

[9]"On the other hand, if . . . the defendant has not conclusively shown that the nature of the injury is not inherently undiscoverable, or that the evidence of injury is not objectively verifiable, then the discovery rule does apply." *Tanglewood Terrace, Ltd.*, 996 S.W.2d at 337. "It is then the defendant's burden to prove as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the nature of its injury." *Id.* "Once the defendant has met its burden under both prongs, the plaintiff may still defeat summary judgment by adducing proof raising a fact issue in avoidance of the statute of limitations." *Id*.

As of 2008, Allen was aware of the Grayson County judgment and its language authorizing Wilson to enforce the judgment. She did not appeal that judgment. Allen has not argued that the recording of the Grayson County judgment was inherently undiscoverable or that her alleged injury was objectively verifiable; she states merely that she did not discover its existence until 2012. Yet, an exercise of reasonable diligence—searching the property records of the county in which Allen maintained "the only other property [she] owned"—would have revealed the judgment lien. Thus, because the recording of the judgment was not inherently undiscoverable (and should have been expected) we find that the discovery rule does not apply to Allen's claim of fraud involving Wilson's filing of the judgment lien.

Next, Allen argues that Wilson's filing of the Grayson County judgment, which encumbered her Red River County property, somehow constituted a continuing tort because the judgment, which Allen has failed to pay, continues to accrue interest. We reject this argument. "A continuous tort involves wrongful conduct that is repeated until desisted, and each day creates a separate cause of action." *Cook v. Exxon Corp.*, 145 S.W.3d 776, 785 (Tex. App.—Texarkana 2004, no pet.). Even if we assume that Wilson's filing of a judgment properly obtained in Grayson County is somehow wrongful, it did not constitute a continuing tort because (1) the filing of the lien is the alleged wrongful act, which occurred once, and (2) the damage to the property was complete when the lien was filed since the judgment set forth the terms of the post-judgment interest. *See Burke v. Union Pac. Res. Co.*, 138 S.W.3d 46, 58–59 (Tex. App.—Texarkana 2004, pets. (2) denied). Moreover, the Texas Supreme Court has not addressed or endorsed the

continuing tort doctrine. *See Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 924 (Tex. 2013).

Allen argued that Wilson's filing of the judgment lien constituted a wrongful act that caused a legal injury.[10] Thus, if we are to take these facts as true, Allen's cause of action accrued when the judgment lien was filed in 2008. Since Allen did not bring this claim within four years of the date of accrual, this cause of action is time-barred, and the trial court's summary judgment on this claim was proper.

(2) Allen's Fraud Cause of Action for Wilson's Failure to Pay the Mortgage Is Time-Barred as a Matter of Law

Allen also asserts that the discovery rule applies to her claims that Wilson defrauded her by failing to pay the mortgage company. Specifically, she argues that, since Wilson never communicated his intentions to Allen, there is a fact question as to when Allen discovered that Wilson had "given up" the manufactured home and was refusing to pay off the mortgage. We find that the summary judgment evidence conclusively proved that Allen knew that Wilson had decided not to pay Allen's mortgage before April 8, 2009.

In her pleadings, Allen asserted that Wilson's wrongful act was his abandonment of the manufactured home with his intent not to make any payments on Allen's note with Green Tree, the original lender on the home. The Grayson County judgment was entered in March 2008. Although that judgment awarded title of the manufactured home to Wilson, Allen's petition

[10]Generally, in causes of action for fraud, "accrual is deferred because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations ha[ve] run." *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996). This is not a typical fraud cause of action. The Grayson County judgment, which was not appealed, established that the recording of the abstract of judgment, at least standing alone, was not fraudulent.

clarified that "Wilson never transferred the title." Allen's own affidavit established that Wilson left the property after entry of the Grayson County judgment. In her deposition, Allen testified that, before and in April 2008, she made payments to Green Tree because Wilson did not make the payments and she did not want the manufactured home to be repossessed.[11] Allen received Green Tree's February 2, 2009, notice of default, which gave the Allens thirty days to cure the default to avoid acceleration of their debt. Allen's handwritten note acknowledged that Wilson had not paid Green Tree "during the third and fourth quarters of 2008" and that Wilson had requested "that the mobile home be repossessed off his land."

The summary judgment evidence conclusively established that, before April 8, 2009, Allen was aware that Wilson was not making payments on the Green Tree Note and had left the mobile home with the intent not to make these payments. Allen's arguments that the statute of limitations did not begin to run until the foreclosure was complete runs contrary to the rule that "a cause of action accrues when a wrongful act causes a legal injury, regardless of . . . if all resulting damages have yet to occur.'" *Friddle*, 378 S.W.3d at 483. Because we find that Allen's fraud cause of action involving Wilson's failure to pay the Green Tree Note accrued before April 2009, we conclude that it was barred by the statute of limitations as a matter of law. Thus, the trial court's summary judgment on this claim was proper.

[11]Allen's affidavit demonstrated that Monica, who had moved into the manufactured home after Wilson left, made several payments to Green Tree on Allen's debt.

(3) Allen's Causes of Action for Unjust Enrichment and Restitution Are Time-Barred as a Matter of Law

Allen claims that Wilson was unjustly enriched by her payments on the Green Tree Note following Wilson's abandonment of the manufactured home. Wilson abandoned the manufactured home in 2008. Assuming the validity of Allen's claim, her unjust enrichment claim accrued each time she made a payment to Green Tree. Since those payments ceased after the home was repossessed in 2009, Allen's 2013 unjust enrichment claims were barred by the two-year statute of limitations. Likewise, Allen's claims that (1) Wilson was unjustly enriched by the Grayson County judgment's award because he did not pay off the Green Tree Note, (2) Wilson unlawfully benefitted from recording a lien against Allen's Red River County property without paying the Green Tree Note, and (3) she was entitled to restitution for Wilson's failure to pay the Green Tree Note were also time-barred.

Because Wilson conclusively established that the statute of limitations barred all of Allen's claims against him, the trial court's summary judgment was proper. We overrule all of Allen's points of error and affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: February 3, 2016
Date Decided: March 4, 2016