TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00571-CV

Fall Air, Inc., Appellant

v.

Paul Sissons, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 425TH JUDICIAL DISTRICT NO. 15-1088-C277, HONORABLE BETSY F. LAMBETH, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Fall Air, Inc., appeals the trial court's summary judgment disposing of its claims against Paul Sissons arising out of his certification of repair work done by a third party on airplane engines owned by Fall Air. We will reverse the trial court's summary judgment and remand the cause for further proceedings.

BACKGROUND[1]

Fall Air is the owner of a Beechcraft King Air twin-turboprop model aircraft that experienced a hard landing in June 2008. Fall Air sent both of the aircraft's engines to Airo Ltd. Partnership d/b/a Century Turbines ("Century Turbines") to be repaired. After Century Turbines completed its work on the engines, Sissons, who holds a Federal Aviation Administration (FAA)

[1] The facts recited in this section are derived from the pleadings and summary judgment evidence presented to the trial court and, unless otherwise indicated, are undisputed.

certificate for Inspection Authorization, signed an FAA Form 337 to certify that Century Turbines's paperwork indicated that it had properly performed the work on the engine. Both engines were reinstalled in May 2009 and, in June 2009 after approximately four hours of flight time, the right engine catastrophically failed during flight.[2] The engine failure was determined to have been caused by a single compressor turbine blade that fractured as the result of high cycle fatigue. Fall Air sent the engine back to Century Turbines, which had promised to correct the problem. Century Turbines sent Fall Air a "loaner" engine to use until the damaged engine was returned. The relationship between Century Turbines and Fall Air subsequently deteriorated and, in September 2009, Century Turbines sued Fall Air in Florida seeking the return of the "loaner" engine while maintaining exclusive possession of the damaged engine. Fall Air filed a counterclaim in the Florida litigation, seeking to recover the cost of rebuilding the engines.[3]

In May 2014, during the course of the Florida litigation, the Florida court ordered Century Turbines to produce all 58 compressor blades from the right engine for inspection by Fall Air's expert witness.[4] During that inspection, Fall Air's expert measured the compressor turbine

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[2] The right engine failed while the plane was being used for a skydiving excursion. After the engine failed, the skydivers jumped from the plane and the pilot successfully landed the aircraft.

[3] After the right engine failure, Fall Air examined the left engine and discovered that it had a major oil leak and "other problems" that caused Fall Air to spend approximately $20,000 for repairs in addition to the approximately $160,000 it had already paid Century Turbines to rebuild, certify, and inspect the two engines.

[4] The Florida court order recites, in part:

> 3. Counsel for [Century Turbines] will produce the described compressor turbine blades personally to Michael Moore the named expert for [Fall Air] on an agreed and scheduled date and time at the agreed upon inspection laboratory.

blades and determined that they were installed "short" and below the manufacturer's factory authorization standards.[5] Fall Air took the position that these blades should not have been installed in their engines and Sissons should not have signed the Form 337 certifying that the work performed on the left and right engines conformed with the manufacturer's manuals and FAA standards. In November 2015, Fall Air sued Sissons in Williamson County district court, alleging causes of action for fraud, negligence, and negligent misrepresentation arising out of his having signed the Form 337 certifying Century Turbines's work. Fall Air later amended its petition to add a claim for breach of fiduciary duty and a claim under the Deceptive Trade Practices-Consumer Protection Act (DTPA). *See* Tex. Bus. & Com. Code §§ 17.41-.63.

Sissons filed a motion for summary judgment on the affirmative defense of limitations. In his motion, Sissons asserted that, as a matter of law, Fall Air's causes of action against him accrued no later than June 8, 2009, the date the right engine failed. He argued that because Fall Air did not file its suit against him until five and a half years later, its claims were barred by the statute of limitations.[6] Fall Air countered that it did not discover the injury caused by

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> 4. The inspection will be conducted in the presence of counsel for [Century Turbines] and all the compressor turbine blades will be returned to the custody of [Century Turbines's] counsel immediately upon completion of the inspection and testing on the day of inspection and testing.
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> 5. At no time will the subject compressor blades be in the custody and/or control of [Fall Air].

[5] Nothing in the record indicates why the expert decided to measure the length of the blades as part of his inspection.

[6] It is undisputed that the limitations period for Fall Air's tort claims and its claim under the DTPA is two years and that the limitations period for its fraud and breach of fiduciary duty claims is four years. *See* Tex. Civ. Prac. & Rem. Code §§ 16.003, .004; Tex. Bus. & Com. Code § 17.565.

Sissons—the presence of non-conforming short compressor turbine blades in its engines—until its expert measured the blades during the May 2014 inspection. After a hearing, the trial court granted Sissons's motion and rendered a take-nothing judgment against Fall Air. This appeal followed.

DISCUSSION

In his summary judgment motion, Sissons argued that Fall Air's suit was barred by limitations because it was filed more than five years after the cause of action accrued, which it contended was the date that Sissons signed the Form 337 for the right engine, and the discovery rule did not apply to defer accrual. *See S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (discovery rule, when applicable, defers accrual of cause of action until plaintiff knew or in exercise of reasonable diligence should have known of wrongful act and resulting injury). Sissons alternatively argued that if the discovery rule applied, when the engine failed on June 8, 2009, Fall Air knew or, in the exercise of reasonable diligence should have discovered, its cause of action against Sissons. *See Childs v. Haussecker*, 974 S.W.3d 31, 40 (Tex. 1998) ("[W]hen the discovery rule applies, accrual is tolled until a claimant discovers or in the exercise of reasonable diligence should have discovered the injury and that it was likely caused by the wrongful acts of another."). The trial court granted the motion. Fall Air asserts on appeal that the trial court erred in granting summary judgment on its claims because Sissons failed to negate the discovery rule and therefore did not conclusively establish his limitations affirmative defense. We review a trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In reviewing a trial court's ruling on summary judgment, we take as true all evidence favorable to the nonmovant,

and we indulge every reasonable inference and resolve all doubts in the nonmovant's favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). Thus, the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving 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 the injury it alleges it suffered. *Id.* If the movant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment evidence raising a fact issue in avoidance of the statute of limitations. *Id.*

The discovery rule applies to certain categories of cases in which a plaintiff does not immediately realize that he has suffered an injury as a result of the defendant's conduct. When the discovery rule applies, the cause of action is deemed not to accrue, and consequently the limitations period is deemed not to have commenced, until the plaintiff "knows or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury." *See S.V.*, 933 S.W.2d at 4. The supreme court has explained that application of the discovery rule is justified in cases in which the injury is both "inherently undiscoverable" and "objectively verifiable." *See id.* at 6. Thus, the discovery rule defers accrual of a cause of action in cases in which "the alleged wrongful act and resulting injury were inherently undiscoverable at the time they occurred but may be objectively verified." *Computer Assocs. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996). "Inherently

undiscoverable encompasses the requirement that the existence of the injury is not ordinarily discoverable, even though due diligence has been used." *Id.* To be "inherently undiscoverable," an injury need not be absolutely impossible to discover. *S.V.*, 933 S.W.2d at 1. Rather, an injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence. *Id.* Whether an injury is inherently undiscoverable is a legal question "decided on a categorical rather than case-specific basis; the focus is on whether a *type* of injury rather than a *particular* injury was discoverable." *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006) (emphasis in original). The requirement that the injury be "objectively verifiable" ensures that "the bar of limitations cannot be lowered for no other reason than a swearing match between parties over facts and between experts over opinions." *S.V.*, 933 S.W.2d at 15. The two elements of inherent undiscoverability and objective verifiability "balance the conflicting policies in statutes of limitations: the benefits of precluding stale or spurious claims versus the risks of precluding meritorious claims that happen to fall outside an arbitrarily set period." *Id.* at 6.

A summary judgment movant can negate the discovery rule by showing that it does not apply as a matter of law or by proving that there is no issue of material fact as to when the plaintiff discovered or should have discovered the nature of the injury. *Howard v. Fiesta Tex. Show Park, Inc.*, 980 S.W.2d 716, 719 (Tex. App.—San Antonio 1998, pet. denied) (citing *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990); *Wood v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 n.2 (Tex. 1988)). We first consider whether the discovery rule applies to Fall Air's claims against Sissons.

Fall Air's claims against Sissons are based on his allegedly fraudulent or negligent act of signing a Form 337 certifying that the work done on the engines was in conformance with the

manufacturer's manuals and FAA standards when, in fact, the documentation showed that the compressor turbine blades were installed short.[7] Sissons signed a Form 337 for the left engine on April 7, 2009, and signed a separate Form 337 for the right engine on April 16, 2009. According to Fall Air, those Form 337s fraudulently or negligently misrepresented that the work records related to the repair of the left and right engines reflected that the work was done in conformance with the manufacturer's manuals and FAA standards, when in fact it was not. The question, then, is whether the nature of this injury is inherently undiscoverable and objectively verifiable. We conclude that it is both.

In order for Fall Air to have discovered the basis for its claims against Sissons, it would have had to discover that the compressor turbine blades that had been installed in the engine were several thousandths of an inch shorter than the length specified by the manufacturer. The compressor turbine blades were installed in the engines as part of the repair work Fall Air hired Century Turbines to perform. When the engine was returned to Fall Air, the engine had been reassembled and the compressor turbine blades were not visible. As part of the repair process, Century Turbines's work records were reviewed by Sissons, a mechanic holding an FAA Inspection Authorization, who signed a Form 337 certifying that the work records showed compliance with the manufacturer's standards. Fall Air had no reason to question Sissons's certification that the

[7] Counsel for Fall Air represented to the trial court that his summary judgment exhibits showed that the compressor turbine blades were "hundredths of thousands shorter and needed to be replaced." Although there was no testimony or evidence to explain them, the work records included in the summary judgment evidence appear to reflect that the installed blades were several thousandths of an inch shorter than the minimum length required by the manufacturer's manual. Counsel for Sissons represented to the trial court that, for purposes of the summary judgment motion, there was no fact question as to whether the blades were installed short.

repairs had been done properly. Additionally, after Fall Air notified Century Turbines in June 2009 of the engine failure, the engine was sent to Century Turbine for repairs and it remained out of Fall Air's possession until it was released by the Florida bankruptcy court in October 2015. Fall Air reasonably released the engine to Century Turbines without further inspection after making the initial determination that the engine failure was caused by a fractured compressor turbine blade, an assessment that was confirmed by Century Turbines. That the blades installed in the engines were, in fact, thousandths of an inch shorter than permitted was not a type of injury that was likely to be discovered by Fall Air within the limitations period. The fact that the blades were installed short could be objectively verified simply by measuring them. Thus, the discovery rule applies and operated to extend the accrual of Fall Air's cause of action against Sissons until it knew or, in the exercise of reasonable diligence should have known, that Sissons's certification was, in fact, incorrect.

We next consider whether Sissons conclusively established that Fall Air discovered or, in the exercise of reasonable diligence should have discovered, the nature of the injury for which it seeks recovery on a date that renders its suit time-barred. *See KPMG Peat Marwick*, 988 S.W.2d at 748 (to negate limitations when discovery rule applies, summary judgment movant must prove, as matter of law, that there is no genuine issue of material fact about when plaintiff discovered or, in exercise of reasonable diligence should have discovered, nature of injury for which it seeks recovery). In its summary judgment motion, Sissons asserted that Fall Air's "injury" occurred when the right engine catastrophically failed on June 8, 2009 and that Fall Air "knew about the injury the moment it happened." Sissons argued that Fall Air also "immediately knew the cause of the injury, a failed compressor turbine blade." Likewise, in its brief on appeal, Sissons asserts that on June 8,

2009, Fall Air "knew immediately that it had suffered a catastrophic injury." Thus, Sissons reasons, Fall Air's suit must have been filed by June 8, 2011 to be within the two-year limitations period for negligence claims and DTPA claims and by June 8, 2013 to be within the four-year limitations period for fraud and breach of fiduciary duty claims. Sissons contends that because the suit was not filed until November 2015 it was barred by limitations.

The flaw in Sissons's argument is that it assumes that when the engine failed on June 8, 2009 Fall Air knew, or in the exercise of reasonable diligence should have discovered, that Sissons had either negligently or fraudulently certified that the work records showed that the compressor turbine blades that were installed were an acceptable length when, in fact, they were not.[8] It is undisputed, however, that the cause of the engine failure was a fractured compressor turbine blade in the right engine. There was no evidence, or even an indication, that the length of the turbine blade contributed to, caused, or was in any way related to the fracture. Thus, Sissons's summary judgment evidence failed to conclusively establish that the engine failure notified Fall Air that Sissons's Form 337 was inaccurate. Nor did the summary judgment evidence conclusively establish that the engine failure should have caused Fall Air to, in the exercise of reasonable diligence, discover that the Form 337 was inaccurate. The summary judgment evidence does not establish that the engine failure was sufficiently related to the alleged faulty certification such that the occurrence of the

[8] Fall Air does not contend that Sissons was aware of or should have detected any defect with the blades other than their length, which it alleges was apparent from the paperwork documenting the repair. It is undisputed that Sissons was not expected to, and did not, visually inspect the blades themselves. His certification was based solely on his review of paperwork documenting what work had been done on the engines, and his responsibility was to certify that the documentation indicated that the work done conformed to the manufacturer's manuals and FAA standards.

engine failure should have led Fall Air to the discovery of Sissons's alleged negligence or fraud in certifying that the blades installed were the correct length. The summary judgment evidence instead indicates that the cause of the engine failure was determined to be the fractured blade, and Fall Air could not reasonably have been expected to investigate whether there were other issues with the engine unrelated to its failure.[9] Sissons failed to meet his burden to conclusively establish that Fall Air knew, or in the exercise of reasonable diligence should have known, of its claims against Sissons on June 8, 2009, a date that would render its claims barred by limitations.

Sissons's reliance on *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194 (Tex. 2011) is misplaced. In that case, the supreme court did not reach the question of the impact of the discovery rule on the limitations period for the pending claims because it held that the plaintiffs had actual knowledge of the defendant's wrongful actions and that those actions caused problems or injuries to their interest even though they did not know the full extent of the damage. *Id.* at 203, 207. Here, there was not conclusive summary judgment evidence that an engine failure determined to be caused by a blade that fractured during flight because of high cycle fatigue would cause a reasonably prudent person to inquire into whether Sissons's certification regarding blade length was inaccurate. *See Bayou Bend Towers Council of Co-Owners v. Manhattan Constr. Co.*, 866 S.W.2d 740, 747 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (knowledge of facts

[9] Sissons's argument seems to be premised on his view that the "injury alleged to have been suffered" by Fall Air is the engine failure. But the claims Fall Air has asserted do not arise from the engine failure. Rather, they arise from the allegedly faulty certification regarding the length of the blades. Whether Fall Air can recover damages related to the engine failure in this suit against Sissons for allegedly inaccurately certifying that the blade length was in conformance with the manufacturer's specifications is unrelated to whether its claims against him arising out of the certification are time-barred.

that would cause reasonably prudent person to make inquiry that leads to discovery of cause of action is legal equivalent to knowledge of cause of action). The summary judgment evidence does not conclusively establish that by June 8, 2009, Fall Air either had actual knowledge of or, in the exercise of reasonable diligence, should have discovered its cause of action against Sissons. The trial court erred by granting Sissons's motion for summary judgment based on limitations.

CONCLUSION

Sissons's summary judgment evidence failed to conclusively establish that Fall Air knew, or should have known, that Sissons's Form 337 inaccurately certified that the compressor turbine blades installed in the engines were in conformance to the manufacturer's standards on June 8, 2009. The trial court erred in granting Sissons's motion for summary judgment. Accordingly, we reverse the trial court's summary judgment and remand this cause for further proceedings.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Reversed and Remanded

Filed: June 1, 2018