NUMBER 13-19-00315-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

FERNANDO RUIZ, **Appellant,**

v.

ROBERT EUGENE POLLOCK JR.,
FORBES ENERGY SERVICES, LTD.
AND SPENCER H. YOUNG, **Appellees.**

On appeal from the 130th District Court
of Matagorda County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Longoria

Appellant Fernando Ruiz appeals from the trial court's granting of summary judgment in favor of appellees Robert Eugene Pollock Jr., Forbes Energy Services, Ltd.

(Forbes), and Spencer H. Young. By one issue, appellant argues that the trial court erred in granting appellees' motion for summary judgment. We reverse and remand.

I. BACKGROUND

On November 15, 2017, appellant filed his original petition against appellees alleging negligence and seeking damages arising from a motor vehicle accident which occurred on November 11, 2015.[1] On November 20, 2017, appellant requested issuance of service and citations were issued by the District Clerk of Matagorda County.

The following day, A.T. Davila, lead counsel for appellant, asked his associate, Thomas A. Neiderhofer, to contact a process server to have the citations served on appellees. Appellant states that the process server agreed to serve the citations on the appellees. Approximately one month later, on December 14, 2017, Neiderhofer, who contacted the process server, discontinued working in Davila's office, taking a personal leave of absence. Davila did not follow up with the process server until February 15, 2018, after Neiderhofer returned, when the attorneys determined that no return of service had been filed. At that point, Davila discovered that the process server did not pick up the issued citations and appellees had not been served. Neiderhofer again arranged for a process server to pick up and serve the citations on appellees. Pollock was served on March 8, 2018. On March 22, 2018, the process server unsuccessfully attempted to serve Forbes, but Forbes appeared by filing an answer on March 30, 2018. Service was successful for Young on April 9, 2018.

[1] Appellant states that he attempted to electronically file his original petition on November 2, 2017, but that it was rejected. He was able to file the petition, and it was accepted by the District Clerk of Matagorda County, on November 15, 2017.

Pollock and Forbes filed their motion for summary judgment on February 13, 2019, arguing that appellant's suit is barred by limitations and that appellant failed to exercise due diligence in securing service of process following expiration of the limitations period. The trial court granted the motion on March 15, 2019. Young filed his motion for summary judgment arguing the same on May 6, 2019, and his motion was granted on June 4, 2019. This appeal followed.

II. SUMMARY JUDGMENT

By his sole issue, appellant argues that the trial court erred in granting summary judgment as he showed due diligence in effecting service on appellees.

A. Standard of Review and Applicable Law

We review de novo the trial court's ruling on a motion for summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641 (Tex. 2015). When a defendant moves for summary judgment, it must either (1) disprove at least one essential element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of an affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). To determine whether there is a fact issue in a motion for summary judgment, we review the evidence in the light most favorable to the non-movant, crediting favorable evidence

if reasonable jurors could do so and disregarding contrary evidence unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848 (citing *City of Keller*, 168 S.W.3d at 827).

Summary judgment on a limitations affirmative defense involves shifting burdens of proof. *Proulx v. Wells*, 235 S.W.3d 213, 215–16 (Tex. 2007) (per curiam). When a plaintiff files his petition within the limitations period but obtains service on the defendant outside of the limitations period, the service is valid only if the plaintiff exercised diligence in procuring service. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *see also Proulx*, 235 S.W.3d at 215 (providing that "a timely filed suit will not interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation"). If a plaintiff diligently effects service after the expiration of the statute of limitations, then the date of service relates back to the date of filing. *Proulx*, 235 S.W.3d at 215. If a defendant affirmatively pleads the defense of limitations and shows that service has occurred after the limitation's deadline, the burden shifts to the plaintiff to prove diligence. *Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 215.

Diligence is determined by asking "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*, 235 S.W.3d at 216. The plaintiff must present evidence regarding the efforts made to serve the defendant and "explain every lapse in effort or period of delay." *Id*. The question of the plaintiff's diligence in obtaining service is generally one of fact, to be "determined by examining the time it took to secure citation, service, or both, and the type of effort or lack of effort the plaintiff expended in procuring service." *Id*. If "one or more lapses between service efforts are

unexplained or patently unreasonable," then the record demonstrates lack of diligence as a matter of law. *Id*.

B. Due Diligence

Appellant alleged that the car accident giving rise to his alleged damages occurred on November 11, 2015, and this is not disputed by appellees. Therefore, November 11, 2017, is the date the two-year statute of limitations expired. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (providing two-year statute of limitations for personal injury suits). In their motions for summary judgment, appellees proved that they were not served until March and April of 2018, after limitations had ran. *See id*. As a result, appellees met their initial burden of establishing that service was outside the limitations period, and the burden then shifted to appellant to show that he exercised diligence in attempting to serve appellees after filing suit and until they were served. *See Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216. In order to satisfy his burden, appellant needed to "present evidence regarding the efforts that were made to serve the defendant[s], and to explain every lapse in effort or period of delay." *Proulx*, 235 S.W.3d at 216.

The period between the filing of the lawsuit on November 15, 2017, and the service of process on appellees in March and April of 2018 was approximately four to five months. To show he exercised due diligence during this period, appellant offered as summary judgment evidence the citations issued for each appellee on November 20, 2017; the return of service for Pollock dated March 9, 2018; the return of service for Young dated April 25, 2018; several pleadings; the affidavit of Debra Adams regarding service attempts on Forbes; and the affidavits of appellant's attorneys, Davila and Neiderhofer.

As noted previously, whether a plaintiff exercised due diligence in obtaining the issuance and service of citation is usually a question of fact; however, if no excuse is offered for a delay, or if the lapse of time and the plaintiff's acts conclusively negate a lack of diligence, then the lack of diligence is determined as a matter of law. *Proulx*, 235 S.W.3d at 216. We conclude that the summary judgment evidence did not conclusively establish lack of diligence as a matter of law. This is not a case involving a delay of "more than a few months" which conclusively negates due diligence as a matter of law. *See, e.g. Weaver v. E–Z Mart Stores, Inc.*, 942 S.W.2d 167, 168 (Tex. App.—Texarkana 1997, no writ)) (inaction for nine months conclusively negated due diligence); *Gonzalez v. Phoenix Frozen Foods, Inc*., 884 S.W.2d 587, 590 (Tex. App.—Corpus Christi–Edinburg 1994, no writ) (five months); *Butler v. Ross*, 836 S.W.2d 833, 835–36 (Tex. App.—Houston [1st Dist.] 1992, no writ) (five months); *Allen v. Bentley Labs., Inc*., 538 S.W.2d 857, 860 (Tex. App.—San Antonio 1976, writ ref'd n.r.e.) (six months); *see also Dragustinovis v. Centroplex Auto. Recovery*, *Inc*., No. 13-16-00150-CV, 2019 WL 613847, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 14, 2019, no pet.)(mem. op.) (twelve months).

The timespan at issue here is a period of approximately four to five months from November 20, 2017 until service was effectuated on Pollock on March 8, 2018 and on Young on April 9, 2018. Forbes was not served but appeared by filing an answer on March 30, 2018. The record evidence indicates that multiple efforts to effectuate service were made during this period. Adams testified, based on specific attempts at service, that Forbes was avoiding service of process. Niederhofer testified that he had difficulty filing the petition with a request for issuance of citation, with repeated attempts spanning from

November 2 until he ultimately filed it without the request for issuance of citation on November 15. He filed a request for issuance five days after the filing of the petition itself, and had the citations issued that same day. The next day, November 21, Niederhofer contacted ClearLegal, a process serving company, and arranged for them to pick up the citations and serve them "immediately." On December 14, Niederhofer took a personal leave of absence, gave his files to Davila, and told him citations had been issued and ClearLegal was effectuating service. In late February, he returned to work and determined no returns had been filed and contacted ClearLegal "immediately" to effectuate service.

According to the evidence, the first attempt to serve Pollock was on March 1, 2018, the first attempt to serve Forbes was on March 22, 2018. The only period of inactivity occurred from November 21 until late February, a period in which Niederhofer had expressly instructed ClearLegal to effectuate service and Niederhofer and Davila thought that ClearLegal was effectuating service.

Appellant contends that he believed the citations had been served and was unaware that they hadn't been until late February of 2018. Once he was aware that service was not completed, he immediately took actions to correct the situation. However, he provides this Court with no explanation for the three-month lapse of time in which no efforts were made to secure service, nor does he provide any justification for his belief that they had been served. *See Proulx*, 235 S.W.3d at 216. In fact, appellant appears to have relied on the belief that the process server followed through, without ever contacting the process server to ensure service had been completed, and without ever receiving return of service to confirm service had been completed. This Court has previously held that it is the responsibility of the person requesting service, and not the process server,

to see that service is properly accomplished. *Roberts v. Padre Island Brewing Co.*, 28 S.W.3d 618, 621 (Tex. App.—Corpus Christi–Edinburg 2000, pet. denied). In *Roberts*, we explained that reliance on the process server does not constitute due diligence in attempting service of process. *Id*. Further, we found that a reasonable person in the same or similar circumstance would have employed an alternate process server, a constable, or would have attempted service through alternate court approved methods. *Id*. However, the present case is distinguishable based on the length of time at issue and the record evidence regarding Niederhofer's leave of absence. *See Boyattia v. Hinojosa*, 18 S.W.3d 729, 734 (Tex. App.—Dallas 2000, pet. denied) (after three months, clerk's duty to service citation was replaced by duty to ensure that service was actually completed).

The duration of the delay and the testimony here raise a fact issue. *See Proulx*, 235 S.W.3d at 216–17; *see also Tate v. Beal*, 119 S.W.3d 378, 381 (Tex. App.—Fort Worth 2003, pet. denied) (holding facts raised issue on diligence when first citation was returned unserved and plaintiff searched for two and one-half months before discovering defendant's address and requesting service again); *Fontenot v. Gibson*, No. 01-12-00747-CV, 2013 WL 2146685, at *2 (Tex. App.—Houston [1st Dist.] May 16, 2013, no pet.) (mem. op.) (concluding that evidence that plaintiff's attorney had requested that the process server investigate defendant's whereabouts, requested a forwarding address from the postal service, and searched various websites for defendant's address over a two-month period raised a fact issue). The delays between appellant's efforts are not so "unexplained or patently unreasonable" that they demonstrate a lack of diligence as a matter of law. *See Proulx*, 235 S.W.3d at 216–17.

Thus, viewing the summary judgment evidence in the light most favorable to appellant, we conclude that appellant's actions were designed to procure issuance and service of citation. *See Proulx*, 235 S.W.3d at 216; *see also St. John Backhoe Serv. v. Vieth*, No. 02-15-00098-CV, 2016 WL 4141026, at *7 (Tex. App.—Fort Worth Aug. 4, 2016, no pet.) (mem. op.) (holding that appellant raised a fact issue where citation was issued immediately following filing of suit and a process server was working to serve the defendants "not three months after suit was filed"). Accordingly, appellees failed to conclusively establish their limitations affirmative defense as a matter of law.

We sustain appellant's sole issue.

III. CONCLUSION

The judgment of the trial court is reversed, and this case is remanded to the trial court for further proceedings consistent with this memorandum opinion.

NORA L. LONGORIA
Justice

Delivered and filed the
9th day of April, 2020.