

Affirmed in Part, Reversed and Remanded in Part, and Opinion filed May 25, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01020-CV

VICKROY E. STONE, Appellant

V.

EL PASO NATURAL GAS COMPANY, Appellee

**On Appeal from the 164TH District Court
Harris County, Texas
Trial Court Cause No. 95-57505**

O P I N I O N

In this fiduciary duty case, Vickroy Stone appeals a summary judgment entered in favor of El Paso Natural Gas Company (“El Paso”) on the ground that the statute of limitations was tolled by application of the discovery rule. We affirm in part and reverse and remand in part.

Background

Although the facts underlying the parties’ dispute are far more numerous, those which are pertinent to this appeal can be summarized as follows. Stone was the chief financial officer of Transamerican Natural Gas (“Transamerican”) from 1986 until he was terminated in 1988. In 1989, he began working with Jonathan Cox, an attorney representing litigants in lawsuits against Transamerican. Cox allegedly advised

Stone that if Cox became Stone's attorney, information Stone possessed about Transamerican could be given to Cox for use in litigation against Transamerican without violating any confidentiality obligations Stone had to Transamerican. In reliance on this advice, Stone allegedly entered into an attorney-client relationship with Cox in May of 1989.

After Transamerican was awarded a \$600 million judgment against El Paso (the "judgment"), El Paso sought to obtain information from Stone for use in its litigation against Transamerican. Cox allegedly advised Stone that, as Stone's attorney, Cox would negotiate a consulting agreement for Stone to provide information to El Paso. To this end, by letter dated June 21, 1989, Cox¹ and Stone agreed that Cox would compensate Stone for doing so by an hourly rate, reimbursement of out-of-pocket expenses, and a possible bonus payable in the event Cox was satisfied with Stone's services. Depending on the amount by which El Paso's liability to Transamerican was reduced, the maximum bonus Stone might earn could reach \$3 million.

Allegedly, however, unbeknownst to Stone until 1997, while Cox had been acting as Stone's attorney in negotiating with El Paso, Cox had also secretly negotiated for himself a far more lucrative agreement for providing Stone's information to El Paso. By letter dated June 6, 1989, El Paso and Cox agreed that for providing information and representation regarding the El Paso lawsuit against Transamerican, Cox would be paid a contingent fee based on the eventual reduction, if any, in the amount of the judgment or the amount El Paso paid to settle it. Depending on the amount of this reduction, Cox's contingent fee could reach \$15 million. El Paso and Transamerican reached a settlement in January of 1990, El Paso paid Cox a bonus on January 31, 1990, and Cox paid Stone in March of 1990.

Stone initially filed suit against Cox in November of 1995, asserting numerous claims, and added El Paso as a defendant in April of 1996.² Among other things,³ Stone eventually sought to recover the

¹ For purposes of this opinion, "Cox" will refer not only to Jonathan Cox, individually, but also to his law firm, Cox & Padmore.

² Stone settled his claims against all defendants in this case except El Paso.

³ Stone also asserted the following claims against El Paso: (1) fraud; (2) fraudulent concealment; (3) indemnity; (4) tortious interference with attorney-client relationship; (5) undue influence and duress; (6) money had and received; (7) constructive trust; (8) conspiracy; and (9) equitable estoppel. He

money of which he was allegedly deprived by El Paso's knowing participation in Cox's alleged self-dealing as Stone's attorney.⁴ After Stone's claims against Cox were settled, El Paso filed a motion for summary judgment asserting, among other things, that Stone's claims against it⁵ were barred by the statute of limitations. The trial court granted El Paso's motion and entered a take-nothing summary judgment against Stone.

Standard of Review

A summary judgment may be granted if the summary judgment evidence shows that, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on those issues expressly set out in the motion or response. *See* TEX. R. CIV. P. 166a(c). To prevail on a motion for summary judgment, a defendant, as movant, must disprove at least one of the essential elements of the plaintiff's cause of action or prove all of the elements of an affirmative defense to the plaintiff's claims. *See Elliot-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex. 1999); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

further pleaded application of the discovery rule.

⁴ *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 574, 160 S.W.2d 509, 514 (Tex. 1942) (recognizing that where a third party knowingly participates in a breach of fiduciary duty, the third party becomes liable as a joint tortfeasor with the fiduciary).

⁵ Although Stone asserted several claims against El Paso, he has represented to this court in oral argument that the claim for breach of fiduciary duty based on self-dealing is the only one for which he seeks a decision in this appeal.

Breach of Fiduciary Duty

El Paso's motion for summary judgment asserted that Stone's indemnity claim was baseless and all his other claims were barred by the statutes of limitations. The take-nothing summary judgment, granted on May 28, 1998, stated that summary judgment was rendered on all of Stone's claims.

On appeal, Stone asserts that he and Cox were in a fiduciary relationship until October of 1995 and that the breach of that duty could not be discovered until 1997, when confidential documents were produced which revealed the compensation arrangement between Cox and El Paso. Therefore, Stone argues that the summary judgment evidence fails to negate application of the discovery rule with regard to his breach of fiduciary duty claim or at least raises a fact issue thereon.

Under the "legal injury" rule, a cause of action generally accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later and all resulting damages have not yet occurred. *See S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). However, under the "discovery rule", an exception to the legal injury rule, the statute of limitations does not begin to run on a claim for breach of fiduciary duty until the claimant knew or should have known of facts that in the exercise of reasonable diligence would have led to discovery of the wrongful act. *See Little v. Smith*, 943 S.W.2d 414, 420 (Tex. 1997). In this case, although El Paso's motion for summary judgment does not specifically address Stone's claim for breach of fiduciary duty, it does generally assert that all of his claims are barred by limitations, and Stone does not assign error to the failure of El Paso's motion to address the breach of fiduciary duty claim more specifically. However, El Paso's motion for summary judgment has no assertion or evidence that Cox's alleged self-dealing or the injury therefrom was or could have been discovered by Stone more than two years before Stone filed suit against El Paso. Of the various documents El Paso submitted in support of its summary judgment motion, the fee agreement between Cox and El Paso appears to be the only evidence of Cox's alleged self-dealing. Stone's affidavit attached to his summary judgment response states that this document was not revealed to him until April of 1997. Therefore, El Paso's motion for summary judgment did not negate the application of the discovery rule to Stone's claim for self-dealing. Accordingly, we: (1) sustain Stone's challenge and reverse the trial court's summary judgment with

regard to Stone's claim against El Paso for participating in Cox's self-dealing,⁶ (2) remand that portion of the case for further proceedings, and (3) affirm the remainder of the trial court's judgment.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed May 25, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig (J. Wittig not participating).

Do not publish — TEX. R. APP. P. 47.3(b).

⁶ Our reversal is based only on the application of the discovery rule to Stone's claim against El Paso for Cox's alleged self-dealing and only with reference to the summary judgment motion, responses, and evidence presented below. We express no opinion on: (i) the operation of the discovery rule with reference to any other evidence; or (ii) any other elements of the limitations defense, any other defense, or the breach of fiduciary claim itself.