Affirmed and Majority and Dissenting Opinions filed June 14, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00605-CV

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JESUS BELLEZA-GONZALEZ, Appellant

V.

CONCEPCION VILLA AND MARIO P. VILLA, Appellees

On Appeal from the Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 709,716

M A J O R I T Y O P I N I O N

Appellant, Jesus Balleza-Gonzalez, sued appellees, Concepcion and Mario P. Villa, for damages arising from a car accident. The Villas moved for summary judgment, urging the affirmative defense of statute of limitations. Although Gonzalez filed suit within the two-year limitations period applicable to this personal injury suit, the Villas filed a motion for summary judgment, claiming that they were not served during the two-year limitations period, and that Gonzalez failed to exercise due diligence in serving the Villas. The trial court granted the Villas' motion for summary judgment. In one issue for review, Gonzalez contends that the trial court erred in granting the Villas' motion for summary judgment because genuine issues of

material fact exist as to whether Gonzalez used due diligence in effecting service. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Gonzalez and Concepcion Villa were involved in a car accident on December 10, 1996, in Harris County. Concepcion was driving Mario P. Villa's car at the time of the accident. Gonzalez sued Concepcion for negligence, and sued Mario for negligent entrustment of a motor vehicle.

Gonzalez started seeking chiropractic care from Karen S. Thomason, D.C. for injuries sustained in that accident. Prior to filing this suit, Gonzalez and his attorney had been attempting to obtain his medical records from Dr. Thomason. In late November and early December of 1998, Gonzalez's attorney spoke with an unnamed insurance adjustor from State Farm, the Villas' insurance carrier. Gonzalez's attorney told the insurance adjustor that he and Gonzalez had been unable to obtain either Dr. Thomason's medical narrative, or a copy of the medical records. Gonzalez's attorney expressed to the adjustor that this would preclude Gonzalez from making a reasonable settlement demand. Not wanting to pursue a frivolous lawsuit, Gonzalez's attorney told the insurance adjustor that Gonzalez would file suit against the Villas, but would withhold service of process on them until such time as Gonzalez obtained his records from Dr. Thomason.

Gonzalez then filed suit against the Villas on December 9, 1998, just within the two-year statute of limitations. Gonzalez and his attorney continued making unsuccessful attempts to contact Dr. Thomason on a daily basis. Finally, they made a surprise visit to Dr. Thomason's office. At that time, they were informed that Dr. Thomason's office had been burglarized and that Dr. Thomason believed that Gonzalez's records had either been lost or destroyed.

On July 29, 1999, Gonzalez filed a motion to retain his case on the court's docket. In support of this motion, he explained to the trial court his difficulty in obtaining his medical records. In this motion, he stated that he had now requested service on the Villas, and proposed that upon their appearance, he would take the deposition of Dr. Thomason and proceed from there either to dismiss the case if no records were found, or to diligently prosecute the case

if the records surfaced. On August 3, the trial court granted the motion to retain.

On August 4, 1999, Gonzalez requested service of process, and Concepcion Villa was served on August 11, 1999. Concepcion Villa filed his original answer on September 1, asserting a general denial and the affirmative defense of statute of limitations. The Villas filed a motion for summary judgment, urging the affirmative defense of statute of limitations. Gonzalez responded to the Villas' motion for summary judgment. Gonzalez's summary judgment proof included (1) his GTE Wireless phone bill which showed calls Gonzalez made to Dr. Thomason's office from his cellular phone; (2) the sworn affidavit of Gonzalez's trial counsel, asserting that he had an agreement with the insurance adjuster not to serve the Villas unless and until he could find the missing medical records; and (3) the sworn affidavit of Dr. Thomason, who explained that she treated Gonzalez between December 1996 and May 1997, but the treatment records had either been stolen or destroyed due to a burglary of her clinic on August 5, 1998. In Dr. Thomason's sworn affidavit, she also explained that after reorganizing the papers scattered on the floor of her office, her staff was able to reorganize Gonzalez's file. Dr. Thomason's affidavit was supported by a copy of the Harris County Sheriff's Department Supplement Report and Citizen's Information Card regarding the burglary in question.

The court granted the Villas' motion for summary judgment. Gonzalez then filed a motion for new trial, which was denied. This appeal followed.

DISCUSSION AND HOLDING

A. Standard of Review

When a defendant moves for summary judgment on an affirmative defense, he must conclusively prove all the essential elements of his defense as a matter of law, leaving no issues of material fact. *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984); *Frost Nat'l Bank v. Burge*, 29 S.W.3d 580, 587 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

In determining whether a disputed issue of material fact precluding summary judgment exists, the court must review the proof in the light most favorable to the non-movant by making all reasonable inferences and resolving all doubts in favor of the non-movant. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

Summary judgment may be granted when service of suit on the defendant is accomplished beyond the limitations period. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex. 1990). However, delay in the service of defendant will provide cause for dismissal of the plaintiff's petition only when the plaintiff failed to exercise due diligence in attempting to accomplish service. *Id*. The defendant bears the burden to conclusively establish the bar of limitations. *Id*. The burden then shifts back to the plaintiff to demonstrate his exercise of due diligence. *Id*. If he can show due diligence, then the defendant must show why that exercise was insufficient to relate the date of service back to the date of filing.

B. The Affirmative Defense of Statute of Limitations

The limitations period for a personal injury cause of action is two years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2000). In order to "bring suit" within the applicable two-year limitations period, a plaintiff must both file suit within the two-year period and use due diligence to have the defendant served with process. *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990). If the petition is filed within the limitations period, but the defendant is not served until the statutory period has expired, the date of service relates back to the date of filing if the plaintiff exercises due diligence in obtaining service. *Id*. at 259-60. The party requesting service must ensure service is properly accomplished. *Weaver v. E-ZMart Stores, Inc.*, 942 S.W.2d 167, 168 (Tex. App.—Texarkana 1997, no writ).

Here, Gonzalez filed suit within the limitations period but did not serve, or make any attempt to serve, the Villas until about eight months after the limitations period expired.

Lack of due diligence in serving process on a defendant has been found as a matter of law after a five and four-fifths month delay. *Hansler v. Mainka*, 807 S.W.2d 3, 5 (Tex. App.—Corpus Christi 1991, no writ). In fact, several Texas courts have held that delays of

more than a few months negate due diligence as a matter of law. *Weaver*, 942 S.W.2d at 168 (nine months); *Gonzalez v. Phoenix Frozen Foods, Inc.*, 884 S.W.2d 587, 590 (Tex. App.—Corpus Christi 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. Benteley Labs., Inc.*, 538 S.W.2d 857, 860 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.) (six months).

Due diligence requires that the plaintiff exercise "that diligence to procure service which an ordinarily prudent person would have used under the same or similar circumstances." *Gonzalez*, 884 S.W.2d at 590 (quoting *Reynolds v. Alcorn*, 601 S.W.2d 785, 788 (Tex. Civ. App.—Amarillo 1980, no writ)). It also requires that the plaintiff act diligently up to the time the defendant is actually served. *Hodge v. Smith*, 856 S.W.2d 212, 215 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Generally, the question of diligence is a question of fact, but if no excuse is offered for a delay in the service of citation, "or if the lapse of time and the plaintiff's acts are such as conclusively negate diligence, a lack of diligence will be found as a matter of law." *Webster v. Thomas*, 5 S.W.3d 287, 289 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Additionally, an offered explanation must involve diligence to seek service of process. *Rodriguez v. Tinsman & Houser, Inc.*, 13 S.W.3d 47, 49-50 (Tex. App.—San Antonio 1999, pet. denied) (citing *Weaver*, 942 S.W.2d at 169).

This case is different than most cases involving lack of diligence. Typically, those cases involve periods of unexplained inactivity. In this case, Gonzalez claims that the eight month delay in serving process on the Villas should be excused because of an alleged oral agreement with an unnamed insurance adjuster to withhold service while Gonzalez searched for records. This case does not involve failed efforts to obtain service on the defendant. Instead, it involves intentionally waiting to serve the defendant by honoring an oral agreement made with the Villas' insurance agent.

The Villas contend that if this agreement constitutes evidence of Gonzalez's due diligence, it is, in any event, unenforceable under Rule 11 of the Texas Rules of Civil Procedure. Rule 11 provides, "[u]nless otherwise provided in these rules, no agreement

between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." *Id*. This was an agreement between Gonzalez's attorney and an agent of the Villas. Unless the specific requirements of Rule 11 are met, no agreements between attorneys or parties are enforceable. *London Mkt. Cos. v. Schattiman,* 811 S.W.2d 550, 552 (Tex. 1991) (orig. proceeding). Accordingly, when an agreement between attorneys or parties delays an appellant from obtaining service on appellees, that agreement must meet the requirements of Rule 11. *Allen v. City of Midlothian,* 927 S.W.2d 316, 320 (Tex. App.—Waco 1996, no writ).

Gonzalez argues that this agreement, being entered before the suit was filed, is not subject to Rule 11. However, once the suit was filed, this agreement became one that touched on a pending suit. As such, the agreement was governed by Rule 11. Gonzalez's misplaced reliance on an unenforceable agreement did not constitute due diligence. Had Gonzalez been diligent, he would have made certain the Villas were aware of the agreement. It seems the best way to do that would have been to get the agreement in writing and file it with the court; in other words, follow the requirements of Rule 11. As a result, Gonzalez cannot claim that he exercised "due diligence" by relying on this oral agreement. *Id*.

Accordingly, we overrule Gonzalez's sole issue for review, and affirm the trial court's judgment.

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Paul C. Murphy
Senior Chief Justice

Judgment rendered and Majority and Dissenting Opinions filed June 14, 2001.

Panel consists of Justices Yates, Wittig, and Senior Justice Murphy[1]. (Wittig, J. dissenting)

Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Chief Justice Paul C. Murphy sitting by assignment.