Affirmed and Opinion filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00083-CV

IRENE KOCH D/B/A/ K & K TRUCK AND AUTO, Appellant

V.

GRIFFITH-STROUD CONSTRUCTION AND LEASING CO., Appellee

On Appeal from the 129th District Court
Harris County, Texas
Trial Court Cause No. 99-12562

O P I N I O N

Appellant Irene Koch, ("Koch") filed suit against appellee Griffith-Stroud Construction and Leasing Company, ("Griffith-Stroud") alleging conversion and a violation of the Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA"). The trial court granted summary judgment for Griffith-Stroud. In one point of error, Koch contends Griffith-Stroud's grounds for summary judgment are insufficient as a matter of law to support the trial court's ruling that both her DTPA and conversion claims are barred by limitations. We affirm.

I. Background

On December 20, 1995, Koch as lessee and Griffith-Stroud as lessor entered into a commercial lease agreement covering the premises at 85 Oates Road in Houston. The term of the lease was two years, and the rent was $1,400.00 per month. Koch operated an automobile repair business on the leased premises. By February 1997, however, Koch was in default under the lease agreement for failure to pay the rent due for the months of December 1996, and January and February, 1997. On February 14, 1997, Griffith-Stroud, through its attorney, demanded in writing that Koch cure the default according to the lease agreement within ten days or vacate the premises. Koch neither cured the default, nor vacated the premises.

On March 7, 1997, Griffith-Stroud changed the locks on the leased premises and posted a notice informing Koch of how she could obtain entry to the premises. On March 12, 1999, more than two years later, Koch filed suit against Griffith-Stroud for conversion and a violation of the DTPA.

Griffith-Stroud moved for summary judgment based on limitations, contending that Koch's conversion and DTPA claims were barred by the two-year statutes of limitations applicable to those causes of action. Koch did not file a response to the summary judgment motion. On October 18, 1999, the trial court held a hearing on Griffith-Stroud's motion for summary judgment. Koch's counsel, although properly given notice, did not appear at the hearing. Summary judgment in favor of Griffith-Stroud was signed on October 18.

On October 29, 1999, Koch filed a motion for new trial. On November 22, 1999, Griffith-Stroud filed its response to the motion for new trial, and on January 4, 2000 the trial court denied Koch's motion. Koch brings this appeal.

II. Standard of Review

Summary judgment is designed to eliminate patently unmeritorious claims and untenable defenses**,** not to deny a party its right to a full hearing on the merits of any real issue of fact. *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952). This court reviews a summary judgment de novo to determine whether a paty's right to prevail is established as a matter of law. *Howard v. INA County Mut. Ins. Co.*, 933 S.W.2d 212, 216 (Tex. App.—Dallas 1996, writ denied). When reviewing a summary judgment we follow these well-established rules: (1) The movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts must be resolved in favor of the nonmovant. *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). Summary judgment is proper if the defendant disproves at least one element of each of the plaintiff's claims, or establishes all elements of an affirmative defense to each claim. *Id.* A party moving for summary judgment on the basis of limitations must conclusively establish the bar of limitations. *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex. 1996). A defendant moving for summary judgment based on the statute of limitations must prove when the cause of action accrued and must negate the applicability of the discovery rule if pleaded by the nonmovant. *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990).

When a defendant moves for summary judgment, a plaintiff can bar summary judgment by presenting evidence that creates a fact question on those elements of the plaintiff's case under attack by the defendant or on at least one element of each affirmative defense advanced by the defendant. *Torres v. Western Casualty & Sur. Co.*, 457 S.W.2d 50, 52 (Tex. 1970). Alternatively, the plaintiff can defeat the motion by conceding the material facts are undisputed, but convincing the court that the defendant's legal position is unsound. *See Estate of Devitt*, 758 S.W.2d 601, 601 (Tex. App.—Amarillo 1988, writ denied).

III. Statute of Limitations

A. Conversion

Koch brought suit against Griffith-Stroud claiming the defendant converted her personal property. The statute of limitations for conversion of personal property is two years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 2001).[1] Under section 16.003(a), suit must be brought not later than two years after the cause of action "accrues." *Id.* Generally, a cause of action accrues when a wrongful act causes an injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur. *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998). Stated differently, a cause of action accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy. *Robinson v. Weaver*, 550 S.W.2d 18,19 (Tex. 1977). In some cases the discovery rule is an exception to the general accrual rule. *Childs,*974 S.W.2d at 37. However, a defendant moving for summary judgment must defeat the discovery rule only when it is pled by the nonmovant. *Burns*, 786 S.W.2d 267. Here, Koch did not plead the discovery rule. Accordingly, applying the foregoing rules, Griffith-Stroud as movant can establish Koch's cause of action for conversion accrued on March 7, 1997 if it offers summary judgment proof establishing as a matter of law sufficient facts existed on March 7, 1997 to authorize her to seek a judicial remedy.

As part of its summary judgment proof, Griffith-Stroud submitted portions of Koch's deposition in which she admitted she had a dispute with Griffith-Stroud on March

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[1] Section 16.003(a) provides in relevant part:

> [A] person must bring suit for trespass or injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

7, 1997 concerning the locking of the leased premises. Here, because Koch did not plead the discovery rule, in order to establish its limitations defense as a matter of law Griffith-Stroud was required to prove only when the cause of action accrued. We hold Griffith-Stroud established as a matter of law that Koch's conversion claim accrued on March 7, 1997, and that her suit for conversion filed on March 12, 1999 was barred by limitations.

B. DTPA

The statute of limitations applicable to a claim under the DTPA is two-years. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987). That statute provides as follows:

> All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.

As noted above, Koch did not plead the discovery rule. A party seeking to avail itself of the discovery rule must plead the rule as a matter of avoidance, either in its original petition or in an amended petition in response to defendant's assertion of the affirmative defense of limitations. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988). A matter in avoidance of the statute of limitations that is not raised affirmatively by the pleadings will be deemed waived. *Id.*

Here, the face of Koch's pleading reflects her DTPA claim was time barred two years after the March 7, 1997 lock-out by Griffith-Stroud. Further, as noted above, there is no showing of a cause for suspension of time in Koch's pleadings, and there is no response to the motion for summary judgment containing any other basis for suspending the running of limitations on her DTPA cause of action.

Based on the summary judgment proof submitted by Griffith-Stroud, Koch was aware on March 7, 1997 that Griffith-Stroud had changed the locks on the leased premises. Griffith-Stroud attached portions of Koch's deposition in which she admitted she had a

dispute with the lessor on March 7 concerning the lockout. This proof was not controverted. Koch's sworn testimony in her deposition established as a matter of law Koch knew she had a cause of action against the lessor on March 7, 1997. Thus, her DTPA cause of action against Griffith-Stroud arose from the acts by Griffith-Stroud that occurred on March 7, 1997, but her petition was not filed until March 12, 1999, more than two years after the alleged false, misleading or deceptive act occurred. Indeed, Koch's petition reflects that her DTPA cause of action is based on the actions and conduct of Griffith-Stroud complained of in the petition, which were the events of March 7, 1997. We hold, therefore, that Griffith-Stroud offered summary judgment proof establishing, as a matter of law, the affirmative defense of limitations as a bar to Koch's DTPA claim.

Because Griffith-Stroud proved Koch's claims under the DTPA and for conversion were barred by the statutes of limitations applicable to such claims, we overrule Koch's sole point of error and affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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