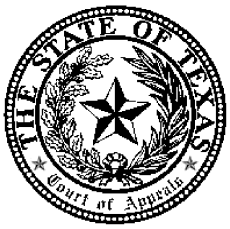
Affirmed and Opinion filed October 25, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00090-CV

ZURICH INSURANCE CO., Appellant

V.

NORTHLINE JOINT VENTURE, MANLEY-BERENSON ASSOCIATES, INC., PETER D. CUMMINGS & ASSOCIATES, BETCO SCAFFOLD & ERECTION CO., and DEMOLITION SERVICES, INC., Appellees

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On Appeal from the 189th District
Harris County, Texas
Trial Court Cause No. 98-19898A

O P I N I O N

This is an appeal of a summary judgment based on limitations rendered by the trial court in favor of appellees, Northline Joint Venture, Manley-Berenson Associates, Inc., Peter D. Cummings & Associates, Betco Scaffold & Erection Co., and Demolition Services, Inc. Appellees were defendants in suit brought by appellant, Zurich Insurance Co. as subrogee of Piccadilly Cafeteria, Inc. On appeal, Zurich raises four issues challenging the trial court's grant of summary judgment.

The facts of this case are not contested. On January 30, 1997, a corridor wall collapsed at Northline Mall in Houston. The collapse forced Piccadilly to close a restaurant it operated at the mall. Piccadilly carried business interruption insurance with Zurich. As a result of the collapse, Piccadilly made a claim on its policy, and Zurich paid Piccadilly a payment of $308,500.00. On January 29, 1999, Zurich, based on its status as a subrogee to Piccadilly's rights, filed a petition in intervention in a suit stemming from the collapse pending against appellees in the 269th Judicial District Court in Harris County, Texas. Zurich later learned of another suit arising from the collapse pending in the 189th District Court. Zurich's counsel advised counsel for two of the appellees that she intended to file a non-suit in the action pending in the 269th District and intervene in the suit pending in the 189th District. Zurich filed its petition in intervention in that suit on April 13, 1999. On April 22, 1999, Zurich filed its notice of non-suit in the action pending in the 269th District. On August 27,1999, appellees moved for summary judgment against Zurich in the action pending in the 189th District asserting the affirmative defense of limitations.[1] The trial court granted appellees' motion, and, pursuant to appellees' motion, severed Zurich's claim from the underlying suit.

Summary judgment is proper if the defendant, as the movant, disproves at least one element of each of the plaintiff's claims or establishes all elements of an affirmative defense to each claim. *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). The movant has the burden of showing there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In reviewing a grant of summary judgment, we take as true all evidence favorable to the nonmovant and make all reasonable inferences in favor of the nonmovant. *Id*. at 548-49. A defendant who moves for summary judgment on the affirmative defense of limitations has the burden to: (1) conclusively prove when the cause of action accrued, and

[1] Both parties agree that Zurich's suit involves property damage and is subject to a two year statute of limitations pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2001).

(2) negate the discovery rule, if it applies and has been 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 its injury. *KPMG Peat Marwick v. Harrison County Housing Finance Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). If the defendant conclusively establishes that the statute of limitations bars the plaintiff's action, the plaintiff must then submit summary judgment proof raising a fact issue in avoidance of the statute of limitations. *Id*.

In its response to appellees' motion for summary judgment, Zurich maintained that the statute of limitations was equitably tolled due to its timely intervention in the suit pending in the 269th District. In its first issue, Zurich contends that, based on its assertion of a basis for tolling in its response, appellees were required to conclusively negate the applicability of equitable tolling. Zurich bases this assertion on *Palmer v. Enserch*, 728 S.W.2d 431 (Tex. App.—Austin 1987, writ ref'd n.r.e.), which states: "[i]f the non-movant has responded with proof of a basis for 'tolling' the statute, the movant then has the burden to negate as a matter of law why the statute should not be tolled." *Id*. at 436. Appellees concede they failed to respond to Zurich's assertion, however, they contend that Zurich did not shift the burden to appellees because it failed to establish a legal basis for such tolling. We agree. Appellees were not required to respond to Zurich's assertion of a defense to their affirmative defense because Zurich failed to adduce summary judgment proof raising a fact issue on its defense in avoidance of equitable tolling. *Id*. at 435.

Zurich relies on a series of "misnomer" cases to support its assertion that the statute of limitations was tolled upon their intervention in the 269th suit. These opinions uniformly hold that a statute of limitations may be equitably tolled when a cause of a action is timely asserted against the wrong party and a special relationship exists between the wrong party and the proper defendant such that the proper defendant was aware of the facts, not misled, and not disadvantaged in its preparation of a defense. *Continental Lines, Inc. v. Hilland*, 528 S.W.2d 828, 831 (Tex. 1975); *Hernandez v. Furr*, 924 S.W.2d 193, 194 (Tex.

App.—El Paso 1996, writ denied); *Palmer*, 728 S.W.2d at 434; *Sanchez v. Aetna Casualty & Surety Co.*, 543 S.W.2d 888, 889-890 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.). These opinions do not support Zurich's contention that appellees are barred from asserting limitations as an affirmative defense to Zurich's claim based on its timely intervention and subsequent voluntary dismissal in another suit. The 269th District dismissed Zurich's claim pursuant to Zurich's non-suit. A dismissal "places the parties in the position that they were in before the court's jurisdiction was invoked just as if the suit had never been brought." *Crofts v. Court of Civil Appeals*, 362 S.W.2d 101, 104 (Tex. 1962). Consequently, Zurich may not rely on their intervention in the 269th suit to support their equitable tolling argument. As a result of Zurich's non-suit, we are required to examine the record before us as if its intervention in the 269th suit never occurred. Accordingly, we find that the record contains no summary judgment proof raising a fact issue on Zurich's defense in avoidance of equitable tolling, and we overrule appellant's first issue.

Zurich's second issue maintains that the trial court erred in granting summary judgment because fact issues existed on its defense in avoidance of equitable estoppel. Equitable estoppel bars a defendant from asserting a limitations defense when the defendant, or his agent or representative, makes representations that induce a plaintiff not to file a suit within the applicable limitations period. *Villages of Greenbriar v. Torres*, 874 S.W.2d 259, 264 (Tex. App.—Houston [1st Dist.] 1994, writ denied). To successfully invoke equitable estoppel, Zurich must prove the following elements: (1) a false representation of material fact; (2) made with knowledge, actual or constructive, of the facts; (3) to a party without knowledge or the means of knowledge of the real facts; (4) with the intention that it should be acted upon; and (5) the party to whom it was made must have relied upon or acted upon it to his prejudice. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). All of the elements of estoppel must be present to invoke the doctrine. *City of Houston v. McDonald*, 946 S.W.2d 419, 421 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

Zurich asserts appellees failure to object to its decision to non-suit in the 269th suit and intervene in the 189th suit constitutes a false representation of material fact which satisfies the first element of equitable estoppel. Zurich, however, fails to address whether appellees had a duty to speak or act. Estoppel by silence would arise only if appellees were under a duty to advise Zurich on how it should prosecute its case. *Casa El Sol, S.A. v. Fontenot*, 919 S.W.2d 709, 718 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). Moreover, an affirmative duty to speak or disclose arises only when a confidential or fiduciary relationship exists between the parties. *Id*. Accordingly, absent the existence of a fiduciary or confidential relationship between the parties, no duty to disclose arises and there can be no estoppel by silence. The record contains no evidence of the existence of a fiduciary or confidential relationship between Zurich and appellees. Thus, estoppel by silence is inapplicable, and we overrule Zurich's second issue.

In its third issue, Zurich contends, "fact issues exist as to whether Zurich's non-suit was 'sufficiently explained' to overcome the limitations defense." The statute of limitations is not interrupted during the pendency of suit which is subsequently abandoned by a plaintiff. *Flatonia State Bank v. Southwestern Life Ins. Co.*, 127 S.W.2d 188, 192-93 (Tex. 1939). However, the statute of limitations is tolled if the subsequent abandonment of the suit is sufficiently explained or accounted for so as to relieve it of being voluntary. *Id*. at 193. Zurich maintains that appellees' counsels' failure to voice an objection to its non-suit in the 269th District and its intervention in the 189th District creates a fact issue as to whether its non-suit constituted a voluntary abandonment. Again, appellees' counsel had no duty to guide Zurich in its prosecution of its case. Accordingly, their silence may not provide a basis for Zurich's contention that its non-suit was involuntary, and we overrule its third issue.

Zurich presents two arguments in its fourth and final issue: (1) summary judgment was an improper vehicle to achieve the purpose of dismissing it from the suit; and (2) its cause of action did not begin to accrue until it received notice of Piccadilly's claim. In its

first argument, Zurich contends the trial court erred in striking its plea in intervention in the absence of a motion to strike. Zurich's brief repeatedly states that appellees never challenged Zurich's authority to intervene in the suit pending in the 189th District. Moreover, the record shows the trial court did not strike appellant's plea in intervention. Instead, subsequent to Zurich's intervention in the suit, the trial court granted appellees' motion for summary judgment which established all of the elements of the affirmative defense of limitations.

Zurich's second argument in its fourth issue asserts that the cause of action did not begin to accrue until it received notice of Piccadilly's claim. However, the general rule is that a subrogee succeeds to the rights of its subrogor so that when the subrogor's rights against a defendant become barred by limitations, the subrogee's claims are also barred. *Sheppard v. State Farm Automobile Ins. Co.*, 496 S.W.2d 216, 218 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ). Thus, Zurich's cause of action began to accrue on the date of the injury to Piccadilly's property, not on the date Zurich received notice of Piccadilly's claim. Accordingly, we overrule appellant's fourth issue and affirm the judgment of the trial court.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 25, 2001.
Panel consists of Justices Anderson, Hudson, and Seymore.
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