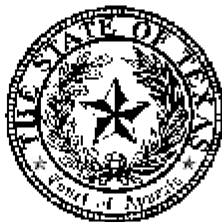
Affirmed and Opinion filed September 21, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01281-CV

NELL JEANETTE WARDEN, Appellant

V.

SUPERTEL HOSPITALITY, INC., SUPER 8 MOTELS, INC., AND DOVER ELEVATOR COMPANY, Appellees

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On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 46,614-272

O P I N I O N

The issue in this appeal is whether appellant used due diligence to serve appellees with citation after the statute of limitations expired on her claims. We find she did not and affirm the trial court's judgment.

Background

On May 9, 1997, appellant sued appellees for personal injuries allegedly sustained on May 12, 1995 in an elevator at the Super 8 Motel in College Station, Texas. She did not request issuance of citation until September 25, 1997. Supertel and Super 8 were served with citation on September 29, 1997 and Dover was served with citation the following day.

Each appellee filed a Motion for Summary Judgment arguing appellant failed to use due diligence in serving appellees with citation. They were not served until four-and-a-half months after the statute of limitations expired. Appellant argued that summary judgment should be denied because the insurance adjuster indicated that service should be delayed to see if appellant's claim could be settled through negotiations and due to the old age and poor health of appellant.

The testimony about appellant's poor health and old age and the agreement between the insurance adjuster and appellant's counsel was presented to the trial court by way of affidavit testimony. Appellees filed objections to the affidavits attached to appellant's summary-judgment response. After these objections were ruled on, the only reason left standing to support appellant's summary-judgment response was the alleged oral agreement made by John Greer, an adjuster for Dover's insurance carrier. Greer, in his affidavit testimony, denied ever having any conversations or communications with appellant's counsel, anyone associated with appellant's counsel, or with appellant involving service of citation or delay in service of citation.

Standard of Review

A defendant prevails on a motion for summary judgment if he can establish with competent proof that, as a matter of law, there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action. *See Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). If the defendant bases his motion for summary judgment on an affirmative defense, he must prove all the elements of the defense as a matter of law. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984).

Moreover,

> [w]hen summary judgment is sought on the basis that limitations have expired, it is the movant's burden to conclusively establish the bar of limitations. Where the non-movant ... pleads diligence in requesting issuance of citation, the limitation defense is not conclusively established until the movant meets his burden of negating the applicability of these issues.

Zale Corp. v. Rosenbaum, 520 S.W.2d 889, 891 (Tex. 1975).

Once the movant establishes a right to summary judgment, the non-movant must expressly present any reasons avoiding the movant's entitlement and must support the response with summary judgment proof to establish a fact issue. *See Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex.1982); *Cummings v. HCA Health Servs. of Texas*, 799 S.W.2d 403, 405 (Tex. App—Houston [14th Dist.] 1990, no writ).

The standards an appellate court employs to review summary judgment proof are as follows:

1. The movant for summary judgment 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 non-movant will be taken as true.

3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

See Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex.1985); *Webster v. Thomas*, 5 S.W.3d 287, 288-89 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Discussion and Holding

In two points of error, appellant contends the trial court erred in concluding that she did not exercise reasonable diligence in serving appellees. Appellant maintains the evidence of her poor health and the alleged agreement between her counsel and appellees' insurance adjuster to refrain from issuing citation during their settlement negotiations raise genuine issues of material fact precluding summary judgment.

When, as here, the plaintiff files her petition within the limitations period, but does not serve the defendant until after the statutory period has run, her suit is time barred unless it is shown that she exercised diligence in effecting service. *See Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990). That is, the date of service will relate back to the date of the petition's filing if the plaintiff exercised diligence in effecting service. *See id*.

The parties do not dispute that appellant's personal injury claims accrued on May 12, 1995, the date of appellant's alleged injuries. Thus, in order to recover for such claims, appellant was required to "bring suit" no later than May 12, 1997. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 1999) (tort action must be brought within two years of time tort was committed). "Bringing suit" within a limitations period involves both filing a petition within the applicable time period and exercising due diligence in serving the defendant with citation. *See Gant*, 786 S.W.2d at 260; *Li v. University of Texas Health Science Ctr.*, 984 S.W.2d 647, 652 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

Due Diligence

Due diligence is that diligence to procure service an ordinarily prudent person would have used under the same or similar circumstances. *See Li*, 984 S.W.2d at 652. Texas courts have consistently held that due diligence is lacking as a matter of law where there are unexplained lapses of time between filing of suit, issuance of citation, and service. *See Li*, 984 S.W.2d at 652. "To obtain summary judgment on the grounds that an action was not served within the applicable limitations period, the movant must show that, as a matter of law, diligence was not used to effectuate service." *Gant*, 786 S.W.2d at 260; *Edwards v. Kaye*, 9 S.W.3d 310, 315 (Tex. App.—Houston [14th Dist.] 1999, pet. filed). The existence of diligence is normally a question of fact, but if no excuse is offered for a delay in the service of the 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*, 5 S.W.3d at 289. Additionally, an offered explanation must involve diligence to seek service of process. *See Rodriguez v. Tinsman & Houser, Inc.*, 13 S.W.3d 47, 49-50 (Tex. App.—San Antonio 1999, pet. denied) (citing *Weaver v. E-Z Mart Stores*, 942 S.W.2d 167, 169 (Tex. App.—Texarkana 1997, no writ)).

Civil Procedure Rule 11 provides that "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 made in open court and entered of record." TEX. R. CIV. P. 11; *See Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995); *Kennedy v. Hyde*, 682 S.W.2d 525, 529 (Tex. 1984). Unless the specific requirements of Rule 11 are met, no agreements

between counsel or parties are enforceable. *See London Market Companies v. Schattman*, 811 S.W.2d 550, 552 (Tex. 1991, orig. proceeding). Accordingly, any agreement between the parties whereby appellant delays obtaining service on appellees must meet the requirements of Rule 11. *See Allen v. City of Midlothian*, 927 S.W.2d 316, 320 (Tex. App.—Waco 1996, no writ). (Absent fraud, bad faith or an express agreement to toll the statute of limitations, settlement negotiations between a plaintiff and defendant do not constitute a waiver of the defendant's right to assert the statute of limitations. *see also Lockhard v. Deitch*, 855 S.W.2d 104, 106 (Tex. App.—Corpus Christi 1993, no writ). Thus, appellant cannot claim the exercise of "due diligence" by relying on an unenforceable agreement to delay obtaining service on appellees. In fact, appellant's own evidence demonstrates that no settlement negotiations took place between the filing of the lawsuit and the issuance and service of citations.

Accordingly, we overrule appellant's two issues and affirm the trial court's judgment.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed September 21, 2000.

Panel consists of Justices Sears, Cannon, and Draughn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.