Affirmed and Memorandum Opinion filed June 30, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00965-CV

WALIAKBAR MUHAMMAD, Appellant

V.

ALBERTO CHUC-ROSALES, Appellee

On Appeal from the County Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 1094566

MEMORANDUM OPINION

This is an appeal from the granting of a summary judgment in favor of Alberto Chuc-Rosales based on the affirmative defense of limitations. We affirm.

I. BACKGROUND

Muhammad alleges he was injured in a car accident caused by Chuc-Rosales on September 6, 2015. Muhammad filed suit on June 15, 2017. Muhammad did not

serve Chuc-Rosales with the lawsuit prior to the expiration of the two-year statute of limitations for personal injury claims. TEX. CIV. PRAC. & REM. CODE § 16.003.

On January 31, 2018, Muhammad filed a motion requesting substituted service. His attorney attached an affidavit to the motion in which he attested, "Defendant, Alberto Chuc-Rosales, is unknown. I have exercised due diligence in attempting to locate the whereabouts of Alberto Chuc-Rosales and have been unable to do so. I have attempted by mail, public data.com, and phone books." On February 12, 2018, Muhammad filed a motion to retain the case on the trial docket, asserting he had not been able to serve Chuc-Rosales with the petition and citation. In the motion, Muhammed noted he had filed a motion to allow service by publication. On February 20, 2018, Chuc-Rosales was served with citation by publication.[1] On April 9, 2018, Mohammad moved the court to appoint an attorney *ad litem* to defend Chuc-Rosales "because service was made by publication." The trial court appointed an attorney ad litem on April 13, 2018.

Chuc-Rosales answered, pleaded the affirmative defense of limitations, and filed a motion for summary judgment on the ground that Muhammad had not served Chuc-Rosales before the statute of limitations expired and did not exercise due diligence in attempting to serve Chuc-Rosales.[2] In his response, Muhammed argued Chuc-Rosales did not conclusively prove his affirmative defense of limitations because summary judgment was based on incorrect dates, Chuc-Rosales failed to attach summary judgment evidence to prove service was not timely, and Muhammad satisfied the requirements of due diligence in effecting service on Chuc-Rosales.

[1] On February 23, 2018, the court received the officer's return verifying the service of citation by publication in the Daily Court Review.

[2] On July 13, 2018, the trial court discharged the *ad litem* because Chuc-Rosales' liability carrier had received notice and provided representation to Chuc-Rosales.

The trial court granted Chuc-Rosales' motion and dismissed the lawsuit. This appeal timely followed.

II. ANALYSIS

In three issues, Muhammad contends the trial court erred in granting Chuc-Rosales' motion for summary judgment because: (1) Chuc-Rosales did not conclusively prove his affirmative defense of limitations because summary judgment was based on incorrect facts; (2) Chuc-Rosales did not support his summary judgment motion with evidence to support his affirmative defense of Muhammad's lack of due diligence; and (3) Muhammad satisfied the requirements of due diligence in effecting service on Chuc-Rosales.

A. Standard of Review

We review *de novo* the trial court's grant of summary judgment. *See Sharp v. Kroger Tex. L.P.*, 500 S.W.3d 117, 119 (Tex. App.—Houston [14th Dist.] 2016, no pet.). In a traditional motion for summary judgment, the movant has the burden of establishing that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id*. (citing TEX. R. CIV. P. 166a(c)). 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. *Sharp*, 500 S.W.3d at 119. We consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *See id*. The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *Id*.

B. Statute of Limitations

A suit for damages based on personal injuries must be filed within two years from the date the cause of action accrues. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a). But a timely filed suit will not interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation. *Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007); *Sharp*, 500 S.W.3d at 119. If service is diligently effected after limitations has expired, the date of service will relate back to the date of filing. *Proulx*, 235 S.W.3d at 215; *Sharp*, 500 S.W.3d at 119. When a defendant has affirmatively plead a limitations defense and shows that service was effected after limitations expired, the burden shifts to the plaintiff to explain the delay. *Proulx*, 235 S.W.3d at 216; *Sharp*, 500 S.W.3d at 119. Thus, it is the plaintiff's burden to present evidence regarding the efforts that were made to serve the defendant and to explain every lapse in effort or period of delay. *Proulx*, 235 S.W.3d at 216; *Sharp*, 500 S.W.3d at 119. If the plaintiff's explanation for the delay raises a material fact issue concerning the diligence of service efforts, the burden shifts back to the defendant to conclusively show why, as a matter of law, the explanation is insufficient. *Proulx*, 235 S.W.3d at 216; *Sharp*, 500 S.W.3d at 119.

It is undisputed that Muhammad filed suit before the statute of limitations expired but did not effect citation or service on Chuc-Rosales until after the statute of limitations expired. Because Chuc-Rosales pleaded the affirmative defense of limitations, the burden then shifted to Muhammad to demonstrate due diligence as to every period of delay in procuring citation and effecting service on Chuc-Rosales. *See Proulx*, 235 S.W.3d at 216.

Muhammad first asserts that Chuc-Rosales failed to conclusively prove his affirmative defense of limitations because his motion is based on an incorrect date of service. Muhammad's claim is without merit. In his motion for summary

judgment, in the paragraph entitled " background," Chuc-Rosales correctly observed that he was served "on February 20, 2018 through publication. This was five months after the statute of limitations passed." However, in the argument section of his brief, Chuc-Rosales inaccurately asserted, "Plaintiff did not procure service until February 20, 2017, which is clearly *after* the statute of limitations." (*emphasis* in original). While the reference to February 20, 2017 is clearly the result of a typographical error, we presume the trial court took into consideration its own file, which included the officer's return of service reflecting the correct date service was effectuated as February 20, 2018. *See Air Routing Int'l Corp. (Canada) v. Britannia Airways, Ltd.*, 150 S.W.3d 682, 697 n.15 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (stating "[t]he trial court may properly take into consideration the file that is before it . . . [w]e presume the trial court took judicial notice of its files")).

Next, Muhammad maintains that Chuc-Rosales failed to prove his affirmative defense because no evidence was attached to the motion for summary judgment to support his motion. In Chuc-Rosales' motion, he notes that a period of nearly five months passed between the expiration of the statute of limitations and Muhammad's request for substitute service. He further argues that Muhammad's motion for substitute service did not attach affidavits from a process server or other disinterested party setting forth details of what service attempts were made where and when. As set forth above, we presume the trial court took judicial notice of the nearly five months after limitations expired before Muhammed moved the court for substituted service as well as the basis for the motion. *See Air Routing Int'l Corp. (Canada)*, 150 S.W.3d at 697 n.15, Chuc-Rosales was only required to state in his motion for summary judgment that he pleaded the affirmative defense of limitations. *See Sharp*,

500 S.W.3d at 119. The burden then shifted to Muhammad to show due diligence. *See id*.

Last, Muhammad argues that the trial court erred in granting Chuc-Rosales' summary judgment because Muhammad satisfied the requirements of due diligence. As an initial matter, we address the applicable time period. We have held that "the measure of diligence begins from the time the suit is filed and an explanation is needed for every period of delay." *Sharp*, 500 S.W.3d at 120; *see also Islas v. Dominguez*, No. 14-18-00139-CV, 2019 WL 3786518, at *2 (Tex. App.—Houston [14th Dist.] Aug. 13, 2019, no pet.) (mem. op). Accordingly, we must analyze Muhammad's delay from the time the suit was filed until he requested citation and effected service. *See Sharp*, 500 S.W.3d at 120. However, the delay, if any, in the time period between the filing of the lawsuit prior to the expiration of the statute of limitations and the delay, if any, in service after limitations has run should be examined differently; suit may be filed until the last day of limitations, therefore, any filing on or prior to that date allows service even after limitations has expired if a party uses diligence in procuring service. *See id.* at 121–22 (Christopher, J., concurring).

A plaintiff is not required to use the highest degree of diligence to procure service but is required to use the degree of diligence that an ordinarily prudent person would have used under the same or similar circumstances. *Sharp*, 500 S.W.3d at 120. 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 conclusively negate diligence, a lack of diligence will be found as a matter of law. *Id*. Texas courts have held that due diligence is lacking as a matter of law when there are unexplained lapses of time between filing suit, issuance of citation, and service. *Id*. We consider the time taken to "procure citation and/or service" and the

type of effort or lack of effort the plaintiff expended in procuring service. *Id*. at 120–21. Any delay between the running of the statute of limitations and the effectuating of service and the time between the filing of suit and the running of the limitations period should be analyzed differently. *Sharp*, 500 S.W.3d at 121–22 (Christopher, J., concurring) ("delay that occurs before the running of limitations should be examined differently from delay that occurs after the running of limitations").

Muhammed moved for substitute service on January 31, 2018, and effectuated service by publication on February 20, 2018, which is eight months after suit was filed and over five months after the statute of limitations had expired. Muhammad was required to explain what steps he took to obtain service during every period of delay. *See Slagle v. Prickett*, 345 S.W.3d 693, 698 (Tex. App.—El Paso 2011, no pet.) ("[W]hen a defendant complains of lack of due diligence in service of process, the plaintiff must explain what steps he took to obtain service, not explain why he did nothing.").

Muhammad contends he exercised due diligence in his efforts to serve Chuc-Rosales. Muhammad attached to his summary judgment response the affidavit his attorney used to support his motion for substitute service, in which the attorney stated he had attempted to locate the whereabouts of Chuc-Rosales by "mail, public data.com, and phone books." Muhammad also attached to his response to summary judgment an affidavit of non-service by a private process server. The process server affidavit states that he attempted service at an apartment on Scarborough Lane twice prior to the expiration of limitations. On June 28, 2017, he went to the door of apartment 24, and when no one answered the door, he left a card. On July 5, 2017, he went to the same address and spoke with a resident, who stated Chuc-Rosales did not live there and he did not know Chuc-Rosales. On December 14, 2017, after limitations had expired, the process server attempted to serve Chuc-Rosales at a

different apartment address provided by the attorney, but the apartment number did not exist.

The duty to exercise diligence is a continuous one, extending until service is achieved. *Boyattia v. Hinojosa*, 18 S.W.3d 729, 733 (Tex. App.—Dallas 2000, pet. denied). Here, trial counsel made some efforts to procure service, but these efforts can only be described as "careless and not persistent." *Webster v. Thomas*, 5 S.W.3d 287, 290 (Tex. App.—Houston [14th Dist.] 1999, no pet.). As set forth below, these affidavits are insufficient to demonstrate Muhammad's efforts to exercise due diligence to procure issuance of citation and service. Two attempts by a process server prior to the expiration of limitations to an apartment where Chuc-Rosales did not reside and one attempt after limitations passed to an apartment number that does not exist is insufficient to explain the delay in effectuating service. The lapse in time between a service attempt on July 5, 2017, and a service attempt on December 14, 2017, a period of five months, is not explained, and there is no evidence of due diligence during that five-month period.

Likewise, Muhammad's attorney's affidavit, the same affidavit attached to his motion for substitute service, fails to provide any detailed information regarding his attempts to effectuate service. The affidavit states: "I have exercised due diligence in attempting to locate the whereabouts of Alberto Chuc-Rosales and have been unable to do so. I have attempted by mail, publicdata.com, and phone books," without providing any information as to how many attempts were made, when the attempts were made, or the result of those attempts. *Cf. Harris v. Bell*, No. 14-16-00829-CV, 2018 WL 1057449, at *4 (Tex. App.—Houston [14th Dist.] Feb. 27, 2018, pet. denied) (mem. op.) (attorney's affidavit "d[id] not explain the reason for the delay or detail any efforts [plaintiffs] undertook to effect service on [defendant] during th[at] time"); *Rodriguez v. Tinsman & Houser, Inc.*, 13 S.W.3d 47, 49 (Tex.

App.—San Antonio 1999, pet. denied) ("[A]n offered explanation must involve diligence to seek service of process.").

The affidavits are conclusory, and neither separately nor combined constitute due diligence in effectuating service. We held in *Webster* that a plaintiff lacked due diligence as a matter of law after a four-month and ten-day delay when that delay was coupled with insufficient effort to serve process on a defendant after filing suit. *See* 5 S.W.3d at 290.

Moreover, "several Texas courts have held that delays of more than a few months negate due diligence as a matter of law." *Sharp*, 500 S.W.3d at 121 (holding inaction for over five months with no explanation for period of delay conclusively negated due diligence as a matter of law); *see also Belleza–Gonzalez*, 57 S.W.3d 8, 11–12 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (eight month delay in reliance on unenforceable agreement did not constitute due diligence) (citing *Weaver v. E–Z Mart Stores, Inc.*, 942 S.W.2d 167, 168 (Tex. App.—Texarkana 1997, no writ) (nine month delay by pro se litigant based on reliance on attorney's secretary and ignorance of the law does not fulfill requirements of due diligence); *Gonzalez v. Phoenix Frozen Foods, Inc.*, 884 S.W.2d 587, 590 (Tex. App.—Corpus Christi 1994, no writ) (attorney reliance on process server and delay of five months after the expiration of limitations does not constitute due diligence); *Butler v. Ross*, 836 S.W.2d 833, 835–36 (Tex. App.—Houston [1st Dist.] 1992, no writ) (five months with no activity or effort at service is not due diligence); *Allen v. Bentley Labs., Inc.*, 538 S.W.2d 857, 860 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.) (unexplained six month delay is not due diligence). We conclude that Muhammad's unexplained five-month delay (between July 5 and December 14, 2017) in attempting to procure service on Chuc-Rosales conclusively negates due diligence

as a matter of law. *See Sharp*, 500 S.W.3d at 120 ("[A]n explanation is needed for *every* period of delay." (*emphasis added*)).

III. CONCLUSION

The trial court did not err in rendering summary judgment in favor of Chuc-Rosales. We overrule Muhammad's three issues. We affirm the judgment of the trial court.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Wise, Jewell, and Poissant.