NUMBER 13-19-00521-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

TYRUS JONES, **Appellant,**

v.

RACHEL COLEMAN, **Appellee.**

On appeal from the 169th District Court of Bell County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Benavides

By three issues, appellant Tyrus Jones challenges the summary judgment granted in favor of appellee Rachel Coleman on grounds that his suit was barred by limitations. Jones raises three issues that we combine into one, that he produced evidence that he acted as an ordinarily prudent person in obtaining service that Coleman did not rebut resulting in an issue of material fact such that the trial court should not have granted

summary judgment. We affirm.

I. BACKGROUND

On January 30, 2016, Jones and Coleman were involved in an automobile collision in Bell County.[1] Jones claims he sustained injuries as a result of the accident. Jones made a claim through Coleman's insurer, Progressive, with the help of his friend and pastor, George Long.

On January 29, 2018, Jones filed a pro se petition against Coleman in Bell County, but he stated no service was necessary at that time. Jones, through Long, claimed an agreement with Progressive that service was not necessary. Nothing was in writing. Coleman did not mention the alleged agreement in her motion for summary judgment.

Jones hired counsel in June 2018. No service was requested. Service on Coleman was first requested on February 19, 2019.

Coleman filed a general denial and pleaded limitations as a defense. She also filed a motion for summary judgment on the ground of limitations. Jones responded and attached the affidavits of Long and his attorney. Long's affidavit stated in pertinent part:

> After [Jones] reached a stable point in his treatment and recovery, I assisted him in calling his medical providers and finding out what he needed to do to get his medical records to Progressive Insurance Company.
>
> Tyrus Jones and I begin to send medical records to the Insurance company as we received them from his providers, and he waited for the insurance company to be in a position to make an offer to settle.
>
> Tyrus Jones and I had some problems getting some medical reports in a

[1] This case was transferred to us from the Third Court of Appeals in Austin pursuant to an order by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001. Because this is a transfer case, we apply the precedent of the Austin Court of Appeals to the extent it differs from our own. See TEX. R. APP. P. 41.3.

timely manner and the statute of limitations was approaching.

> I talked with the adjuster and advised her that Tyrus Jones would be filing a lawsuit pro se to toll the statute of limitations and we mutually agreed that he would not serve their insured with the understanding we were still getting updated medical records and negotiating in good faith and at the time we all thought the case could be settled.
>
> . . .
>
> After the suit was filed and the insurance company was made aware of it being filed and given the case number add date of filing, Progressive wanted to continue to negotiate the case and acknowledged that if we did not serve their insured and could settle the case it would save Progressive from the expenses, time and cost of Attorney Fees and other litigation expenses. The Progressive adjuster expressed to me that they really would rather negotiate a settlement in lieu of going through litigation and having to pay the expenses of attorney fees and getting their insured involved with a lawsuit. The first offer to settle was made after the suit was filed.

According to Long, it was only after he was involved in his own serious auto collision in May 2018 and could not assist Jones any longer that Jones sought help from counsel in June 2018.

Counsel's affidavit recited that he was hired on June 21, 2018, and that Long told him about "an agreement with Progressive to provide Progressive with all the medical records and bills in an attempt to negotiate a settlement of this case before serving the Defendant." Counsel sent a letter of representation to Progressive on July 23, 2018, and began the process of accumulating medical information. He sent a demand letter on November 13, 2018, with the medical information. On November 27, 2018, the Progressive adjuster responded that they could not negotiate until their insured was served. Counsel did not verify Coleman's address until after January 1, 2019 and then first requested service on February 19, 2019. Coleman was served on February 26, 2019.

The trial court granted Coleman's motion for summary judgment on the grounds

that Jones did not exercise due diligence in obtaining service and his suit was barred by limitations. This appeal followed.

II. SUMMARY JUDGMENT

Jones's three issues challenge the summary judgment granted against him on the grounds that he raised an issue of material fact regarding his diligence under the ordinary prudent person standard. We consider all three together in light of the standard of review and the applicable law.

A. Standard of Review

We review the trial court's grant of summary judgment de novo. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003); *Fiallos v. Pagan–Lewis Motors, Inc.*, 147 S.W.3d 578, 582–83 (Tex. App.—Corpus Christi–Edinburg 2004, pet. denied). A traditional motion for summary judgment requires the moving party to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Provident Life*, 128 S.W.3d at 215–16. If the movant carries this burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). In reviewing the grant of summary judgment, we must credit evidence favoring the non-movant, indulging every reasonable inference, and resolving all doubts in his or her favor. *Lujan*, 555 S.W.3d at 84; *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995).

B. Applicable Law

Personal injury claims are governed by a two-year statute of limitations. *See* TEX.

CIV. PRAC. & REM. CODE ANN. § 16.003(a). If a plaintiff files his petition within the limitations period, service outside the limitations period may still be valid if the plaintiff exercises diligence in procuring service on the defendant. *See Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex.1990) (per curiam). When a defendant affirmatively pleads the defense of limitations, and shows that service was not timely, the burden shifts to the plaintiff to prove diligence. *Proulx v. Wells*, 235 S.W.3d 213, 216 (Tex.2007) (per curiam) (citing *Murray v. San Jacinto Agency*, Inc., 800 S.W.2d 826, 830 (Tex.1990)).

Diligence is determined by asking "whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served." *Id.* Although diligence is a fact question, a plaintiff's explanation may demonstrate a lack of diligence as a matter of law, "when one or more lapses between service efforts are unexplained or patently unreasonable." *Id.* A plaintiff has the 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." *Id.* If a plaintiff can show due diligence, then the defendant must show why the plaintiff's efforts were insufficient to relate the date of service back to the date of filing. *See Belleza-Gonzalez v. Villa*, 57 S.W.3d 8, 11 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

C. Discussion

Coleman was served thirteen months after limitations expired, approximately eight months after Jones hired counsel, and three months after Progressive told counsel she

would not discuss the case until after Coleman was served. Counsel explains the three-month gap by stating he did not get Coleman's address until after January 1, 2019 and staff vacations and the Christmas holidays delayed the request for citation. Counsel explains the preceding five-month gap by stating he believed there was an agreement to extend limitations due to on-going settlement negotiations, but there is nothing in his affidavit to indicate that he confirmed his belief or that he notified Progressive of his belief. There is also nothing to explain the delay of five weeks in obtaining Coleman's address after the adjuster's phone call.

As an initial matter, we address the oral agreement that Jones, Long, and counsel believed they had with an unnamed adjuster which they assert explains the delay beginning January 30, 2018 for Jones and Long and June 28, 2018 for counsel. In *Bella-Gonzalez*, our sister court held that an oral agreement to extend the statute of limitations was not effective because such agreements must meet the requirements of Rule 11.[2] 57 S.W.3d at 12; *see* TEX. R. CIV. P. 11. "This was an agreement between [plaintiff]'s attorney and an agent of the [defendant]. Unless the specific requirements of Rule 11 are met, no agreements between attorneys or parties are enforceable." *Bella*-Gonzalez, 57 S.W.3d at 12 *(*citing *London Mkt. Cos. v. Schattman*, 811 S.W.2d 550, 552 (Tex.1991) (orig.

[2] The Houston court described the circumstances outlined in the affidavits as follows:

> 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.

Belleza-Gonzalez v. Villa, 57 S.W.3d 8, 12 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

proceeding)); *accord El Paso Indep. Sch. Dist. v. Alspini*, 315 S.W.3d 144, 151 (Tex. App.—El Paso 2010, no pet.) (holding that plaintiff's explanation for the delay of service upon EPISD, an unenforceable oral agreement to delay service, is insufficient as a matter of law to show diligence of any kind in seeking or accomplishing timely service").

Because such oral agreements are insufficient to toll limitations, we must connsider the period of eleven months between January 31, 2018 (after suit was filed) and January 1, 2019 (when counsel determined Coleman's address) with no effort to obtain service and then an unexplained period of five weeks. Texas courts have previously found such lengthy periods to reflect a lack of due diligence as a matter of law. *See e.g. Ashley*, 293 S.W.3d at 180 (delay of eleven and a half months); *Alspini*, 315 S.W.3d at 151 (fourteen-month delay); *Bella-Gonzalez*, 57 S.W.3d at 11 (eight months); *Weaver v. E–Z Mart Stores, Inc.*, 942 S.W.2d 167, 168 (Tex. App.—Texarkana 1997, no writ) (nine-month delay); *Gonzalez v. Phoenix Frozen Foods, Inc.*, 884 S.W.2d 587, 590 (Tex. App.—Corpus Christi–Edinburg 1994, no writ) (five-month delay); *Butler v. Ross*, 836 S.W.2d 833, 835–36 (Tex. App.—Houston [1st Dist.] 1992, no writ) (five-month delay); *Allen v. Bentley Labs., Inc.*, 538 S.W.2d 857, 860 (Tex. App.—San Antonio 1976, writ ref'd n.r.e.) (six-month delay); *see also Dragustinovis v. Centroplex Auto. Recovery, Inc.*, No. 13-16-00150-CV, 2019 WL 613847, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 14, 2019, no pet.) (mem. op.) (twelve-month delay); *Richard v. Turner*, No. 13-08-00015-CV, 2009 WL 2712393, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 31, 2009, pet. denied) (mem. op.) (holding as a matter of law a lack of due diligence in obtaining service of citation thirteen months after limitations).

Accordingly, the trial court did not err in granting Coleman's motion for summary judgment. No issue of material fact was raised.

We overrule Jones's first, second, and third issues.

III. CONCLUSION

We affirm the judgment of the trial court.

GINA M. BENAVIDES,
Justice

Delivered and filed the
11th day of June, 2020.