



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-20-00024-CV

KELLY FLANIGAN, Appellant

V.

SREENATH NEKKALAPU, M.D., Appellee

On Appeal from the 96th District Court
Tarrant County, Texas
Trial Court No. 096-307893-19

Before Sudderth, C.J.; Womack and Wallach, JJ.
Opinion by Chief Justice Sudderth

OPINION

I. Introduction

Appellant Kelly Flanigan appeals from the trial court's order granting Appellee Sreenath Nekkalapu, M.D.'s motion for summary judgment on his affirmative defense of limitations. In two issues, Flanigan complains that the trial court erred by granting summary judgment because (1) limitations had not run when the suit was filed and (2) a fact issue exists regarding whether Flanigan had exercised diligence in effectuating service after limitations had run. We affirm.

II. Background

On February 16, 2017, Flanigan arrived at Sundance Behavioral Hospital seeking outpatient medical treatment. After evaluating her, medical personnel at Sundance determined that she posed a threat to her own personal safety and placed her on a court-ordered involuntary hold. The facility released Flanigan a week later, on February 23.¹ According to Flanigan, during this time she was detained against her will and was denied basic human needs.

¹While Flanigan's affidavit states that she was released on February 23, 2019, the record reflects that she was released in 2017. Except for this discrepancy, which we attribute to a typographical error, the summary judgment evidence establishes that she was released in 2017, not in 2019.

Nekkalapu, Flanigan’s treating physician at Sundance, first examined Flanigan on February 16.² On that date, Nekkalapu performed a psychiatric evaluation, prescribed medications, and created a plan of care. On February 20, Nekkalapu reexamined Flanigan and changed her prescriptions. Nekkalapu also visited Flanigan on February 21, 22, and 23. Nekkalapu claims that February 20 was the last time he treated Flanigan because there was no change in treatment or new diagnosis after that date, and every visit thereafter was merely “routine.”

On May 9, 2019, Flanigan filed a health care liability suit against Nekkalapu alleging negligence. *See generally* Tex. Civ. Prac. & Rem. Code Ann. §§ 74.001–.507 (“Medical Liability”). Although limitations would ordinarily have run by the end of February 2019, *see id.* § 74.251(a), Flanigan claims it was tolled when she sent to Nekkalapu a statutorily compliant notice and medical authorization form on February 25, 2019. *See id.* § 74.051(c); *Henry v. Premier Healthstaff*, 22 S.W.3d 124, 126 (Tex. App.—Fort Worth 2000, no pet.) (holding that limitations tolls for 75 days when plaintiff sends proper notice and authorization form to defendant within initial limitations period).³

²In Nekkalapu’s affidavit, he states that the first date he saw Flanigan was February 17. Flanigan states that the first date was February 16. Because the initial date is irrelevant to our resolution of either issue on appeal, we will assume that February 16 was the first date of treatment.

³Flanigan contends that because the February 25 notice and authorization form tolled limitations, the last day she could have timely filed her lawsuit was May 13, 2019. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.051(c).

On May 16, one week after filing suit, Flanigan’s attorney requested the issuance of citation. Flanigan’s attorney received the citation from the clerk on May 20, but then waited nine days—until May 29—to forward it to a process server for service of process. According to the attorney, during the four-and-a-half week span that followed—from May 29 to July 1—he had “several conversations” with the process server to determine the status of service.⁴

In his affidavit attached as summary judgment evidence, the process server identified two difficulties that he had encountered while attempting to serve Nekkcalapu. First, he claimed that he “was having trouble locating” Nekkcalapu. Second, and more importantly, he revealed that “[i]n reality,” he was “holding various part-time jobs at the time” that “limited [his] ability to attempt service” on Nekkcalapu, so he restricted his service attempts to “short periods” of time at “odd hours.” However, he did not share the latter difficulty with Flanigan’s attorney until July 1, when Flanigan’s attorney asked him to prepare an affidavit for a substituted service motion.

According to Flanigan’s attorney, once the process server disclosed this information to him, he determined that the process server’s attempts were

⁴In his affidavit, Flanigan’s attorney does not state any specific dates or instances when he had these “conversations” with the process server regarding service. And although he states that he believed that the process server was making “reasonable” attempts to serve Nekkcalapu, he also does not specify the facts upon which he based this belief.

“inadequate to justify a motion for substituted service” and instructed him to “stop any further attempts” to serve Nekkhalapu. But then Flanigan’s attorney waited ten more days, until July 11, to hire another process server. That process server finally served Nekkhalapu on July 18, more than two months after Flanigan filed suit, and almost two years and five months after Nekkhalapu last treated Flanigan.

In his answer, Nekkhalapu asserted the affirmative defense of limitations. In his traditional summary judgment motion, Nekkhalapu argued that limitations barred Flanigan’s May 2019 lawsuit because (1) Flanigan’s notice and authorization form did not toll limitations because she did not send the notice and form to Nekkhalapu before limitations had run in February 2019, and (2) even if Flanigan’s notice and authorization form had tolled limitations, Flanigan did not exercise due diligence in serving Nekkhalapu after limitations had run following her timely filing suit. Flanigan now appeals the trial court’s order granting Nekkhalapu’s summary judgment motion.

III. Standard of Review

We review a summary judgment de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant’s favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A

defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all elements of that defense. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508–09 (Tex. 2010); *see* Tex. R. Civ. P. 166a(b), (c). To accomplish this, the defendant must present summary judgment evidence that conclusively establishes each element of the affirmative defense. *See Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008).

IV. Applicable Law

Health care liability claims are subject to a two-year limitations period that commences on one of three dates: (1) the date the breach occurred, (2) the last date of treatment, or (3) the last date of hospitalization. Tex. Civ. Prac. & Rem. Code Ann. § 74.251(a); *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). Generally speaking, the plaintiff must both file suit and serve the defendant within the limitations period. *See Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990). For a claim's notice and authorization form to toll limitations for 75 days under Section 74.051(c), they must be sent at least 60 days before filing suit and within the normal limitations period. Tex. Civ. Prac. & Rem. Code Ann. § 74.051(a), (c); *Henry*, 22 S.W.3d at 126 (citing *Thompson v. Cmty. Health Inv. Corp.* 923 S.W.2d 569, 571 (Tex. 1996)).

When a lawsuit is filed within the limitations period but the defendant is served after limitations has expired, the date of service may relate back to the date of filing if the plaintiff shows the exercise of due diligence in effectuating service. *Gant*, 786 S.W.2d at 260. In a summary judgment proceeding, once the defendant proves that

service occurred after limitations expired, the burden shifts to the plaintiff to explain the delay and to raise a fact question regarding diligence of service. *Butler v. Skegrud*, No. 02-14-00168-CV, 2015 WL 4148474, at *2 (Tex. App.—Fort Worth July 9, 2015, no pet.) (mem. op.).

To raise a fact issue on diligence, the plaintiff must explain “every lapse in effort or period of delay.” *Proulx v. Wells*, 235 S.W.3d 213, 216 (Tex. 2007). And although the question of diligence is typically a fact question, it can be resolved as a matter of law if “one or more lapses between service efforts are unexplained or patently unreasonable.” *Id.* Once a plaintiff raises a fact question regarding diligence, the burden shifts back to the defendant to conclusively show why the explanation is insufficient. *Id.* The inquiry when assessing diligence is whether “the plaintiff acted as an ordinarily prudent person would have acted” in the same circumstances. *Id.*

The plaintiff must show continuous diligence from the filing of the suit up until the date that the defendant is served. *Id.*; *Tate v. Beal*, 119 S.W.3d 378, 381 (Tex. App.—Fort Worth 2003, pet. denied). But if the plaintiff’s excuse is legally invalid, it does not matter if service was completed even in a relatively short period of time after filing. *See Proulx*, 235 S.W.3d at 216 (citing *Brown v. Shores*, 77 S.W.3d 884, 889–90 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Brister, C.J., concurring) (citing *Belleza-Gonzalez v. Villa*, 57 S.W.3d 8, 11–12 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (holding that because an oral agreement to delay service was unenforceable, it was insufficient to show diligence as a matter of law))); *see also Roberts v. Padre Island*

Brewing Co., 28 S.W.3d 618, 621 (Tex. App.—Corpus Christi—Edinburg 2000, pet. denied) (holding that misplaced reliance on a process server to effectuate service did not constitute due diligence); *Rodriguez v. Tinsman & Houser, Inc.*, 13 S.W.3d 47, 50–51 (Tex. App.—San Antonio 1999, pet. denied) (holding that “[t]he proffered explanation of miscommunication [was] not valid because it [did] not involve diligence to seek service of process” and thus no diligence was shown).

Our sister courts have held that it is the plaintiff’s, not the process server’s, duty to ensure that the defendant is served. *Carter v. MacFadyen*, 93 S.W.3d 307, 314 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Roberts*, 28 S.W.3d at 621. Accordingly, in *Roberts*, the Corpus Christi court reasoned that reliance on a process server does not suffice to demonstrate due diligence. 28 S.W.3d at 621 (holding that diligence was lacking as a matter of law when plaintiff’s process server failed to serve defendant despite plaintiff’s “repeatedly” attempting to contact server to inquire about service).

V. Discussion

In her second issue,⁵ Flanigan argues that a fact issue exists regarding whether she exercised diligence in effectuating service. We disagree. Assuming without deciding that limitations did not expire until May 13 as Flanigan contends, we hold

⁵Because it is dispositive, we take up Flanigan’s second issue first and do not reach her remaining issue. *See* Tex. R. App. P. 47.1.

that she failed to provide sufficient evidence to create a fact issue that would preclude summary judgment on Nekkhalapu's limitations defense.

Here, in essence, Flanigan argues that she exercised due diligence, even though the process server she hired did not. Flanigan's attorney admitted that the process server's attempts to serve Nekkhalapu from May 29 to July 1 were insufficient to support a Rule 106 motion for substituted service. *See* Tex. R. Civ. P. 106(b) (stating that motion must be supported with affidavit stating specific facts proving that service was attempted in accordance with Rule 106(a) and was not successful). As a result, the attorney fired the process server. Thus, the crux of Flanigan's excuse is that she exercised due diligence by placing her faith in the process server to effectuate service in a diligent manner and that the process server failed to do so.

But we agree with our sister court in *Roberts* that the law does not allow Flanigan to pass the buck in this way. *See* 28 S.W.3d at 621. In *Roberts*, after hiring a process server, Roberts repeatedly attempted to contact him but later hired a different server to effectuate service. *Id.* The court held that despite Roberts's repeated attempts to contact the process server to inquire about service, Roberts's reliance on the process server after limitations had expired did not constitute due diligence. *Id.* Much like Roberts's reliance, here, Flanigan's attorney allowed the process server to "attempt" service for four and a half weeks before taking the necessary action to get

the job done.⁶ Flanigan’s wholesale reliance on the process server to exercise due diligence does not constitute due diligence on Flanigan’s part as a matter of law. *See id.*

Moreover, even if Flanigan’s reliance on the process server could establish a fact issue, on this record, additional delays between filing and service remain unexplained. For example, Flanigan failed to explain why her attorney waited until May 16—one week after filing suit and *at least three days after limitations had run under any theory*—to ask the trial court clerk to issue a citation in this case. *Cf. Proulx*, 235 S.W.3d at 214 (noting that plaintiff requested and received citation prior to expiration of limitations); *St. John Backhoe Serv. v. Vieth*, No. 02-15-00098-CV, 2016 WL 4141026, at *2–3 (Tex. App.—Fort Worth Aug. 4, 2016, no pet.) (mem. op.) (noting that plaintiff requested citation at the time of filing of its original petition); *Fontenot v. Gibson*, No. 01-12-00747-CV, 2013 WL 2146685, at *1 (Tex. App.—Houston [1st Dist.] May 16, 2013, no pet.) (mem. op.) (noting that plaintiff filed suit and requested citation two days before the two-year limitations period expired). Additionally, the record is silent as to why, when the attorney received the citation on May 20, he

⁶Flanigan’s attorney, without reference to any specific dates, times, or content regarding these conversations, claims that he had “several conversations” with the server within this time period to determine the status of service. But even looking at the summary judgment evidence in the light most favorable to Flanigan, this vague evidence does not establish that Flanigan did anything more than just check in occasionally while still relying on the process server to exercise the due diligence required by law.

waited nine days to forward it to the first process server. Likewise, after learning about that process server's inadequate attempts on July 1, the attorney inexplicably waited another 10 days to hire a new process server, who finally effectuated service on July 18.

Flanigan provided no summary judgment evidence to explain these additional gaps. *See Proulx*, 235 S.W.3d at 216. Nor did Flanigan's summary judgment proof include any indication that Nekkhalapu was avoiding service in any manner. *Cf. id.* at 217 (pointing to summary judgment evidence that the defendant was "moving from relative to relative and doing his best to avoid service from the courts and creditors"). And, finally, Flanigan's attorney admitted that the process server's attempts were "inadequate to justify a motion for substituted service." *Cf. Vieth*, 2016 WL 4141026, at *4, *7 (noting that the trial court signed an order authorizing substituted service, finding that plaintiff had made "numerous and diligent attempts to serve [d]efendant").

While we have previously held that two- or three-week delays—or even a two-month delay—may be insufficient to establish a lack of diligence, *cf. id.* at *6, such determinations are necessarily dependent on the circumstances of the case. *See id.* (pointing to a process server's affidavit "detailing her service attempts" and her "search [of] appraisal district records" to confirm the accuracy of the defendant's address as evidence of diligence during a two-and-a-half-month delay). Here, Flanigan's waiting until limitations had run before even requesting citation, the

multiple unexplained gaps of time between filing suit and service, and Flanigan’s four-and-a-half week reliance on the process server—an excuse that is invalid as a matter of law—establish that diligence was lacking as a matter of law. Accordingly, we overrule Flanigan’s second issue.

VI. Conclusion

Having overruled Flanigan’s dispositive issue, we affirm the trial court’s judgment.

/s/ Bonnie Sudderth
Bonnie Sudderth
Chief Justice

Delivered: November 5, 2020