IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8648
(Summary Calendar)

GENE EVERETT d/b/a
5 Star Diesel Repair, ET AL.,

Plaintiffs-Appellees,

versus

AMERICAN CENTRAL GAS COMPANIES,
INC. ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(MO-92-CA-064)

June 9, 1993

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

In this negligence suit, Defendants-Appellants American Central Gas Companies, Inc. and Tristar (collectively "Gas Companies") appeal the adverse judgment, contending that the Texas statute of limitations barred the claim. The district court denied the Gas Companies' motions for summary judgment, judgment as a matter of law, renewed judgment after trial, and new trial. After

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

reviewing the application of the Texas statute of limitations de novo, we conclude that a sixteen month delay in obtaining service of process without a legally sufficient explanation demonstrates nondiligence as a matter of law.

I

FACTS AND PROCEEDINGS

On September 19, 1989, Plaintiff-Appellee Gene Everett's business premises, 5 Star Diesel Repair, were destroyed by an explosion, which he blamed on the negligent operation and maintenance of the Gas Companies' nearby gas gathering systems. Consequently, Everett (through his attorney) sent a demand letter to the Gas Companies on April 10, 1990. The Gas Companies responded that there was no factual basis for a negligence claim because the Texas Railroad Commission had issued a letter indicating that a leaking propane tanksQand not the gas gathering operationssQhad caused the explosion. In August, Everett forwarded additional information about his claim to the Gas Companies, which did not respond.

On November 12, 1990, Everett again contacted the Gas Companies, sending letters to American Central and Tristar containing the following statement:

> Please advise if you will accept service and file a response on behalf of your client . . . . If I do not hear from you within ten days, I will assume that your client will not allow you to do so and will proceed to have a citation served on it.

In the letter to Tristar, Everett also stated: "Since I have not heard from you after my last letter with its enclosures, I was

compelled to file suit." This was not correct, however, as Everett did not actually file suit until one week later, on November 19. After filing his complaint, Everett did not attempt to serve process on the Gas Companies. Neither did he provide additional notice to the Gas Companies that the pleading had been filed.

On March 24, 1992, following sixteen months of inactivity, Everett requested service of process. Service was finally effectuated on March 30. As explanation for this lengthy period of inaction, Everett's attorney said that he had failed to notice that the Gas Companies had not filed answers during that time. His self-described "mistake" was due to his attention to other business and family matters and his incorrect belief that the Gas Companies would accept service and no service of citation would be necessary.

The Gas Companies filed a joint answer on April 16, 1992, removing the case to federal court based on diversity. They then moved for summary judgment, alleging that Everett had failed to use due diligence in attempting to procure service of process. The district court denied the motion, and the case proceeded to trial. The Gas Companies moved for judgments as a matter of law at the close of Everett's case-in-chief and at the close of its case, both of which motions were denied. After the jury returned a verdict in favor of Everett, the Gas Companies renewed their motion for judgment after trial, and, when that was denied, filed a motion for new trial, which was likewise rejected. The Gas Companies timely appealed.

II

ANALYSIS

A. Standard of Review

Both sides present the standards of review for each decision of the district courtsQthe denial of summary judgment, the denial of the motions for judgment as a matter of law, the denial of the renewed motion for judgment after trial, and the denial of the motion for new trial, suggesting that this court should review each decision accordingly. We note, however, that we do not review the denial of a motion for summary judgment.[1] The denial of motions for judgment as a matter of law and judgment after trial are reviewed de novo. These motions should be granted "only if the nonmoving party has failed to present `substantial evidence . . . of such quality and weight that reasonable and fair-minded [persons] in the exercise of impartial judgment might reach different conclusions.'"[2] A motion for a new trial is reviewed for abuse of discretion.[3]

More importantly, at issue in the instant case is the interpretation of Texas law governing statutes of limitation. In reviewing a district court's interpretation of state law, we accord

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[1] Wells v. Hico Independent Sch. Dist., 736 F.2d 243, 251 n.9 (5th Cir. 1984). The standard of review presented in both briefs is, in fact, the standard for review of a grant of summary judgment.

[2] Argubright v. Beech Aircraft Corp., 868 F.2d 764, 766 (5th Cir. 1989)(quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969)(en banc)).

[3] Lubbock Feed Lots, Inc. v. Iowa Beef Processors Inc., 630 F.2d 250, 269 (5th Cir. 1980).

no deference, but review the decision de novo.[4]

B. Due Diligence

Texas lawSQthe law which governs this caseSQimposes a two year statute of limitations, accruing from the moment of injury, on suits for property damage.[5] The Texas Supreme Court has construed the applicable statute in Gant v. Deleon:[6]

> To "bring suit" within the two-year limitations period prescribed by section 16.003, a plaintiff must not only file suit within the applicable limitations period, but must also use diligence to have the defendant served with process.[7]

In other words, for a suit to be deemed timely filed, there are two requirements: (1) the suit must be filed within that time period specified in the statute of limitation; and (2) diligent efforts to accomplish service of process must be instituted and prosecuted. Service of process accomplished as a result of diligent efforts relates back to the filing date even if that service is not effectuated until after the statutory limit has expired.[8] If, on the other hand, service occurs after the running of the statutory period without there having been duly diligent efforts to serve legal process, the claim is time barred.[9]

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[4] Salve Regina College v. Russell, 111 S.Ct. 1217, 1221 (1991).

[5] TEX. CIV. PRAC. & REM. CODE ANN. §16.003(a).

[6] 786 S.W.2d 259 (Tex. 1990)(emphasis added).

[7] Id. at 260.

[8] Id.

[9] Id. at 259.

Although whether efforts to achieve service were diligent is normally a question of fact to be judged under a reasonably prudent person standard,[10] one line of cases does establish "that an unexplained delay of as little as six months demonstrates as a matter of law that the plaintiff lacked diligence in obtaining the issuance and service of process." A valid "explanation" is "an excuse offered that if proved would negate the inference of nondiligence."[11]

Here, the delay was sixteen monthsSQwell in excess of the minimum six months held in other cases to demonstrate, as a matter of law, a lack of diligence. Everett's attorney insists, however, that he has explained the delay so that this line of cases is inapposite. To reiterate, his explanation was that (1) he was busy with other business and (2) he believed that the defendants would accept service even though they did not respond to his letters (in which, we note, he stated that if no response was forthcoming he would assume that they would not accept process).

Although these are attempted explanations, they obviously do not rise to the level of "excuse[s] . . . that if proved would negate the inference of nondiligence."[12] Counsel's first assertionSQthat he was busy with other cases and family businessSQis tantamount to an admission of nondiligence. A lawyer's inattention

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[10] Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1113 (5th Cir. 1981).

[11] Id. at 1114.

[12] Id.

does not toll the statute of limitations.[13] Counsel's second assertionSQthat he believed the Gas Companies would accept servicesSQsimply cannot be squared with his own letter to the Gas Companies, which informed them that if they did not respond Everett would assume that they would not accept service. Counsel for Everett does not explain how, given the lack of response, he could have believed that the Gas Companies would accept service. In any event, a lawyer's failure to keep abreast of the proceedings in a lawsuit that he filed constitutes nondiligence.[14]

Everett argues that due diligence is not an issue; rather, that the main issues are whether (1) the defendant had actual notice; (2) the defendant suffered any harm; and (3) the purposes of the statute of limitations have been met. Despite his failure to comply with a clear procedural requirement, Everett urges that his failure to follow the rule does not matter because the Gas Companies were not prejudiced by his mistake. In its simplest terms, Everett's argument issQ"no harm, no foul." If taken to its logical conclusionSQor, more appropriately, reduced to its absurditySQthe statute of limitations would be eviscerated, only to be replaced with a case by case analysis of actual notice and harm. If this is the law anywhere, it certainly is not the law of Texas.

Consequently, the district court erred in its interpretation of Texas law. Cases construing the Texas statute of limitations

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[13] Ferguson v. Estes & Alexander, 214 S.W. 465, 467 (Tex. Civ. AppSQEl Paso 1919, no writ).

[14] Sanchez v. Providence Memorial Hosp., 679 S.W.2d 732, 732-33 (Tex. App.SQEl Paso 1984, no writ).

provision hold that in the absence of a legally acceptable reason a delay of six months or more in seeking service is nondiligent as a matter of law; and only due diligence to accomplish service can excuse service of process after the statute of limitation has run. Everett did not institute efforts to make service until more than a year after the statute of limitations had run, and even then provided no explanations for the delay which, if proved, would defeat the inference of nondiligence. His claim, therefore, is barred as a matter of law.

For the foregoing reasons, the district court's opinion is REVERSED and Everett's action against the Gas Companies is DISMISSED.