

CAUSE NO. 2006-81236

Hadeel Assali, et al.	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, T E X A S
	§	
Young Men’s Christian Association Of Greater Houston Area, et al.	§	157th JUDICIAL DISTRICT

Order

Defendants YMCA have moved for summary judgment on limitations. For the reasons stated, the motion is granted.

Background Facts

Plaintiffs allege various tort causes of action from injuries accruing on November 21, 2004. The two year statute of limitation is applicable. On Nov. 13, 2006, plaintiffs filed their original petition with the District Court of Harris County. The file reflects a filing date of Nov. 13, 2006 at 7:49 p.m. According to the court records, plaintiffs paid a filing fee of \$197.00 on Nov. 13, 2006. However, the petition was returned to plaintiff with the notation: “Returned due to insufficient fees not paid at time of filing.” According to the file, Plaintiffs faxed the petition back to the clerk on Nov. 28, 2006 at 3:59 p.m. Plaintiffs apparently filed the petition again on December 29, 2006 at 4:12 p.m., but no new filing fees were paid. This time, however, the clerk’s office accepted the petition. On April 2, 2007, plaintiff paid \$16 for citations to be issued. Defendants were served on May 4, 2007.¹

¹ Even this service, however, was arguably defective since defendants were served with the first two pages of the petition and the remainder of the service consisted of pages from an unrelated lawsuit also involving plaintiffs’ law firm. Defendants were finally provided with a complete copy of the petition on May 23, 2007.

Defendants have moved for summary judgment on two grounds. First, that the petition was not “filed” until December 29, 2006, over a month after limitations had expired. Second, that plaintiffs unreasonably delayed obtaining service. Each issue will be discussed separately.

Filing Date

The first issue presented is whether tendering a petition within the limitations period but lacking sufficient filing fees² constitutes a “filing” for purposes of the statute of limitations. Under Texas law, “a document is ‘filed’ when it is tendered to the clerk, or otherwise put under the custody or control of the clerk.” *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993). *See also Mr. Penguin Tuxedo Rental & Sales, Inc. v. NCR Corp.*, 787 S.W.2d 371, 372 (Tex.1990); *Biffle v. Morton Rubber Indus., Inc.*, 785 S.W.2d 143 (Tex.1990); *Standard Fire Ins. Co. v. LaCoke*, 585 S.W.2d 678, 681 (Tex.1979). Further, the appropriate filing fee is not absolutely required at the time of filing. *See Hecker v. Wal-Mart Stores, Inc.*, 33 F.3d 531, 532 (5th Cir. 1994) (citing *Arndt v. Arndt*, 709 S.W.2d 281, 282 (Tex. App.—Houston [14th Dist.] 1986, no writ)). As such, a document that is tendered to a clerk without the appropriate filing fee is considered to be “conditionally filed,” which allows the original filing date to be used for limitations purposes. *Jamar*, 868 S.W.2d at 319.

As a result, the petition was originally filed within the limitations period.

Delay in Service

The plaintiffs’ delay in effecting service is a more difficult issue. Although the petition was “filed” on Nov. 13, 2006, citation was not requested until April 2, 2007 and service not accomplished until May 4, 2007.

² The court will assume for purposes of this motion that the original filing on Nov. 13, 2006 had insufficient filing fees, although the court finds it curious that the petition was accepted for filing on December 29, 2006, yet no new fees were apparently received.

Filing suit interrupts limitations only if a plaintiff exercises diligence in serving the defendant. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex.1990). When a defendant moves for summary judgment and shows that service occurred after the limitations deadline, “the burden shifts to the plaintiff ... to explain the delay.” *Id.*; see also *Brown v. Shores*, 77 S.W.3d 884, 888-89 (Tex.App.--Houston [14th Dist.] 2002, no pet.) (Brister, C.J., concurring) (discussing possible conflict between *Murray* and *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex.1975) (requiring plaintiff merely to plead diligence)). The plaintiff's evidence must explain every period of delay. See *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex.1990). Once the plaintiff presents an explanation, the burden shifts back to the defendant to show why those explanations are insufficient as a matter of law. *Belleza-Gonzalez v. Villa*, 57 S.W.3d 8, 11 (Tex.App.--Houston [14th Dist.] 2001, no pet.).

Here, as a threshold matter, plaintiffs provided no affidavit in response to the motion for summary judgment. Technically, plaintiffs have no evidence to support diligence. Plaintiff did, however, attach various pieces of paper that attempt to explain the delay in effecting service. First, plaintiffs apparently sent a certified copy of the petition to Michael Logan, registered agent for YMCA, on Nov. 17, 2006. (Ex. A to Plaintiffs' response) However, there was no indication that this was sent by a person authorized to serve defendants under Rule 103. At best, this effort was merely a courtesy copy of a lawsuit that had been filed and returned.

Second, plaintiffs argue that they were diligent thereafter because they called the Texas Secretary of State and were told that defendants did not have a registered agent. There are many problems with this. First, there is no affidavit to prove this conversation. Second, plaintiffs do not state when this conversation occurred. Third, it appears this conversation was very late in the

process, because plaintiffs obtained a certificate of no record from the Secretary of State on May 29, 2007.³

Finally, plaintiffs point to a letter from defendants' counsel on March 18, 2005 stating that they have been retained by "YMCA Association of Greater Houston and YMCA International Services", which is not the legally correct name of the defendants.⁴ Even if this letter somehow misled plaintiffs,⁵ plaintiffs provide absolutely no explanation for several delays. Plaintiffs do not explain the delay from November 13, 2006 to December 29, 2006 in re-filing the petition. Plaintiffs have no explanation for the delay from December 29, 2006 to April 2, 2007 when plaintiffs finally paid for and requested citation. Here, the court is confronted with no attempt by plaintiffs to explain a delay of 4 ½ months from the time of original filing to the request for citation.

In short, plaintiffs have failed to explain every period of delay. *See Brown v. Shores*, 77 S.W.3d 887 (Tex. App.—Houston [14th Dist.] 2002, no pet.)(summary judgment affirmed where plaintiff gave no explanation for a 5 month delay); *Hansler v. Mainka*, 807 S.W.2d 3, 5 (Tex. App.—Corpus Christi 1991, no writ)(an unexplained delay of five months after the expiration of limitations not due diligence in procuring issuance and service of citation); *Buie v. Couch*, 126 S.W.2d 565 (Tex. Civ. App.—Waco 1939, writ ref'd)(3 ¾ months between filing and issuance of citation and one month between issuance and service), *cited with approval in Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990).

³ This certificate of no record occurred after Defendants had been served and after Defendants had answered.

⁴ Defendants are apparently correctly known as Young Men's Christian Association of Greater Houston Area d/b/a YMCA and YMCA International Services d/b/a YMCA.

⁵ The court is dubious that this letter misled plaintiffs, since, by plaintiffs own admission, plaintiffs somehow knew the identity of Defendants' registered agent as early as November 2006 when plaintiffs sent a registered letter to Michael Logan. Moreover, despite being "misled" by the March 18, 2007 letter, plaintiffs were somehow able to request citation in April and serve YMCA in May.

For the reasons stated herein, and, in addition, for the reasons stated in Defendants' Motion for Summary Judgment and in the Reply Brief in Support of Defendants' Motion for Summary Judgment, Defendants' motion for summary judgment is granted.

Signed August 6, 2007.

Hon. Randy Wilson