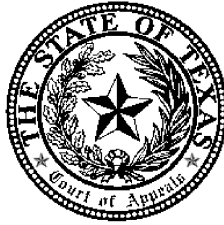


Affirmed and Opinion filed March 21, 2002.



In The
Fourteenth Court of Appeals

NO. 14-01-00354-CV

JESUS MONTALVO, Appellant

V.

GARY ROTH, Appellee

**On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 00-02976**

OPINION

Appellant, Jesus Montalvo, appeals the trial court's summary judgment in favor of appellee, Gary Roth. In three issues, appellant claims the trial court erred (1) in finding the statute of limitations had expired and (2) in allowing a pro se attorney to have an attorney not of record prepare and file a summary judgment motion. We affirm.

This case arises from an attorney client relationship between Montalvo and Roth. Montalvo hired Roth to represent him in an action filed by Montalvo's landlord to terminate Montalvo's tenancy doing business as JuJitsu & More. Roth first prepared the case for trial in Justice Court. The Justice Court entered judgment in favor of Montalvo. The landlord,

Edward Rizk, appealed the Justice Court decision to the County Court at Law. Trial was held in the County Court at Law No. 3 on August 18, 1997. Because he was out of town, Roth did not receive the scheduling order from the County Court at Law. Roth did not submit a witness list to the county court and was not permitted to introduce live testimony at the trial. The county court entered judgment in favor of Rizk. The record reflects that the last action taken in this lawsuit took place on December 18, 1997 when Montalvo filed motions regarding garnishment issues.

On January 24, 2000, Montalvo filed suit against Roth alleging malpractice in Roth's representation in the lawsuit against Rizk. Roth filed a motion for summary judgment alleging the two year statute of limitations had expired on Montalvo's action. The trial judge denied the motion stating she would entertain a further motion with more evidence showing actions taken in the underlying lawsuit. Roth then filed a second motion for summary judgment, which the trial court granted.

For the movant to prevail in a summary judgment, he must either disprove at least one necessary element of the plaintiff's theory of recovery or plead and conclusively establish each essential element of an affirmative defense, thereby rebutting the plaintiff's cause of action. *Peeler v. Hughes & Luce*, 868 S.W.2d 823, 827 (Tex. App.—Dallas 1993), *aff'd*, 909 S.W.2d 494 (Tex. 1995). We view the summary judgment proof in the light most favorable to the nonmovant, and all doubts as to the existence of a genuine issue of material fact are resolved in the nonmovant's favor. *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 548-49 (Tex. 1985).

In his first and third issues, Montalvo challenges the trial court's finding that his cause of action was barred by the statute of limitations. The legal malpractice claim in this case is governed by the two year statute of limitations. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). Limitations generally begins to run when the cause of action accrues, which means when facts have come into existence that authorize a claimant to seek a judicial remedy. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514

(Tex. 1998). In legal malpractice actions the statute of limitations is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 119 (Tex. 2001).

In this case, Montalvo claims the statute of limitations was tolled until February 5, 1998 when an order dismissing with prejudice was filed by Montalvo against Rizk. Roth claims the last action taken in the underlying cause of action took place on December 18, 1997 when a motion for garnishment was filed. Roth asserts that the February 5, 1998 order was filed in another matter. In his motion for summary judgment, Roth states he has submitted summary judgment evidence to prove the February 5, 1998 order was filed in another matter. When the clerk's record was prepared in this case, the supporting documents attached to Roth's motion for summary judgment were omitted. On December 14, 2001, this court ordered the Harris County District Clerk to supplement the clerk's record with the documents filed in support of Roth's motion. The district clerk responded that he was unable to match the motion to the attachments. He further responded that attempts to contact the attorneys for help in matching the documents were not successful.

In the absence of a complete record, we must presume the missing portions of the record support the trial court's judgment. *Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991). Although the burden now rests with the appellate court to ensure the record is filed timely, appellant maintains the responsibility for requesting a complete record. TEX. R. APP. P. 34. Because Montalvo did not provide the district clerk with the assistance necessary to provide the documents supporting his position we presume the missing documents are either not in the record or support Roth's assertion that the February 5, 1988, order was unrelated to the underlying action here, and thus, the January 24, 2000, suit was filed after the expiration of the two year statute of limitations. Montalvo's first and third issues are overruled.

In his second issue, appellant contends the trial court erred by allowing a pro se attorney not of record to prepare and file a second summary judgment motion. In the trial

court, Roth represented himself when he filed his first motion for summary judgment. Roth was represented by counsel on his second motion for summary judgment. Montalvo contends the trial court violated Texas Rule of Civil Procedure 8 by allowing the attorney to substitute as Roth's counsel without prior notice.

Initially, we note the record does not reflect whether Montalvo raised this objection in the trial court. To preserve error for appeal, a party must raise the issue before the trial court. *Pace v. Jordan*, 999 S.W.2d 615, 620 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Further, Montalvo does not show this court how the failure to formally substitute counsel harmed him. He does not contend that he was unable to communicate with Roth's counsel or that his filings were not appropriately directed to Roth. Therefore, the trial court did not abuse its discretion in allowing Roth's attorney to file the motion for summary judgment. *See Spellmon v. Collins*, 970 S.W.2d 578, 580 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Montalvo's second issue is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed March 21, 2002.

Panel consists of Justices Hudson, Fowler, and Edelman.

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