

Colorado Court of Appeals

2 East 14th Avenue

Denver, CO 80203

DATE FILED
August 30, 2024 6:07 PM

Appeal from:

Douglas County District Court

District Court Judge: The Hon. Andrew Baum

District Court Case Number: 2023CV030570

In the Case of:

Plaintiff-Appellant: OBED RIVERA,

v.

Defendant-Appellee: PAUL FORT

Filing Party: Furtado Law PC, on behalf of

Plaintiff/Appellant Obed Rivera

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▲ FOR COURT USE ▲

Court of Appeals

Case No: 24CA000856

OPENING BRIEF

Plaintiff/Appellant, Obed Rivera, through his undersigned counsel, submits the following Opening Brief, and as grounds therefore states as follows:

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 3090 words.

The brief complies with the standard of review requirements set forth in 28(a)(7)(A).

For each issue raised, the brief contains under a separate heading placed before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ David J. Furtado

David J. Furtado

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ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in ruling that the doctrine of equitable tolling must be pled in the complaint rather than raised in response to a motion to dismiss based on the statute of limitations?
2. Did the District Court err in failing to apply the doctrine of equitable tolling despite evidence that Appellee Fort engaged in wrongful conduct by evading service of process, which prevented Appellant Rivera from timely asserting his claims?

STATEMENT OF THE CASE

Plaintiff/Appellant Obed Rivera (“Appellant Rivera”) filed the original complaint in this matter on September 30, 2021, asserting claims against Defendant/Appellee Paul R. Fort (“Appellee Fort”) and his previous employer, Defendant T.R. Fort LLC, in the Douglas County District Court case styled *Rivera v. Fort et al.* (Case No. 2021CV30695) (the “2021 Case”). Appellee Fort is the brother of Tad R. Fort, the owner of Defendant T.R. Fort, LLC. R. CF, p. 4. The Complaint asserted three causes of action based on Appellant Rivera’s allegations of negligent performance of plumbing services which caused Appellant Rivera’s house to catch on fire. R. CF, pp. 62-65.

Despite the best efforts of Appellant Rivera’s counsel during the 2021 Case, Appellee Fort actively avoided service of process. Specifically, On December 30, 2021, Appellant Rivera’s process server notified his counsel that six (6) separate attempts to serve Appellee Fort had been unsuccessful at his then-known address, 4601 E. Wyoming Pl, Denver, CO 80222. R. CF, p. 58. The process server noted

that “a vehicle was at the property but [he] saw no lights, noise, or movement at any time, such that the server no longer believed he would receive a response to service attempts there.” *Id.* Due to Appellee Fort’s evasion of service, Appellant Rivera had to file three motions for enlargement of time to serve him—in January, February and March of 2022—which the district court granted. R. CF, pp. 33, 47, 57, 67. Appellant Rivera then requested the Denver County Sheriff’s Department serve Appellee Fort at his last known address, as well as a second address obtained by Appellant Rivera’s counsel through a background check service. R. CF, p. 58. On March 7, 2022, Appellant Rivera’s counsel received an affidavit of non-service from Denver County Sheriff’s Department, indicating that five (5) separate attempts had been made pursuant to the service request, but officers were unable to achieve service. *Id.*

Despite Appellee Fort’s ability to elude service, he was aware of the action against him. On January 7, 2022, Appellant Rivera’s counsel was contacted by Hamilton Faatz, PC—the counsel initially retained by Defendant T. R. Fort LLC in the 2021 Case—for conferral regarding Defendant T.R. Fort LLC’s intention to file an Answer and potential acceptance of service by Appellee Fort, pending confirmation of Appellee Fort’s representation by counsel. R. CF, p. 48, 54, 58, 66, 71. Defendant T.R. Fort LLC filed an Answer in the 2021 Case on January 31, 2022, and its counsel advised on February 10, 2022 that it was not in fact going to represent

Appellee Fort. R. CF, pp. 33, 42, 48, 51, 71. Similarly, on June 23, 2022, Appellant Rivera's counsel received an email from tadfort@gmail.com attaching two letters regarding facts at issue in Appellant Rivera's claims, with the signatories named as Paul Fort and Tad Fort, respectively. R. CF, pp. 37-40, 67, 71.

Having exhausted all known information as to Appellee Fort's address, Appellant Rivera was eventually left with no choice but to move for leave for substituted service on April 25, 2022. R. CF, pp. 43, 67. In its order addressing that motion, the district court issued an additional 30-day enlargement of time to serve Appellee Fort but otherwise denied Appellant Rivera's request for leave for substituted service. R. CF, pp. 43, 67, 71.

On May 26, 2022, Appellant Rivera's counsel filed a motion to dismiss Appellee Fort without prejudice in order to progress the claim against the remaining defendant in the 2021 Case, T.R. Fort LLC. R. CF, p. 41. In that motion to dismiss, Appellant Rivera's counsel advised the district court that "Plaintiff will continue efforts to locate Paul R. Fort" and "should Plaintiff subsequently locate Paul R. Fort for service, Plaintiff will file the appropriate motion to re-open his claim against Paul R. Fort." R. CF, p. 43.

On March 13, 2023, after learning new information relating to Appellee Fort's address, Appellant Rivera moved to reopen the claim against Appellee Fort and to

continue the trial. On March 28, 2023, the district court granted the motion in part, denying the continuance of trial but stating that it would reopen the case as to Appellee Fort if he was served within 21 days of the order. R. CF, p. 28.

Upon the district court's order, Appellant Rivera made eight (8) additional attempts to serve Appellee Fort at two (2) different addresses, all of which were unsuccessful. Defendant T.R. Fort LLC served Appellee Fort on April 10, 2023, before the 21-day deadline, but only informed Appellant Rivera's counsel after the deadline had passed. R. CF, p. 22. Appellant Rivera was unable to independently serve Appellee Fort before the deadline. The 2021 Case settled and was dismissed before trial on May 25, 2023.

Appellant Rivera then revised the complaint to remove the claims against Defendant T.R. Fort and successfully served Appellee Fort on July 22, 2023 in the Douglas County District Court case styled *Rivera v. Fort* (Case No. 2023CV30570) (the "2023 Case"). R. CF, p. 5. On August 11, 2023, Appellee Fort filed a motion to dismiss (the "Motion to Dismiss") the 2023 Case based on an expired statute of limitations. R. CF, p. 12. In response, Appellant Rivera argued that equitable tolling applied to his negligence action against Appellee Fort until the final dismissal of the 2021 Case on May 25, 2023. R. CF, p. 74-77.

On February 27, 2024, the district court granted Appellee Fort’s Motion to Dismiss. R. CF, p. 103. In its ruling, the district court reasoned that “equitable tolling is limited to situations in which either the defendant’s wrongful conduct prevented the plaintiff from asserting the claims in a timely manner or truly exceptional circumstances prevented the plaintiff from filing the claims despite diligent efforts.” *Id.* The district court ultimately determined that “Plaintiff fails to allege in his complaint wrongful conduct by Defendant that prevented him from asserting his claims in a timely manner.” *Id.*

On February 29, 2024, Appellee Fort moved to amend the order of dismissal to include costs and attorney’s fees. R. CF, p. 104. On April 22, 2024, the district court amended its Order to include costs and fees. R. CF, p. 108. Finally, on May 13, 2024, the district court issued an Order for Appellant Rivera to pay Appellee Fort’s specific costs and fees related to the 2023 Case, resolving all issues pending before the district court. R. CF, p. 121.

ARGUMENT SUMMARY

The district court erred in dismissing Appellant Rivera’s negligence claim against Appellee Fort by failing to apply the doctrine of equitable tolling. First, the district court incorrectly concluded that Appellant Rivera was required to allege equitable tolling in his complaint. Colorado law does not mandate such a pleading

requirement, and equitable tolling is typically raised in response to a statute of limitations defense. Appellant Rivera properly raised the issue in his response to Appellee Fort's Motion to Dismiss, detailing the wrongful conduct that warranted tolling.

Second, Appellant Rivera sufficiently alleged Appellee Fort's wrongful conduct in his response to the Motion to Dismiss. Appellee Fort was aware of the action against him, actively evaded process servers and the Denver Sheriff Department, and his actions directly prevented timely service. This behavior constitutes the type of wrongful conduct that justifies equitable tolling.

Finally, the district court's refusal to apply the doctrine of equitable tolling was contrary to public policy. Appellant Rivera's evidence of extensive efforts to serve Appellee Fort should have prompted the district court to exercise a reasonable degree of flexibility to accomplish the goals of justice. The district court's failure to consider these facts resulted in an unjust dismissal that should be reversed.

ARGUMENT

I. The District Court Erred by Declining to Apply Equitable Tolling

Standard of Review

An appellate court reviews de novo a district court's dismissal of an action based on a statute of limitations defense. *Gomez v. Walker*, 2023 COA 79, ¶ 7, 540

P.3d 936, 939, cert. granted in part, No. 23SC755, 2024 WL 966206 (Colo. Mar. 4, 2024).

Preservation on Appeal

Appellant Rivera raised the issue of equitable tolling in Plaintiff's Response to Defendant Paul R. Fort's Motion to Dismiss, R. CF, pp. 74-77. The district court ruled on the issue by written order. R. CF, p. 103.

Discussion

The district court erred by refusing to apply the doctrine of equitable tolling to Appellant Rivera's negligence claim against Appellee Fort. Colorado law recognizes that equitable tolling may be appropriate in circumstances where either the defendant's wrongful conduct prevents the plaintiff from asserting the claim in a timely manner or exceptional circumstances prevented the plaintiff from filing despite diligent efforts. *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996); *Garrett v. Arrowhead Imp. Ass'n*, 826 P.2d 850, 853 (Colo. 1992). The district court improperly applied this standard by finding that Appellant Rivera failed to allege in his complaint wrongful conduct by Appellee Fort and therefore could not benefit from equitable tolling.

A. Equitable Tolling Does Not Require Allegation in the Complaint

The district court's finding that Appellant Rivera failed to allege equitable tolling in the complaint was legally incorrect. There is no requirement under Colorado law that a plaintiff plead equitable tolling in the complaint. Equitable tolling is an equitable defense that is typically raised in response to a motion to dismiss after the statute of limitations has been raised as a defense. Indeed, the Colorado Supreme Court has indicated that the application of equitable tolling requires an "inquiry into the circumstances of the delay that prompted the statute of limitations to be invoked," not a pleading requirement in the complaint. *Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs*, 948 P.2d 1002, 1010 (Colo. 1997), as modified on denial of reh'g (Dec. 15, 1997).

Here, Appellant Rivera did raise the issue of equitable tolling in his response to Appellee Fort's Motion to Dismiss, in which he detailed how Appellee Fort's active avoidance throughout the 2021 Case prevented timely service. By finding that Appellant Rivera waived this argument by failing to allege it in his complaint, the district court improperly conflated the procedural requirements for raising an equitable defense with the substantive requirements for pleading a claim.

B. Appellee Fort's Wrongful Actions Justify Equitable Tolling

Appellant Rivera sufficiently alleged Appellee Fort's wrongful conduct in his Response to Appellee Fort's Motion to Dismiss. Colorado law recognizes that

equitable tolling is appropriate when a defendant's wrongful conduct prevents the plaintiff from asserting a claim in a timely manner. *Dean Witter Reynolds, Inc.*, 911 P.2d at 1096. In his Response to the Motion to Dismiss, Appellant Rivera detailed how Appellee Fort engaged in wrongful conduct by actively avoiding service during the pendency of the 2021 Case. Specifically, Appellee Fort was aware of the action against him as early as January 2022 when TR Fort LLC's counsel considered representing both defendants. Appellee Fort also communicated directly with Appellant Rivera's counsel in June 2022 regarding the facts of the case.

Despite his awareness of the action, Appellee Fort continuously evaded service, forcing Plaintiff to seek multiple extensions from the court and ultimately leading to the dismissal of Appellee Fort from the 2021 Case without prejudice. These facts, established through Appellant Rivera's Response, demonstrate that Appellee Fort engaged in wrongful conduct that directly contributed to the delay in serving him.

In *Garrett v. Arrowhead Imp. Ass'n*, the Colorado Supreme Court emphasized that equitable tolling applies when a defendant's actions contribute to the running of the statute of limitations. 826 P.2d 850, 853 (Colo. 1992). Here, Appellee Fort's actions were not passive but intentional, as he actively avoided service despite knowing that litigation was ongoing. His behavior falls squarely within the scope of

wrongful conduct that should invoke the equitable tolling doctrine. By erroneously dismissing Appellant Rivera's claims without considering Appellee Fort's deliberate evasion of service, the district court allowed Appellee Fort to benefit from his own misconduct.

The district court's failure to recognize Appellee Fort's wrongful conduct as a basis for equitable tolling ignored the principle that equitable doctrines are designed to prevent injustice. Here, dismissing the case on statute of limitations grounds would unjustly reward Appellee Fort for his avoidance tactics, which is precisely the kind of inequitable outcome the doctrine of equitable tolling seeks to prevent. Thus, the facts alleged in Appellant Rivera's Response sufficiently demonstrate that Appellee Fort's wrongful conduct contributed to the delay, and the district court should have applied equitable tolling.

C. Justice Requires the Application of Equitable Tolling in this Case.

At the core of the judicial system is the principle that all parties should have a fair opportunity to present their claims in court. This principle is threatened when a defendant, through intentional evasion, manages to avoid service of process and, by extension, liability. Likewise, Colorado courts have held that "[e]quity may require a tolling of the statutory period where flexibility is required to accomplish

the goals of justice.” *Dean Witter Reynolds, Inc.*, 911 P.2d at 1096; *Garrett*, 826 P.2d at 853.

Here, Appellant Rivera made nineteen (19) documented attempts to serve Appellee Fort during the 2021 Case. Despite these efforts, Appellee Fort avoided service while being fully aware of the pending litigation against him. Not only did Appellee Fort know of the action, but he acknowledged it in written correspondence as early as June 2022, effectively engaging with the case from a distance while evading formal service.

Moreover, Appellee Fort was likely aware of the lawsuit even earlier. In January 2022, the law firm Hamilton Faatz considered representing both Defendants in the 2021 Case, Paul Fort and TR Fort LLC, but ultimately confirmed that it would not be retained by Paul Fort. This decision likely involved direct communication with Appellee Fort about the litigation, putting him on clear notice of the action. Additionally, Appellee Fort executed an affidavit that was filed in the 2021 Case by T.R. Fort LLC and was served with a subpoena to appear at trial, all while he continued to evade formal service. These facts indicate that Appellee Fort was not an uninformed party but a defendant deliberately manipulating the process to avoid responsibility.

Equally, the district court knew that Appellant Rivera intended to reopen the case against Appellee Fort upon locating and serving him, yet it allowed Appellee Fort's evasive conduct to dictate the outcome of the case. The district court's refusal to be flexible, after hearing Appellant Rivera's evidence of 19 unsuccessful service attempts, undermines the equitable tolling doctrine and its goals of justice.

The courts are tasked with promoting fairness, ensuring that defendants cannot evade justice through technicalities. Public policy dictates that equitable tolling should apply when a defendant, fully aware of the legal action against him, deliberately evades service. Appellee Fort's actions constitute the kind of wrongful conduct that equitable tolling is designed to address, and the district court erred in ignoring such conduct.

CONCLUSION

For the foregoing reasons, the district court's order dismissing Appellant Rivera's claims should be reversed. Appellant Rivera respectfully requests this Court to find that the doctrine of equitable tolling applies under the facts of this case, or in the alternative, to remand the matter to the district court for further proceedings consistent with the application of equitable tolling principles.

Dated this 30th day of August, 2024

Respectfully submitted,

FURTADO LAW PC

/s/ Robert E. Roetzel

David J. Furtado

Robert E. Roetzel

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I served a true and correct copy of the foregoing on the Colorado Courts E-Filing system or email addressed to the following:

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