

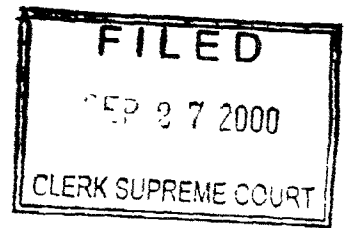
IN THE COURT OF APPEAL OF IOWA

No. 0-315 / 99-837
Filed September 27, 2000

**MICHAEL CRAIG MAYS and
ROBIN MAYS,
Plaintiffs-Appellants,**

vs.

**MONTGOMERY KONE, INC.,
Defendant-Appellee.**



Appeal from the Iowa District Court for Scott County, James E. Kelley,
Judge.

The plaintiffs appeal from the district court's ruling granting summary judgment to defendant on the ground the suit was barred by the statute of limitations. **AFFIRMED.**

Russell A. Dircks of Dircks, Ridenour and Macek, Davenport, for appellants.

Stuart R. Lefstein and John F. Doak of Katz, Huntoon & Fieweger, P.C., Rock Island, Illinois, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

PER CURIAM

Michael and Robin Mays appeal the district court's grant of summary judgment to defendants. The district court determined their suit was barred by the statute of limitations. The Mays claim summary judgment was not appropriate in this case. We affirm.

On November 15, 1994, Michael Mays, a business invitee, was injured when the elevator he was using precipitously dropped from the second floor to the ground. The elevator was in a commercial building owned by Alpine Centre, L.C., in Bettendorf, Iowa.

At the time of the accident, Alpine had a contract with Montgomery Kone, Inc., to maintain and service the elevator. In an affidavit, plaintiffs' counsel, Russell A. Dircks, stated that in July 1995, an adjuster for Montgomery, Steve Mettee, told him Montgomery did not have a service contract on the elevator. Based on this representation, plaintiffs decided not to bring suit against Montgomery.

On June 20, 1996, Mays and his wife filed suit against Alpine under a theory of premises liability.¹ On December 12, 1996, after the two-year statute of limitations had run, Alpine's counsel informed Dircks that Alpine had an elevator maintenance agreement with Montgomery. Plaintiffs took no further action until October 8, 1997, when they added Montgomery as a defendant.

Montgomery filed a motion to dismiss, claiming plaintiffs' suit was barred by the statute of limitations. The district court denied the motion. The court

¹ The suit against Alpine is the subject of a companion case, *Mays v. Alpine Centre, L.C.*, No. 99-0078 (Iowa App. Sept. 27, 2000).

found there was a factual question concerning whether the doctrine of equitable estoppel might apply in the case due to the alleged misrepresentation by Mettee. Equitable estoppel can preclude a statute of limitations defense. See *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 578 (Iowa 1990).

After discovery, Montgomery filed a motion for summary judgment which assumed equitable estoppel did apply, and asserted plaintiffs' suit should be barred because they failed to exercise diligence in instituting an action after the grounds for estoppel had expired.

The district court granted the motion for summary judgment. The court concluded the Mays had not exercised due diligence in commencing suit against Montgomery after the circumstances which gave rise to the estoppel had ceased to operate. The court found that on December 12, 1996, when the Mays discovered Montgomery had a service contract for the elevator, the circumstances giving rise to the equitable estoppel ceased to exist, but they did not file suit against Montgomery until October 8, 1997. The district court held:

This second delay on the part of Plaintiff from December 12, 1996 to October 8, 1997 when they commenced suit against Montgomery constitutes an unreasonable delay and the Court believes lack of due diligence on the part of the Plaintiffs.

The Mays appeal.

We review a summary judgment ruling for corrections of errors of law. *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998). Under Iowa Rule of Civil Procedure 237, summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of

law. *Id.* The facts are reviewed in the light most favorable to the nonmoving party. *Shriver v. City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997).

For purposes of the motion for summary judgment, Montgomery concedes Mettee's representations would give the Mays an equitable estoppel defense to the two-year statute of limitations found in Iowa Code section 614.1(2) (1995).² Therefore, we assume, without deciding, that an equitable estoppel defense applies in this case.

The supreme court has stated:

However, before the doctrine of equitable estoppel to plead limitations may be successfully invoked on the basis of fraud, it is essential to show existence of the essential elements of such an estoppel,

* * *

and in this connection it has been held that plaintiff is under a duty to exercise reasonable care and diligence.

DeWall v. Prentice, 224 N.W.2d 428, 430 (Iowa 1974) (citation omitted). See also 54 C.J.S. Limitations of Actions § 24, at 55 (1987) ("Plaintiff must proceed with due diligence to assert its claim against defendant once the circumstances ruled on to justify estoppel cease to be operational"). The only question we must decide is whether the Mays exercised due diligence by delaying the filing of their action against Montgomery after they became aware Montgomery had a service contract for the elevator.

On the matter of due diligence, the supreme court has stated:

The showing of diligence required is that a reasonable effort was made. The applicant is not called upon to prove he sought

² Equitable estoppel is a recognized defense to the application of a statute of limitations. *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 157 (Iowa 1984). Equitable estoppel is triggered when false representations induce the plaintiff into inaction to his or her detriment under the statute of limitations. *Meier*, 454 N.W.2d at 579.

evidence where he had no reason to apprehend any existed. He must exhaust the probable sources of information concerning his case; he must use all that of which he knows, and he must follow all clues which would fairly advise a diligent man that something bearing on his litigation might be discovered or developed.

State v. Compiano, 261 Iowa 509, 518, 154 N.W.2d 845, 850 (1967) (citation omitted). Lack of due diligence may be determined as a matter of law. *Met-Coil Sys. Corp. v. Columbia Cas. Co.*, 524 N.W.2d 650, 657-58 (Iowa 1994).

We determine plaintiffs' delay in commencing suit against Montgomery was unreasonable. Plaintiffs waited ten months after finding out Montgomery had a service contract for the elevator which caused the injuries. We note that a delay of service beyond 120 days after filing is presumptively abusive. *Becker v. Becker*, 603 N.W.2d 627, 628 (Iowa 1999). This case does not involve a delay in service after filing, but we find similar concerns about due diligence exist in the present case. *Cf. Becker v. Star Auto, Inc.*, 376 N.W.2d 645, 647 (Iowa App. 1985). Plaintiffs did not exercise due diligence in initiating the action against Montgomery.

We affirm the decision of the district court. Costs of this appeal are assessed to plaintiffs.

AFFIRMED.