

AFFIRMED; Opinion Filed October 4, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-01418-CV

**IDA ENGINEERING, INC., Appellant
V.
PBK ARCHITECTS, INC., Appellee**

**On Appeal from the 160th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-07539**

MEMORANDUM OPINION

Before Justices Myers, Evans, and Schenck
Opinion by Justice Myers

This case concerns the statute of limitations in a suit for breach of contract. IDA Engineering, Inc. appeals the trial court's judgment granting PBK Architects, Inc.'s motion for summary judgment that asserted the affirmative defense of the statute of limitations. IDA brings four arguments¹ on appeal contending (1) suit was filed on July 3, 2014 and not July 16, 2014 when it was file-stamped by the district clerk; (2) the cause of action accrued no earlier than December 15, 2009; (3) the parties' course of performance altered the date for payment of IDA's invoices; and (4) limitations was tolled by equitable estoppel. We affirm the trial court's judgment.

¹ IDA's brief did not include a statement of the issues presented as required by Rule of Appellate Procedure 38.1(f). IDA's arguments are apparent from its brief.

BACKGROUND

In 2008, PBK and IDA entered into two contracts for IDA to perform engineering-design and construction-administration services on a building for the Waco Independent School District. The contracts were in the form of letter agreements on IDA's letterhead addressed to PBK. The contracts set forth the total fee that would be charged for the services (\$840,000 on one contract and \$197,500 for the other). The contracts contained the following terms concerning billing and payment: "Invoices will be issued monthly, per percentage of completion or per phase and will be due upon issuance date. Late payments will incur a late charge of (1½%) per month from original date of invoice."

On September 29, 2009, IDA issued two invoices for "Completion of 50% of CA Phase." One invoice was for \$42,000 and the other was for \$9,875. IDA issued a second pair of invoices on December 8, 2009 for "Final Completion of 50% to 90% CA Phase" in the amounts of \$33,600 and \$7,900.

On December 15, 2009, PBK terminated the contracts due to IDA's deficient services and told IDA it would be "hiring alternate MEP engineering representation." PBK also stated, "We will not release retained funds until we have confirmed our cost exposures due to: a) the requirement to hire a new engineer, and b) until we have mitigated any exposure with our client due to IDA's incorrect or incomplete plans and specifications."

On November 12, 2013, the parties entered into a tolling agreement providing that the statute of limitations "shall be tolled and suspended and shall not run during the Tolling Period," which was November 12, 2013 through May 31, 2014.

IDA electronically filed its original petition on July 3, 2014, which was exactly four years after December 15, 2009, including the agreed tolling period. PBK moved for summary judgment on the ground that IDA's suit was barred by the four-year statute of limitations. The

trial court granted the motion for summary judgment and ordered that IDA take nothing on its claims.

STANDARD OF REVIEW

The standard for reviewing a traditional summary judgment is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 549; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party’s right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

STATUTE OF LIMITATIONS

Section 16.004 of the Civil Practice & Remedies Code provides, “A person must bring suit on the following actions not later than four years after the day the cause of action accrues: . . . (3) debt” TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (West 2002). The issues in this case concern when the cause of action accrued.²

IDA argues its breach of contract cause of action accrued, at the earliest, when PBK terminated the contracts on December 15, 2009. If the cause of action accrued before December 15, 2009, then IDA’s suit was filed outside the statute of limitations.

² IDA also argues that it filed suit on July 3, 2014, and not on July 16, 2014 when its original petition was file-stamped. Because we conclude limitations expired before July 3, 2014, the issue of whether IDA filed suit on July 3 or July 16 is not necessary to the disposition of this appeal. Accordingly, we do not address it. *See* TEX. R. APP. P. 47.1.

Generally, a cause of action accrues, and the statute of limitations begins to run, when facts come into existence that authorize a claimant to seek a judicial remedy. *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 279 (Tex. 2004). The date a cause of action accrues is normally a question of law. *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 623 (Tex. 2011) (per curiam). A breach-of-contract claim accrues when the contract is breached. *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006) (per curiam). Generally, a party breaches a contract when it fails to pay an invoice on or before the date payment is due. *See Oro-Castillo v. Nat'l Specialty Servs.*, No. 05-01-01319-CV, 2002 WL 971913, at *3 (Tex. App.—Dallas, May 13, 2002, no pet.) (not designated for publication) (party breached contract by not paying invoice by its due date; limitations ran from due date of invoice).

In this case, the contracts are clear that payment on the invoices was due the day they were issued. The contracts state, “Invoices . . . will be due upon issuance date.” The contracts provide for late fees in the form of interest dating back to the date of the invoice. According to the plain language of the contracts, when PBK failed to pay the invoices on the dates they were issued, it breached the contracts, and IDA was authorized to bring suit for breach of contract.

IDA argues these contracts were continuing contracts for performance, so the limitations period did not commence until the contract was fully performed or terminated. IDA cites two cases in support of this argument, *Lyle v. Jane Guinn Revocable Trust*, 365 S.W.3d 341, 355 (Tex. App.—Houston [1st Dist.] 2010, pet. denied), and *Intermedics Inc. v. Grady*, 683 S.W.2d 842, 845 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). In *Lyle*, the operator of an oil well had a continuing obligation to pay royalties monthly to the royalty owners. The court of appeals stated,

However, “[i]f the parties’ agreement contemplates a continuing contract for performance, the limitations period does not usually commence until the contract is fully performed.” Furthermore, “if the terms of an agreement call for periodic

payments during the course of the contract, a cause of action for such payments may arise at the end of each period, before the contract is completed.”

Lyle, 365 S.W.3d at 355 (citations omitted) (quoting *Davis-Apparel v. Gale-Sobel, a Div. of Angelica Corp.*, 117 S.W.3d 15, 18 (Tex. App.—Eastland 2003, no pet.); *Intermedics*, 683 S.W.2d at 845). The court determined that the four-year statute of limitations did not bar the royalty owners’ claim for unpaid royalties and that they could bring suit for royalty payments accruing during the four years before the filing of the suit. *Id.* *Lyle* does not assist IDA; as in *Lyle*, the facts in this case called for PBK to make periodic payments (i.e., pay the invoices on issuance during the term of the contract), and the failure to pay each invoice when due gave rise to a cause of action which had to be sued on within four years.

Intermedics concerned an employee’s suit for promised stock in a company as compensation. The employment agreement did not state when the stock was to be transferred to the employee, and the jury found the stock should have been transferred within one year of the agreement. Three years after the agreement took effect, the employee made a demand for the stock; instead of receiving the stock, the employer terminated him. The employee brought suit within two years after demanding the stock. *Intermedics*, 683 S.W.2d at 844. The court determined that because the employment contract was a continuing contract, the statute of limitations began to run when demand was made for the stock as long as the demand was made within a reasonable time. The court concluded the demand was within a reasonable time and that the employee’s suit was filed within the limitations period after the demand. *Id.* at 845–47. In this case, IDA’s demands for payment occurred on the dates the invoices were issued. *Intermedics* does not support IDA’s position that limitations did not run from the date of the invoices.

IDA also argues that the parties’ course of performance altered the due date for the payments because PBK always waited several months before paying the invoices. The only

authority IDA cites in support of this position is section 1.303 of the Texas Business and Commerce Code, which is part of Texas's enactment of the Uniform Commercial Code (UCC). *See* TEX. BUS. & COM. CODE ANN. § 1.303 (West 2009). Chapter 1 of the UCC “applies to a transaction to the extent that it is governed by another chapter of this title.” *Id.* § 1.102. The UCC does not apply to contracts involving only the rendition of services. *See Palmer v. Espey Huston & Assocs., Inc.*, 84 S.W.3d 345, 355 (Tex. App.—Corpus Christi 2002, pet. denied). Because IDA cites no authority that supports its argument, we conclude IDA has not shown the trial court erred by rejecting its argument that the parties' course of conduct altered the due date of the invoices.

IDA also argues the requirement that the invoices be based on the percentage of the project completed meant that its invoices were estimates of that amount. IDA asserts that until the project was completed or the contracts terminated, it was impossible to determine exactly what percentage of the project had been completed because that percentage was dependent upon the amount of services IDA would be called upon to perform in the future on the project, which could be estimated but not exactly determined. IDA stated, “At the end of the Projects, the parties were to re-evaluate invoices based on actual work performed/required and make whatever adjustments might be necessary.” However, nothing in the contracts called for re-evaluation of the invoices at the end of the project “based on actual work performed/required.” Instead, the contracts are for a flat fee to be paid in installments based upon IDA's estimation of the percentage of the contract has been completed at that point. Even if the invoices might be subject to dispute based on their accuracy, that dispute would not bar IDA from bringing suit. Instead, it would raise a fact issue to be resolved in the litigation. It would not prevent the accrual of the cause of action. *See Howard v. Fiesta Tex. Show Park, Inc.*, 980 S.W.2d 716, 721 (Tex. App.—San Antonio 1998, pet. denied) (“The issue whether all of the damages or the full

extent or seriousness of the injury resulting from the act is yet known is immaterial to the accrual of the cause of action.”).

We conclude PBK conclusively established that IDA’s cause of action accrued on the dates of the invoices and not on December 15, 2009, and that the cause of action accrued more than four years before IDA brought suit.³

IDA also argues that PBK is equitably estopped from asserting the cause of action accrued before December 15, 2009. The elements of equitable estoppel are: (1) a false representation or concealment of a material fact; (2) made with knowledge of the facts; (3) to a party without knowledge or the means of knowledge of the real facts; (4) with the intention that it should have been acted upon; and (5) the party to whom it was made must have relied upon or acted upon it to his prejudice. *Gulbenkian v. Penn*, 252 S.W.2d 929, 932 (Tex. 1952). IDA had the burden of providing sufficient summary judgment evidence to raise a fact question on each element of equitable estoppel. *Fiengo v. Gen. Motors Corp.*, 225 S.W.3d 858, 861 (Tex. App.—Dallas 2007, no pet.). IDA asserts the following statement by PBK to IDA raises equitable estoppel:

We are hiring alternate MEP engineering representation. We will not release retained funds until we have confirmed our cost exposures due to: a) the requirement to hire a new engineer, and b) until we have mitigated any exposure with our client due to IDA’s incorrect or incomplete plans and specifications.

IDA argues, “This statement suggests that after PBK Architects completed the projects, and negotiated a settlement with Waco Independent School District, PBK Architects would release all or a portion of the invoice amounts to IDA Engineering. IDA Engineering clearly relied upon this statement in postponing the filing of this suit.” Despite IDA’s assertion that it “clearly relied upon this statement in postponing the filing of this suit,” it presented no summary judgment

³ For the September 29, 2009 invoices, limitations expired on September 29, 2013. For the December 8, 2009 invoices, December 8, 2009 to November 12, 2013 when the agreed tolling period began was three years, 339 days, leaving twenty-six days of limitations left when tolling ceased on May 31, 2014, which meant limitations expired on June 26, 2014, one week before IDA filed suit on July 3, 2014.

evidence of its reliance. Likewise, IDA presented no evidence that the statement was false, that IDA lacked knowledge or the means of knowledge of the real facts, or that PBK intended for IDA to forbear filing suit based on the statement. We conclude IDA failed to meet its burden of raising a fact question on each element of equitable estoppel.

CONCLUSION

We conclude the trial court did not err by granting PBK's motion for summary judgment. We affirm the trial court's judgment.

/Lana Myers/

LANA MYERS
JUSTICE

151418F.P05



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IDA ENGINEERING, INC., Appellant

No. 05-15-01418-CV V.

PBK ARCHITECTS, INC., Appellee

On Appeal from the 160th Judicial District
Court, Dallas County, Texas

Trial Court Cause No. DC-14-07539.

Opinion delivered by Justice Myers. Justices
Evans and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is
AFFIRMED.

It is **ORDERED** that appellee PBK ARCHITECTS, INC. recover its costs of this appeal
from appellant IDA ENGINEERING, INC.

Judgment entered this 4th day of October, 2016.