SUPREME COURT OF ALABAMA

Fogarty v. Southworth

953 So. 2d 1225 (Ala. 2006) · No. No. 1050207 · Decided September 29, 2006

SUMMARY

The Alabama Supreme Court reviewed a summary judgment entered for defendants in a dispute involving investments in a limited liability company, alleged fraud, and related claims. The court affirmed the judgment on the fraud count, concluding that the appellants waived an argument concerning constructive notice and failed to provide sufficient evidence of later misrepresentations. It reversed the judgment on the remaining counts and remanded because the defendants had not established entitlement to summary judgment on those claims.

CASE DETAILS

COURT	Supreme Court of Alabama
WRITING FOR THE COURT	Per Curiam; Nabers, C.J.; Lyons, J.; Woodall, J.; Smith, J.; Parker, J.
JURISDICTION	Alabama
DECIDED	September 29, 2006
DOCKET	No. 1050207
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The plaintiffs appealed a Rule 54(b)-certified summary judgment entered by the Baldwin Circuit Court in favor of Confederate Money, LLC, Gary Southworth, and Gerald McGill on all claims against them.
STANDARD OF REVIEW	Summary judgment is reviewed de novo. The court determines whether a genuine issue of material fact exists and whether the movant is entitled to judgment as a matter of law, viewing the record in the light most favorable to the nonmovant and resolving reasonable doubts against the movant.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Charles M. Fogarty, Jane C. Fogarty v. Gary Southworth, Gerald McGill, Confederate Money, LLC

TOPICS

summary judgment · discovery dispute · statute of limitations · appellate procedure · civil procedure

PRACTICE AREAS

civil procedure · appellate procedure · commercial litigation · torts · corporate law

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion under Rule 56(f), Ala. R. Civ. P., by refusing to continue the summary-judgment proceedings to permit additional discovery.
2. Whether the Fogartys waived appellate review of the constructive-notice basis for summary judgment on the fraud claim by failing to address that issue in their initial appellate brief.
3. Whether the evidence supported summary judgment on fraud claims based on alleged misrepresentations occurring after the initial land-conveyance representations.
4. Whether summary judgment on the fraud count justified summary judgment on the Fogartys' remaining 13 counts.

HOLDINGS

1. The trial court did not exceed its discretion by refusing to continue the summary-judgment proceedings because the Fogartys' Rule 56(f) affidavit was conclusory and did not specifically identify which outstanding discovery was crucial or explain why it was essential to opposing summary judgment.
2. The summary judgment on the fraud count was affirmed insofar as it was based on the alleged representations concerning conveyance of the property free and clear because the Fogartys waived appellate review of the constructive-notice issue by failing to address it in their initial brief and raising it for the first time in reply.
3. Summary judgment was affirmed as to the other aspects of the fraud count because the Fogartys offered no evidence beyond the bare allegations of their complaint concerning alleged misrepresentations occurring after the initial land-conveyance representations.
4. The trial court erred by entering summary judgment on all remaining claims because the defendants did not establish that the statute of limitations applicable to the fraud count barred the other claims, many of which were governed by different or longer limitations periods, and they did not make a prima facie showing supporting judgment on those claims.

KEY QUOTATIONS

> *“"Our review is subject to the caveat that we must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant."”* (at 1229)

> *“"Therefore, to be considered sufficient and not merely \"conclusory,\" an affidavit in support of a continuance under Rule 56(f) must specifically state what items of outstanding discovery are crucial and why that discovery is essential to aid the nonmoving party in opposing the pending motion for a summary judgment."”* (at 1231)

> *“"When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue in the appellant's principal brief constitutes a waiver with respect to the issue."”* (at 1232)

FACTUAL BACKGROUND

The Fogartys invested nearly $200,000 in Confederate Money, LLC, received an asserted 12.5% ownership interest, personally guaranteed a $2.6 million construction loan, and later contributed additional funds based on representations about the company's property, finances, and their ownership percentage. They later learned that land represented as being conveyed to Confederate Money free and clear had been conveyed subject to a mortgage that was paid off with part of the construction-loan proceeds. The Fogartys retained counsel in April 2002 and filed suit on January 14, 2004, asserting fraud and numerous other claims.

PROCEDURAL HISTORY

The Fogartys filed a 14-count action in the Baldwin Circuit Court alleging, among other claims, fraud, breach of fiduciary duty, conversion, conspiracy to defraud, civil theft, and unauthorized practice of law. The defendants moved for summary judgment, asserting that the fraud claim was barred by the two-year statute of limitations. The trial court entered summary judgment on all claims against those defendants and certified the judgment as final under Rule 54(b), Ala. R. Civ. P. The Supreme Court of Alabama affirmed the judgment on the fraud claim, reversed it as to the remaining claims, and remanded.

DISPOSITION

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reversed_and_remanded
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REMAND INSTRUCTIONS

The cause was remanded for further proceedings consistent with the opinion; the summary judgment remained affirmed as to the fraud count but was reversed as to the remaining claims.

CASES CITED

- Ex parte Alfa Mut. Gen. Ins. Co., 742 So. 2d 182, 184 (Ala. 1999)
- Bass v. South-Trust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989)
- West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)
- Alabama Republican Party v. McGinley, 893 So. 2d 337, 342 (Ala. 2004)
- Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412, 413 (Ala. 1990)
- Scrushy v. Tucker, [Ms. 1050564, Aug. 25, 2006] ___ So.2d ___ (Ala. 2006)
- Reeves v. Porter, 521 So. 2d 963, 965 (Ala. 1988)
- Hope v. Brannan, 557 So. 2d 1208, 1212 (Ala. 1989)
- McCullar v. Universal Underwriters Life Ins. Co., 687 So. 2d 156, 161 (Ala. 1996)
- Stallworth v. AmSouth Bank, 709 So. 2d 458, 469 (Ala. 1997)
- Wallace v. Brownell Pontiac-GMC Co., 703 F.2d 525, 527 (11th Cir. 1983)
- SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980)
- Willmar Poultry Co. v. Morton-Norwich Prods., Inc., 520 F.2d 289, 297 (8th Cir. 1975)
- Lloyd Noland Hosp. v. Durham, 906 So. 2d 157, 173 (Ala. 2005)

- Birmingham Bd. of Educ. v. Boyd, 877 So. 2d 592 (Ala. 2003)
- Sanders v. Smitherman, 776 So. 2d 68, 73 (Ala. 2000)
- Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839, 850 (Ala. 2002)
- Travis v. Ziter, 681 So. 2d 1348, 1351 (Ala. 1996)
- Ex parte Quinlan, 922 So. 2d 914, 916 (Ala. 2005)
- Buist v. Time Domain Corp., 926 So. 2d 290, 293 (Ala. 2005)
- Payton v. Monsanto Co., 801 So. 2d 829, 834 (Ala. 2001)
- Ex parte General Motors Corp., 769 So. 2d 903, 909 (Ala. 1999)
- Lacy v. Mini Warehouse World, 835 So. 2d 154, 157 (Ala. 2002) (Lyons, J., concurring specially)
- Fogarty v. Parker, Poe, Adams, & Bernstein L.L.P., [Ms. 1040335, Aug. 18, 2006] ___ So.2d ___ (Ala. 2006)