SUPREME COURT OF ARKANSAS

Bomar v. Moser, 369 Ark. 123

251 S.W.3d 234 (2007) · No. No. 06-895 · Decided February 28, 2007

SUMMARY

The Arkansas Supreme Court reviewed summary judgment in a legal-malpractice action against attorneys arising from failed negotiations involving a software company. The court held that genuine issues of material fact remained regarding the plaintiff's individual standing and whether fraudulent concealment tolled the statute of limitations, but affirmed the denial of a motion to strike based on the defendants' Fifth Amendment assertions and declined to review an adverse-inference issue that lacked a trial-court ruling. The judgment was affirmed in part, reversed in part, and remanded.

CASE DETAILS

COURT	Supreme Court of Arkansas
WRITING FOR THE COURT	Annabelle Clinton Imber
JURISDICTION	Arkansas
DECIDED	February 28, 2007
DOCKET	No. 06-895
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Bomar appealed from summary judgments entered in favor of Moser and Jewell in his legal-malpractice action. The circuit court ruled that Bomar lacked standing and that his claims were barred by the statute of limitations; it also denied Bomar's motion to strike the appellees' statute-of-limitations defense.
STANDARD OF REVIEW	Summary judgment is proper when the pleadings and other materials show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The evidence is viewed in the light most favorable to the nonmoving party, doubts and inferences are resolved against the moving party, and summary judgment is improper when reasonable minds could draw inconsistent conclusions from the evidence.
PRECEDENTIAL VALUE	Published Arkansas Supreme Court opinion; precedential.
PARTIES	Bob Bomar v. Keith Moser, Barry Jewell

TOPICS

professional negligence · statute of limitations · summary judgment · standing · civil procedure

PRACTICE AREAS

professional negligence · civil procedure · appellate procedure · corporate law · evidence

QUESTIONS PRESENTED

1. Whether genuine issues of material fact existed concerning Bomar's standing to assert individual claims based on the failed Boeing transaction.
2. Whether genuine issues of material fact existed concerning fraudulent concealment sufficient to toll the statute of limitations for Bomar's legal-malpractice claims.
3. Whether the circuit court properly denied Bomar's motion to strike the appellees' statute-of-limitations defense because they asserted the Fifth Amendment privilege during discovery.
4. Whether the appellate court could consider Bomar's request for an adverse inference based on the appellees' Fifth Amendment assertions when the circuit court had not ruled on that issue.
5. Whether the appellate court could consider Jewell's argument that he was not derivatively liable for Moser's conduct when the circuit court had not ruled on it.

HOLDINGS

1. A shareholder may bring an individual action only for an injury distinct and separate from the harm caused to the corporation. Because the evidence could support either a personal injury to Bomar through lost employment and royalties or an injury primarily suffered by STI, genuine issues of material fact remained concerning standing, making summary judgment improper.
2. Summary judgment was improper because Bomar presented evidence creating a genuine issue of material fact as to whether the appellees committed fraudulent concealment that tolled the statute of limitations.
3. The circuit court properly denied Bomar's motion to strike because the appellees did not make blanket Fifth Amendment assertions; they answered some interrogatories, asserted the privilege only as to matters involving the Boeing transaction, and gave reasons for withholding testimony.
4. The court could not consider Bomar's argument for an adverse inference because the circuit court had not ruled on the issue.
5. The court could not address Jewell's derivative-liability argument because he had not obtained a ruling on that issue from the circuit court.

KEY QUOTATIONS

> *"The object of summary-judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied."* (at 239)

> *“Direct suits brought by a shareholder are only appropriate when the shareholder asserts an injury that is distinct and separate from the harm caused to the corporation.”* (at 240)

> *“Thus, in order to toll the statute of limitations on the basis of fraudulent concealment, there must be (1) a positive act of fraud (2) that is actively concealed, and (3) is not discoverable by reasonable diligence.”* (at 242)

> *“Accordingly, we hold that summary judgment was improper because Bomar submitted evidence that raised a genuine issue of material fact as to whether Appellees committed acts of fraudulent concealment that tolled the statute of limitations.”* (at 243)

FACTUAL BACKGROUND

Bomar was a shareholder, officer, and director of Scanning Technologies Incorporated, a software company whose stock and financial affairs became subject to the control of entities known as FBN Investments and EAB Enterprises. Bomar alleged that attorneys Barry Jewell and Keith Moser secretly controlled those entities, diverted funds, took control of STI's finances, and mishandled negotiations with Boeing concerning STI's software. In 2002, investigators informed Bomar that FBN and EAB were shell corporations associated with Jewell and Moser, after which Bomar investigated and filed suit in 2004. The appellees asserted the Fifth Amendment privilege during discovery and moved for summary judgment based on standing and the statute of limitations.

PROCEDURAL HISTORY

Bomar filed suit in January 2004, asserting breach of fiduciary duty, negligence, and fraud arising from the handling of negotiations concerning STI's software. After discovery, including the appellees' assertions of the Fifth Amendment privilege, the circuit court entered summary judgment for the appellees based on standing and limitations grounds and denied Bomar's motion to strike. The Supreme Court of Arkansas affirmed the ruling on the motion to strike, declined to reach issues lacking a circuit-court ruling, and reversed and remanded the standing and fraudulent-concealment issues.

DISPOSITION

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reversed_and_remanded
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REMAND INSTRUCTIONS

Remanded for further proceedings on Bomar's standing and whether fraudulent concealment tolled the statute of limitations. The denial of Bomar's motion to strike was affirmed, and the court did not reach the adverse-inference or derivative-liability issues because no lower-court rulings preserved them for review.

CASES CITED

- Farm Bureau Ins. Co. of Ark., Inc. v. Running M Farms, Inc., 366 Ark. 480, 237 S.W.3d 32 (2006)
- Flentje v. First National Bank of Wynne, 340 Ark. 563, 11 S.W.3d 531 (2000)
- Dunkin v. Citizens Bank of Jonesboro, 291 Ark. 588, 727 S.W.2d 138 (1987)

- Hurst v. Dixon, 357 Ark. 439, 182 S.W.3d 102 (2004)
- Delanno v. Peace, 366 Ark. 542, 237 S.W.3d 81 (2006)
- Meadors v. Still, 344 Ark. 307, 40 S.W.3d 294 (2001)
- Tyson Foods v. Davis, 347 Ark. 566, 66 S.W.3d 568 (2002)
- Shelton v. Fiser, 340 Ark. 89, 8 S.W.3d 557 (2000)