

Cite as 2009 Ark. App. 659

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-320

SUNBELT BUSINESS BROKERS OF
ARKANSAS, INC., AND MARVIN
WINSTON

APPELLANTS

V.

NANCY W. JAMES

APPELLEE

Opinion Delivered October 7, 2009APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CV2004-10633]HONORABLE WILLARD
PROCTOR, JR., JUDGE

REVERSED

DAVID M. GLOVER, Judge

Sunbelt Business Brokers of Arkansas, Inc., and Marvin Winston have appealed from a \$73,390 judgment for appellee Nancy James on her claims alleging fraud.¹ This is the third time that this dispute has been before us. On May 23, 2007, we remanded CA06-948, so that appellants could supplement the record and comply with the court's briefing requirements to demonstrate whether the appeal was from a final order. On May 6, 2009, we again remanded for supplementation of the record and rebriefing. On remand, the trial court dismissed one of the outstanding claims and issued a certificate under Ark. R. Civ. P. 54(b) as to the other one. Because one of the trial court's findings of fact was clearly erroneous, we reverse.

¹ Appellants also appeal from the trial court's finding that appellee could petition for an award of attorney's fees. Appellee concedes that, because her recovery was in tort, she was not entitled to attorney's fees, and notes that no actual award was made.

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In 2003, Thomas M. Cormier employed Sunbelt to sell his Subway stores in Lonoke and Carlisle. Winston was an agent for Sunbelt. Using information provided by Cormier to Winston on Sunbelt's cash-flow form, appellee decided to enter into a contract to purchase the stores. The stores' profits proved to be less than appellee expected, and she contended that the cash-flow form contained erroneous information. Although this form stated that, in 2001, the "compensation of owner/manager" was \$38,431, and that it was \$47,437 in 2000, Cormier had in fact not taken a salary. Appellee ultimately sold the stores at a loss for \$90,000. She and her company, NARP, Inc., which purchased the stores, sued appellants; Cormier; Lycor, Inc., which owned and sold the stores and of which Cormier was a co-owner and officer; and Roy Gorcyca, Sunbelt's sole shareholder, for fraud and breach of contract. In the first amended complaint, appellee alleged that Sunbelt had been dissolved and that Gorcyca was responsible for its liabilities.

The trial court made the following findings in the May 2, 2006 judgment:

There was a misunderstanding as to what the figures relating to the compensation of the owner and/or managers for the years 2000 and 2001 meant. The Sunbelt Business Brokers' form is not clear. It is clear to the Court that Mr. Cormier provided the information that he was directed to provide by Mr. Winston. Ms. James' interpretation of the figures provided was reasonable, and therefore, the Court finds that she was justified in relying on the figures provided by Mr. Cormier. The Court also finds that Mr. Cormier intended Ms. James to rely upon the representations and induced that reliance by verifying its authenticity through his signature on Schedule of Sellers Net Discretionary Cash Flow and other documents. The only question left for the Court is whether Mr. Cormier knew or believed that the representations were false or that he didn't have sufficient information to make them. While Mr. Cormier may have lacked the basis for knowing that the listing would be misleading, Mr. Winston did not. From the testimony, it appeared to the Court that Mr. Cormier relied extensively on the advice of Mr. Winston in preparing documents and forms. Indeed, it is the Sunbelt form that is at the center of plaintiff's claim of fraud. Mr. Cormier took the professional advice of the firm he had hired to advise him of the proper figures to be put into Sunbelt's form.

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Mr. Winston clearly should have known that representations regarding compensation to the owner were false and therefore should have properly instructed Mr. Cormier on what information to provide.

The trial court found that appellee proved fraud on the part of Sunbelt and Winston, and awarded her \$73,390 from Sunbelt. Sunbelt and Winston appealed, and we remanded to settle the finality issue.

As it turned out, a final order had not yet been entered. On remand, the circuit court entered a supplemental judgment on November 13, 2007. In that judgment, the court denied appellee's claims against Cormier; Cormier's claims against Sunbelt and Gorcyca for indemnity; and Gorcyca's claims against Cormier. It granted Cormier's claim against appellee for the unpaid portion of the purchase price. It expressly stated, however, that Cormier's cross-complaint against Gorcyca stated facts upon which relief could be granted. Appellants filed their notice of appeal on December 11, 2007, initiating this appeal. Appellee filed a motion on October 3, 2008, with this court under Ark. R. Civ. P. 60(b) to amend the May 2, 2006 judgment because, although the circuit court had found that Winston and Sunbelt were liable for fraud, it awarded damages only against Sunbelt. We remanded the case to the circuit court on October 22, 2008. On October 31, 2008, the circuit court entered an amended judgment awarding damages to appellee against Sunbelt and Winston, who filed another notice of appeal.

In our May 6, 2009 opinion, we remanded again because the trial court had not yet decided Cormier's remaining claim against Gorcyca or appellee's claim against Gorcyca for

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the unpaid claims against Sunbelt. (Gorcyca was Sunbelt's agent and only shareholder when it was dissolved.) On May 20, 2009, the trial court entered a second supplemental judgment dismissing all remaining claims by Cormier against Gorcyca and issuing a Rule 54(b) certificate regarding appellee's claim against Gorcyca, because her claim against him was derivative of the claim against Sunbelt. Appellants filed another notice of appeal.

Appellants challenge the sufficiency of the evidence to support the trial court's findings that appellee was justified in relying on the information provided about Cormier's compensation; that Winston committed fraud; and that appellee suffered damages. In order to establish fraud, the party asserting it must prove the following: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance on the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Joplin v. Joplin*, 88 Ark. App. 190, 196 S.W.3d 496 (2004). Whether fraud occurred is a question of fact. *Godwin v. Hampton*, 11 Ark. App. 205, 669 S.W.2d 12 (1984). Because the trial court clearly erred in finding that appellee's reliance was justified, we need not address the other issues.

Appellee and her husband testified that they relied heavily on the cash-flow form in deciding whether to purchase the stores. Appellants argue that, given appellee's and her husband's extensive experience in accounting, business, and financial services, along with the array of business records and tax returns appellee received, she could not have reasonably

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believed that Cormier was paid the amount of money indicated on Sunbelt's cash-flow form. We agree. Appellee is a financial-services advisor, with extensive experience in accounting, and serves as a financial consultant to companies. Mr. James is a CPA and has many years of experience as an executive in the fields of accounting, financial services, and banking. At one time, he was the chief financial officer for ten Subway Stores in New Mexico. He has a long history of involvement in the purchase and sale of businesses and is a member of the International Business Brokers Association.

Appellee also did not demonstrate the standard of diligence required of a plaintiff alleging fraud. To toll the statute of limitations, such a plaintiff has a duty to make a reasonable effort to discover fraud. *See Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995). We recently acknowledged this duty in *Rice v. Ragsdale*, 104 Ark. App. 364, 375, __ S.W.3d __, __ (2009), where we stated: "Appellants received information from an authoritative source that directly contradicted the representations made by appellees when the medical negligence case was dismissed by the trial court, and, therefore, it was incumbent upon appellants to reconcile the contradiction by doing something other than accepting assurances by appellees." To claim fraud, one has an affirmative duty to make further inquiry into conflicting information. *See Alliance Steel, Inc. v. TNT Constr., Inc.*, 2009 Ark. App. 405; *Burgess v. French*, 100 Ark. App. 51, 263 S.W.3d 578 (2007). Based upon the information in appellee's possession before the sale, which she and her husband reviewed, plus the information that they could have received, but did not request, appellee's reliance on the

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cash-flow form was not reasonable. She received Lycor's tax returns for the relevant years, which reported no income paid to officers. Mr. James stated that he compared the cash-flow form, which reflected income for the "owner/manager," to the tax returns and admitted that he could have resolved the discrepancy by requesting Cormier's 1099 or W-2 forms, which he did not do. Also, Mr. James asked for and was provided with Lycor's 2002 general ledger, which did not correspond with the cash-flow figures for that year. Other than the cash-flow form, appellee does not dispute the accuracy of any of the financial documents provided to her. Additionally, appellee knew that Cormier was an absentee owner, and was on notice that the cash-flow form contemplated that, in lieu of paying a manager, the new owner would actually work as a manager in the business. The Business Profile Report, which appellee received, stated that the "[o]wner does not currently work in the stores. One store has a manager that could stay." It went on to state that the cash-flow figure was for "[c]ash flow generated by owner managing one store with another manager placed at the other store."

As discussed above, in order to establish fraud, it is essential that a party show justifiable reliance on the false representation. *Seeco, Inc. v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000). Actual reliance means that the plaintiff acted or did not act by reason of the defendant's misrepresentation. *Id.* Whether there was justifiable reliance is a question of fact. *Godwin v. Hampton, supra*. We are mindful of the standard of review that we must apply to the trial court's findings of fact, which we will not reverse unless they are clearly erroneous or clearly against the preponderance of the evidence. *Smith v. Eisen*, 97 Ark. App. 130, 245 S.W.3d 160

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(2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Orr v. Orr*, 2009 Ark. App. 578. We are convinced that this is such a case and hold that appellee failed to prove that her reliance on the documents was reasonable.

Reversed.

GLADWIN AND HENRY, JJ., agree.