

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002565-MR

H. B. THOMPSON and
JUANITA THOMPSON

APPELLANTS

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL LONG, JUDGE
ACTION NO. 99-CI-00164

AA SALES AND DEVELOPMENT INC.;
CAROLYN SPENCER and TODD BALL

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: EMBERTON, GUIDUGLI and JOHNSON, JUDGES.

EMBERTON, JUDGE: H. B. Thompson and Juanita Thompson, husband and wife, appeal from a summary judgment entered in favor of AA Sales and Development, Inc., a/k/a A. A. Limestone, Inc., Carolyn K. Spencer and Todd Ball. On May 17, 1999, the Thompsons filed a complaint alleging that they and Spencer and Ball entered into an oral agreement to share in the ownership of A. A. Limestone, Inc., and requested that the court declare them forty-nine percent owners in the corporation. They alleged also that appellees violated various provisions of the Kentucky Business

Corporations Act;¹ and, made a claim for unjust enrichment. The trial court dismissed the action holding that the Thompsons failed to file the complaint within the time provided by the applicable statute of limitations. While the Thompsons' motion to alter amend or vacate the dismissal order was pending, they filed a motion to amend the complaint to add allegations of fraud. The trial court denied the motion to alter, amend, or vacate and held the issues raised in the motion to be moot.

In reviewing a motion to dismiss, we assume all facts stated by the Thompsons to be true.² On May 5, 1992, Articles of Incorporation were filed for A. A. Limestone, Inc., with Juanita Thompson as the incorporator. The Thompsons home was listed as the corporate office and Juanita was designated the registered agent for service of process. The Articles provided for the issuance of one hundred shares of stock; only fifty shares were issued, however, and forty-nine remained outstanding. The Thompsons submitted affidavits alleging that from 1992 through 1999 they used their experience in the coal business to obtain leases of limestone minerals for A. A. Limestone.

In 1998, an employee reported to Juanita Thompson that Ball directed her to prepare paperwork to remove the Thompsons' names as owners, officers and agents for the corporation. Juanita then contacted Ball who assured her that the Thompsons' ownership interest was protected. In March 1999, without notice or a meeting of the Board of Directors, the Articles and the

¹ Kentucky Revised Statutes (KRS) 271B.010, et. seq.

² Gall v. Scroggy, Ky. App., 725 S.W.2d 867 (1987).

corporate name were changed to AA Sales and Development, Inc. Fifty-one votes were cast for the amendment, forty-nine shares remained outstanding, and Carolyn Spencer signed as president of the corporation. After learning of the amendment, Juanita contacted Ball to protest the action and to explain that she had borrowed \$15,000 against her home to develop limestone leases for the corporation. Ball responded by informing her that she and her husband had no interest in the corporation.

The leases obtained by the Thompsons on behalf of A. A. Limestone, Inc., were transferred to Davon, Inc., an Ohio corporation, pursuant to an Assignment of Mineral Leases. The Assignment indicates that there was an Asset Purchase Agreement dated September 30, 1998, in connection with the transfer of the leases signed by A. A. Limestone, Inc., Carolyn Spencer, President.

The trial court held that the complaint is barred by the statute of limitations and the statute of frauds. The statute of limitations for enforcement of an oral contract is five years from the date the cause of action accrued.³ We disagree that the Thompsons' action to be declared forty-nine percent owners in the corporation is time barred. The cause of action would not have accrued on the date of the corporation's formation nor on the last date which the Thompsons performed services for the corporation, which the appellees assert was more than five years prior to the filing of the complaint.

³ KRS 413.120.

As stated in Owingsville & Mt. Sterling Turnpike Road Co. v. Bondurant's Adm'r:⁴

A corporation is the agent of and holds in trust for the shareholder his interest in the corporate property. He has the right to rely upon the fact that the corporation will preserve his rights to his stock in it, and to presume that the corporation will not assert an adverse claim to his interest as a stockholder. It is the business of the corporation and its officers to preserve and maintain the rights of the stockholders in the corporate property.

It is not averred in the answer, or as amended, that the testator, or his personal representative, ever had any notice whatever that his right, or that the estate, was denied to the stock, either by the company or stockholders. If the plea of limitations is available in an action like this, there was a total failure to allege facts which would make it so.

This court said in Mercer Co. Court v. Springfield, M. & H. Turnpike Co., 10 Bush, 258; "If it be conceded that a corporation can rely on lapse of time against a stockholder who merely demands the evidence of title to his stock (a question we do not decide), the statute certainly will not begin to run in its favor until the stockholder is notified by some unequivocal act that his right to the stock is disputed. Until he receives such notice, he has the right to regard the corporation as his agent, and as holding in trust for him his interest in the corporate property."

We do not believe the Thompsons' action is barred by the statute of limitations because even if the five year statute does apply, the Thompsons' action did not accrue until after March 1999, when Ball unequivocally informed the Thompsons that

⁴ 107 Ky. 505, 508, 54 S.W. 718 (1900).

their interest in the corporation was challenged. The trial court erred in holding otherwise.

Without elaboration, the trial court also indicated that the Thompsons' claim of ownership in the corporation is barred by the statute of frauds. KRS 371.010 requires that contracts for the sale of stock which cannot be performed within one year be in writing. To fall within the purview of the statute, however, there must be a contract for the "sale" of securities. The term "sale" necessarily requires an owner's attempt to transfer the stock for consideration to a nonowner. The Thompsons' allegations are not based on a sale of the stock from the appellees. To the contrary, it is their contention that the appellees never owned the entire corporation but that from its inception the Thompsons were forty-nine percent owners. The statute of frauds is inapplicable to the present set of facts.

The trial court did not address the remaining allegation made in the Thompsons' complaint and dismissed the complaint in its entirety based on the misconception that the Thompsons' complaint is based on an oral contract for the sale of stock. Additionally, since it dismissed the complaint with prejudice, it refused the Thompsons' attempt to file an amended complaint alleging fraud. In view of our contrary holding, we remand this case to the trial court for further consideration of the issues raised by the Thompsons' complaint and their motion to file an amended complaint.

The order of the Carter Circuit Court is reversed and this case is remanded for further consideration.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANTS:

Dwight O. Bailey
Flatwoods, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEES:

Charles M. Johnstone, II
Charleston, West Virginia