

IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01096 COA

RICK LYONS

APPELLANT

v.

RUDY A. LESSO, JR., CLELL ROSETTI, JAMES SABLICH, JR. LIONEL HOLLEY, AND
GREAT SOUTHERN DEVELOPMENT CO., INC.

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM H. MYERS

COURT FROM WHICH APPEALED: JACKSON COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

TEMPLETON FOWLKES

CAMERON BARRINGTON SMITH

ATTORNEYS FOR APPELLEES:

RANDALL SCOTT WELLS

WILLIAM LEE GUICE III

NATURE OF THE CASE: CLOSE CORPORATIONS

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED IN FAVOR OF APPELLEES

MANDATE ISSUED: 8/5/97

EN BANC.

McMILLIN, P.J., FOR THE COURT:

This is an appeal from an action of the Jackson County Chancery Court granting summary judgment in favor of the defendants in this cause. Lyons appeals the Chancellor's finding that he could prove no set of facts which would show that the defendants had breached either their fiduciary duty or their duty of utmost good faith and loyalty to him. Lyons assigns the following issues for our consideration:

I. WHETHER THE TRIAL COURT FAILED TO APPLY THE CORRECT LAW TO THE FACTS BEFORE IT;

II. WHETHER *DE NOVO* REVIEW BEFORE THIS COURT YIELDS A GENUINE DISPUTE AS TO MATERIAL FACTS; and

III. WHETHER THERE IS A DIFFERENT DUTY OWED BY OFFICERS AND DIRECTORS OF CLOSE CORPORATIONS FROM THAT OWED IN LARGER CORPORATIONS.

Finding that there was no issue of material fact in dispute and that the trial court correctly applied the law to the facts in this case, we affirm the decision of the trial court granting summary judgment in favor of the defendants.

FACTS

Appellant Rick Lyons and the defendants entered into a real estate partnership called Great Southern Development. By virtue of their respective investments, Lyons acquired an initial interest in the partnership of twenty-five percent. Lesso and Rosetti likewise acquired one-quarter interests, while Holley and Sablich pooled their resources to obtain a shared twenty-five percent. Later, the

partnership was reorganized into a Subchapter S corporation and Great Southern Development Co. Inc. was created.

The partners sold their respective interests in the partnership to the new corporation in exchange for proportional numbers of shares of stock of Great Southern Development Co., Inc. at the par value of one dollar per share. According to Lyons, the stock issued at this time had a nominal value of ten dollars per share. Lyons became Secretary-Treasurer and was charged with the responsibility of keeping the books and records of the new corporation.

During the course of operations, shareholders, with the exception of Lyons, voted to amend the corporation's earlier arrangement with an outside financing entity. According to the new agreement, all proceeds of the sales of subdivision lots would be made payable in whole to the financing entity, instead of the prior sixty percent. This change necessitated a loan of additional funds to the corporation in order to maintain its ordinary business obligations. The investors lent the necessary funds themselves, lending to the corporation in proportion to their respective ownership interests.

In 1990, Lyons was removed from his position on the Board of Directors of Great Southern and also from his position as Secretary-Treasurer of the corporation. From this point forward, Lyons's knowledge of the management and operations of the company was via the required mailings to stockholders and through annual meetings. Lyons claims that he was no longer privy to the "vital decisions" that affected his interest in the corporation.

Lyons claims that because of the lack of information, he was reluctant to invest further in the company. Therefore, when Lyons was asked to loan more money to the company, he refused. Apparently, the other investors were not willing to loan the company additional money if Lyons was not also willing to do so, as this would require them to loan money to the corporation in an amount which was disproportionate to their respective ownership interests. Lyons proposed instead that the corporation's financing agreement with the outside entity lending working capital be modified to reduce the percentage of corporate revenue attributed to loan payments as was originally done. Lyons hoped that this would obviate the need for additional loans to the company. Lyons's suggestion, however, was rejected by the other shareholders. They instead approved a new stock issue at the original one-dollar par value to raise the needed capital. Lyons states that because of the uncertainties in the future of the corporation, he elected to not participate in the issue of new stock by Great Southern. After the stock issue, Lyons's ownership interest in Great Southern was diminished to roughly three percent.

Several years later, property values on the Mississippi Gulf Coast began to increase because of the arrival of the casino gambling industry and the greater demand for real estate that ensued. The value of and demand for the property owned by Great Southern likewise increased. In the years that passed between the time that Lyons's allowed his ownership interest to be diluted and the time he filed his complaint, Great Southern went from having a negative cash value to being a profitable company. In his complaint, Lyons asked the chancellor to order that Great Southern restore Lyons's share value to an undiluted status, as well as to award punitive damages for breach of fiduciary duty. The chancery court found that Lyons was not entitled to relief, and Lyons now appeals to this court.

STANDARD OF REVIEW

Rule 56(c) of the Mississippi Rules of Civil Procedure governs motions for summary judgment and mandates that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c).

On appeal, we review the lower court's grant of summary judgment motion de novo. *Mississippi Ethics Comm'n v. Aseme* 583 So. 2d 955, 957 (Miss. 1991). Therefore, we use the same standard as the lower court in determining the correctness of the decision. The evidence before us is reviewed in the light most favorable to the non moving party and is to be given the benefit of every reasonable doubt. The burden of demonstrating that no genuine issue of material fact is present is on the movant. *Id.* Additionally, the movant must show that the "existing facts warrant judgment for the movant as a matter of law. The movant must produce significant, probative evidence to support the motion, and neither party may rely upon mere allegations or denials. The court will then grant a motion for summary judgment if the court determines, beyond a reasonable doubt, that the plaintiff would not be able to prove any facts supporting his claim." *Skelton v. Twin County Rural Elec. Ass'n.*, 611 So. 2d 931, 935 (Miss. 1992).

ANALYSIS

For the sake of clarity, the issues raised by the Appellant will be addressed in an order different from that appearing in the appellant's brief.

I. WHETHER THERE IS A DIFFERENT DUTY OWED BY OFFICERS AND DIRECTORS OF CLOSE CORPORATIONS FROM THAT OWED IN LARGER CORPORATIONS.

Lyons cites the case of *Fought v. Morris*, 543 So. 2d 167 (Miss. 1989) in support of his proposition that officers and directors in a close corporation owe a higher duty of loyalty to each other than do those in larger corporations. We agree. In *Fought*, the Mississippi Supreme Court imposed a "'strict good faith standard' upon shareholders in a close corporation because of its resemblance to a partnership." *Fought*, 542 So. 2d at 170. The court recognized that "standards for the discharge of management and responsibilities of shareholders are substantially the same as standards applicable to partners, and are stricter than standards imposed on shareholders and directors of publicly held corporations." *Id.* Furthermore, the court held that "in a close corporation where a majority stockholder stands to benefit as a controlling stockholder, the majority's action must be 'intrinsically fair' to the minority interest. Thus, stockholders in close corporations must bear toward each other the same relationship of trust and confidence which prevails in partnerships, rather than resort to statutory defenses." *Id.* at 171. With that being said, this determination by no means concludes our analysis, nor does it dictate a finding in favor of Lyons. Rather, we are compelled to inquire further to determine whether the defendants breached this standard.

II. WHETHER *DE NOVO* REVIEW BEFORE THIS COURT YIELDS A GENUINE DISPUTE AS TO MATERIAL FACTS.

Lyons maintains that there were contested issues of fact which should have been resolved by a jury. In order for the existence of any disputed fact to defeat a motion for summary judgment, it must be material. "A fact is material if it 'tends to resolve any of the issues, properly raised by the parties.'" *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss. 1995). In the instant case, a fact qualifying under this standard would be one which is both disputed and tends to prove that the actions of the majority stockholder were intrinsically unfair. *Fought v. Morris*, 543 So. 2d 167, 171 (Miss. 1989). Lyons, however, fails to specify any such issue in his brief. Instead, he merely asserts that the record is replete with such contested issues. Despite Lyons's assertions to the contrary, this court is unable to find any genuine issue of material fact in dispute. A non-moving party may not rely upon mere allegations or denials in an attempt to overcome a motion for summary judgment. *Skelton*, 611 So. 2d at 935. The motion for summary judgment should be granted if the court properly determines, beyond a reasonable doubt, that the plaintiff would not be able to prove any facts supporting his claim. *Id.* Because we are unable to discover any disputed facts which would support Lyons's claim, we hold that the lower court acted properly regarding this issue.

III. WHETHER THE TRIAL COURT FAILED TO APPLY THE CORRECT LAW TO THE FACTS BEFORE IT.

Lyons submits that for the purpose of determining whether or not the actions of the defendants were intrinsically fair, we must examine not only the manner in which the defendants treated Lyons for the purposes of the stock distribution, but also the events that led up to the actual stock distribution and the dilution of Lyons's ownership interest. Lyons urges us to adopt a broad interpretation of *Fought* wherein we would consider whether the actions of the majority shareholder are such that they cause an "erosion of trust". Lyons argues that such an erosion of trust could result in effectively "freezing-out" the minority shareholder, even though the majority takes no direct action toward that end. We decline Lyons's invitation to expand the rule in *Fought*. To do so would cause us to delve into the realm of speculation in making our determination. Instead, we find that the trial court correctly applied the existing law to the facts of this case.

The *Fought* case instructs us that the actions of the shareholders in a close corporation must be "intrinsically fair" to remaining shareholders. In *Fought*, the shareholders entered into a stock redemption agreement which stated that if one of the stockholders wished to sell his shares, he must first offer them to the company. Under the agreement, if the company did not elect to purchase the shares, then the shares must be offered to the other shareholders, each of whom had a right to purchase a proportionate share of the stock. The case held that Morris, the company's president, violated the redemption agreement when he purchased the entire interest of one of the three shareholders without giving the other shareholder an opportunity to purchase his proportionate share. This action resulted in Morris becoming the majority shareholder. The court held that "Morris's intended exclusion of Fought from the purchase of [the seller's] shares was a breach of the Stock Redemption Agreement and bylaws, and, therefore, a breach of his fiduciary duty as an officer, a director and a stockholder under the good faith standard" *Fought*, 543 So. 2d at 172.

Considered in the light most favorable to Lyons, the facts before us do not constitute a breach of fiduciary duty on the part of Lesso. First, even though Lesso had a right of first refusal on the shares,

he did not exercise it. Second, the new shares were offered to Lyons, yet he elected not to purchase them even though he admitted he was financially able to do so. Third, there is no evidence that the decision to issue additional shares of stock as a means of raising capital was made in bad faith. Unlike the *Fought* case, there was no violation of any shareholder agreement. Additionally, because Lyons was offered the opportunity to maintain his proportionate share of the business by purchasing some of the new stock being offered, the actions of the majority were not intrinsically unfair.

It is an axiom of investing that the greater the risk, the greater the potential reward. It appears to us that Lyons determined, using his best business judgment, that further investment in Great Southern was not prudent. After all, it is uncontroverted that the company had a negative cash value at the time of the stock offering and that it was having trouble meeting its credit obligations. We question whether Lyons would have brought this claim had the company ultimately failed. Instead, it succeeded and now Lyons has decided that he would like to reap the rewards of a risk that he, unlike the other shareholders, did not assume. Thus, in addition to the chancellor's decision being a correct application of the law, the equities of the situation dictate that Lyons not be allowed to participate in the earnings of Great Southern to the same extent as those shareholders who were willing to assume a greater risk.

THE JUDGMENT OF THE JACKSON COUNTY CHANCERY COURT TO GRANT APPELLEES' MOTION FOR SUMMARY JUDGMENT IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.