IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 15, 2015 Session

CECIL SIMS IRVIN v. BASS, BERRY AND SIMS, PLC, ET AL.

Appeal from the Circuit Court for Davidson County
No. 12C2246 Ross H. Hicks, Judge*

No. M2014-00671-COA-R3-CV

This case arises from the 1986 sale of a family farm. One family member filed suit against another family member, who was also an attorney, and his law firm alleging malpractice, breach of fiduciary duty, negligent misrepresentation, and fraud in connection with the sale. The attorney and his law firm filed a motion for summary judgment, which was granted by the trial court. Because we find, as did the trial court, that the claims are barred by the applicable statutes of limitations, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Cecil Sims Irvin, Murfreesboro, Tennessee, appellant, pro se.

Darrell G. Townsend, Nashville, Tennessee, for the appellees, Bass, Berry and Sims, PLC and Wilson Sims.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Until his death, Cecil Sims farmed approximately 420 acres of land located in Williamson County, Tennessee, known as Cecilwood Farms. In 1968, title to Cecilwood Farms passed to Cecil Sims's widow, Grace Wilson Sims. In 1978, Mrs. Sims, with the

* Sitting by designation of the Chief Justice of the Supreme Court following the recusal of the Honorable Thomas W. Brothers.

assistance of her son, Wilson Sims, then an attorney with the law firm of Bass, Berry and Sims, began gifting portions of Cecilwood Farms to her children, Wilson Sims and his two sisters, and her grandchildren. As a result of these gifts, Cecil Sims Irvin, who is Mrs. Sims's grandson and Wilson Sims's nephew, acquired a 4.13% interest in Cecilwood Farms.

As the price of land increased in Williamson County in the 1980s, the Sims family began exploring the sale of Cecilwood Farms. Wilson Sims acted on behalf of the other family members in making and receiving offers on the farm. In 1984, the family sold approximately twenty acres of the farm to the City of Franklin. In February 1986, Wilson Sims, individually and as attorney-in-fact for the other owners, entered into an agreement granting Harlon-East of Tennessee, Inc. an option to purchase the remaining acreage comprising Cecilwood Farms. The agreement, which was drafted by Wilson Sims and representatives for Harlon, called for a purchase price of $9,100 per acre.

Just prior to the option expiring, Wilson Sims, again acting individually and as attorney-in-fact for the other owners, agreed to modify the terms of the original purchase option. Among other things, the modification extended the option period and increased the purchase price to $10,500 per acre. Harlon exercised the option, and the sale of the farm closed in December of 1986.[1]

Wilson Sims sent periodic letters to members of the Sims family regarding the efforts to sell Cecilwood Farms, including the negotiations with Harlon. Consistent with this practice, in January 1987, Wilson Sims sent a letter to all family owners, including Mr. Irvin, confirming the closing of the sale to Harlon. The letter summarized the prior offers for the property, the details of the sale to Harlon, and the tax implications of the transaction. The last paragraph of the letter stated, "If there are any questions, please contact . . . me."

In April 2010, Mr. Irvin reviewed a file concerning the sale of Cecilwood Farms at Bass, Berry and Sims's offices. In that review, Mr. Irvin claims to have discovered that Bass, Berry and Sims represented Harlon in connection with the sale of Cecilwood Farms. Bass, Berry and Sims acknowledges representing Harlon, but claims that the representation did not commence until after execution of the original option agreement. Bass, Berry and Sims also acknowledges that its representation of Harlon related to Fieldstone Farms, a development project that included Cecilwood Farms and neighboring properties acquired by Harlon.

[1] The property was deeded to Harlon-Tenn. Investors, Ltd. II; each of the family members with an ownership interest in Cecilwood Farms signed the deed.

On May 20, 2011, Mr. Irvin filed suit against Wilson Sims and Bass, Berry and Sims, PLC,[2] in the Circuit Court for Davidson County. Mr. Irvin alleged that an attorney-client relationship existed between himself and other Sims family members with an ownership interest in Cecilwood Farms, on the one hand, and Wilson Sims on the other. He further alleged that, due to the conflict of interest resulting from the simultaneous representation of the Sims family and Harlon, he failed to receive the best purchase price for Cecilwood Farms. Based on these allegations, Mr. Irvin asserted claims of attorney malpractice and fraud against both Wilson Sims and Bass, Berry and Sims. He also asserted claims of breach of fiduciary duty and negligent misrepresentation against Wilson Sims.

At Mr. Irvin's request, the trial court dismissed the case without prejudice by order entered on June 13, 2011. On June 6, 2012, Mr. Irvin re-filed essentially the same complaint. In the re-filed action, Wilson Sims and Bass, Berry and Sims moved for summary judgment, contending that all of Mr. Irvin's claims were barred by the statute of limitations. The trial court granted summary judgment, concluding "that all of Mr. Irvin's claims are barred by the applicable statutes of limitations and that neither the equitable estoppel nor the fraudulent concealment doctrines apply."

II. ANALYSIS

A. STANDARD OF REVIEW

Summary judgment may be granted only "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." Tenn. R. Civ. P. 56.04; *see also Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). The court is not to "weigh" the evidence when evaluating a motion for summary judgment or substitute its judgment for that of the trier of fact. *Martin*, 271 S.W.3d at 87; *Byrd*, 847 S.W.2d at 211. Instead, the court is to "take the strongest legitimate view of the evidence in favor of the nonmoving party." *Byrd*, 847 S.W.2d at 210. When considering a motion for summary judgment, courts grant all reasonable inferences in favor of the nonmoving party and "discard all countervailing evidence." *Id.* at 210-11.

A grant of summary judgment is appropriate when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion. *Stanfill v. Mountain*, 301 S.W.3d 179, 184 (Tenn. 2009). Defenses based on statutes of limitations are particularly well suited to summary judgment motions because the facts material to the defense are often undisputed. *Cherry v. Williams*, 36 S.W.3d 78,

[2] Bass, Berry and Sims, PLC is the successor entity to Bass, Berry and Sims.

83 (Tenn. Ct. App. 2000). The statute of limitations is an affirmative defense. Tenn. R. Civ. P. 8.03. As such, a party moving for summary judgment on the grounds that a claim is barred by the statute of limitations has the burden of establishing all of its elements. *Carr v. Borchers*, 815 S.W.2d 528, 532 (Tenn. Ct. App. 1991).

We review the summary judgment decision as a question of law, with no presumption of correctness. *Martin*, 271 S.W.3d at 84; *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). Accordingly, we must review the record de novo and make a fresh determination of whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *Eadie v. Complete Co.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair*, 130 S.W.3d at 763.

B. STATUTES OF LIMITATIONS

On appeal, Mr. Irvin presents seven issues, but this case turns on only one issue—whether Mr. Irvin's claims are barred by the applicable statutes of limitations. In considering a statute of limitations defense, we must examine three interrelated elements: "the length of the limitations period, the accrual of the cause of action, and the applicability of any relevant tolling doctrines." *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 456 (Tenn. 2012).

To determine the length of the limitations period, we look to the gravamen or object of the complaint, which presents a question of law. *Id*. at 457. In this case, the object of the complaint is the recovery of a perceived loss in value of real property based on four theories of liability: legal malpractice, breach of fiduciary duty, negligent misrepresentation, and fraud. The statute of limitations for legal malpractice claims is one year, as provided by Tennessee Code Annotated § 28-3-104(a)(2) (2000).[3] *John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998); *see also Davidson v. Baydoun*, No. M2014-01486-COA-R3-CV, 2015 WL 3455426, at *3 (Tenn. Ct. App. May 29, 2015). Tennessee Code Annotated § 28-3-105(1) (2000) provides a three-year statute of limitations for the remainder of the claims. *Ne. Knox Util. Dist. v. Stanfort Constr. Co.*, 206 S.W.3d 454, 459 (Tenn. Ct. App. 2006) (applying the three-year statute of limitations in Tenn. Code Ann. § 28-3-105 to a negligent misrepresentation claim); *Keller v. Colgems-EMI Music, Inc.*, 924 S.W.2d 357, 361 (Tenn. Ct. App. 1996) (holding that appellant's claim for breach of fiduciary duty and fraudulent misrepresentation was subject to the three year statute of limitations found in Tenn. Code Ann. § 28-3-105).

The date at which the cause of action accrues is the date on which the statute of limitations begins to run. *Redwing*, 363 S.W.3d at 457. Legal malpractice, fraud, breach

[3] The General Assembly amended this statute in 2014 by deleting subsection (a)(2) and replacing it with subsection (c). *See* 2014 Tenn. Pub. Acts 618 § 2. This amendment did not change the duration of the statute of limitations for legal malpractice actions, which remains one year. Tenn. Code Ann. § 28-3-104(c).

of fiduciary duty, and negligent misrepresentation claims are subject to the discovery rule. *See Potts v. Celotex Corp.*, 796 S.W.2d 678, 680 (Tenn. 1990); *PNC Multifamily Capital Inst'l Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 544 (Tenn. Ct. App. 2012). The discovery rule provides that a cause of action accrues when the plaintiff has actual knowledge of a claim or is on inquiry notice of a claim. *Redwing*, 363 S.W.3d at 459. Inquiry notice "'charges a plaintiff with knowledge of those facts that a reasonable investigation would have disclosed.'" *Id.* (quoting *Sherrill v. Souder*, 325 S.W.3d 584, 593 n.7 (Tenn. 2010)). When a plaintiff is aware of information sufficient to put a reasonable person on notice of the need to investigate "the injury," the claim accrues and the limitations period begins to run. *Id.* (citing *Sherrill*, 325 S.W.3d at 593 n.7). In legal malpractice cases, the discovery rule is composed of two elements: (1) the plaintiff must suffer an actual injury as a result of the defendant's wrongful or negligent conduct; and (2) "the plaintiff must have known or, in the exercise of reasonable diligence, should have known that this injury was caused by the defendant's wrongful or negligent conduct." *PNC Multifamily*, 387 S.W.3d at 544.

Here, Mr. Irvin's claims accrued at least by January 1987, and the statute of limitations began to run at that time. Mr. Irvin contends he did not have actual knowledge of his claims until April 2010. He points out that, during the period of time the farm was being marketed, he was on active military duty. However, he had inquiry notice of his claims at least as early as January 1987, when he received the letter regarding the sale of Cecilwood Farms and offers for the property. As to the legal malpractice claim, Mr. Irvin suffered a legally cognizable injury on December 23, 1986, when the farm was sold at a price lower than what he alleges could have been achieved. *See, e.g.*, *id.* at 544-45. With the exercise of diligence, Mr. Irvin could have known of any alleged wrongful conduct many years before the filing of his first suit in 2010. Mr. Irvin was "aware of facts sufficient to put a reasonable person on notice that an injury ha[d] been sustained as a result of the [alleged] negligent or wrongful conduct." *Kohl & Co.*, 977 S.W.2d at 532.

Lastly, we consider whether the running of the applicable statutes of limitations was tolled. Mr. Irvin asserts that the statutes of limitations should be tolled by the doctrine of fraudulent concealment.[4] Under that doctrine, statutes of limitations may be tolled for a time when the defendant has "taken steps to prevent the plaintiff from discovering he was injured." *Fahrner v. SW Mfg., Inc.*, 48 S.W.3d 141, 146 (Tenn. 2001). If the doctrine applies, the statute of limitations is tolled until the plaintiff discovers or has inquiry notice of the defendant's fraudulent concealment. *Vance v. Schulder*, 547 S.W.2d 927, 930 (Tenn. 1977). To toll the statute of limitations under the doctrine of fraudulent concealment, four elements must be present: (1) the defendant

[4] Initially, Mr. Irvin also claimed that the doctrine of equitable estoppel tolled the statute of limitations, but he later recognized in his "Proposed Findings of Fact, The Existence of Genuine Issues of Material Fact, and Conclusions of Law" that the doctrine was inapplicable.

must have "affirmatively concealed" the plaintiff's injury or failed to disclose material facts regarding the injury or wrongdoer, despite a duty to do so; (2) the plaintiff must have been unable to discover the injury or the identity of the wrongdoer despite using reasonable care and diligence; (3) the defendant must have known the plaintiff had been injured and the identity of the wrongdoer; and (4) the defendant must have concealed material information from the plaintiff "'by withholding information or making use of some device to mislead the plaintiff.'" *Redwing*, 363 S.W.3d at 462-63 (quoting *Shadrick v. Coker*, 963 S.W.2d 726, 735 (Tenn. 1998)).

We conclude the doctrine of fraudulent concealment is not applicable under these facts. Even were we to assume that Wilson Sims or Bass, Berry and Sims affirmatively concealed material facts, Mr. Irvin failed to exercise reasonable diligence in the pursuit of his claims. *See Redwing*, 363 S.W.3d at 463 ("Plaintiffs asserting the doctrine of fraudulent concealment to toll the running of a statute of limitations must demonstrate that they exercised reasonable care and diligence in pursuing their claim.") Mr. Irvin did not request "access to family client files maintained by the firm," specifically "the file of his late grandmother and the Cecilwood Farm[s] file" until 2010. A delay of over two decades is not reasonable or diligent.

III. CONCLUSION

Mr. Irvin's claims are barred by the applicable statutes of limitations. Accordingly, the judgment of dismissal is affirmed.

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W. NEAL McBRAYER, JUDGE