In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00132-CV

MAD-MAG DEVELOPMENT, LLC, JEFFERY C. YATES, AND NOEL BUNYAN, APPELLANTS

V.

KEN CARGLE, KEVIN DUNN, JAMES HICKS, JEFF MCMENAMY, KOETTING INVESTMENTS AND C2MP, LTD, APPELLEES

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 100,159-E, Honorable Douglas Woodburn, Presiding

June 26, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.[1]

Appellants, Mad-Mag Development, LLC, Jeffery C. Yates, and Noel Bunyan, (collectively referred to as Mad Mag) appeal the trial court's summary judgment in favor of appellees, Ken Cargle, Kevin Dunn, James Hicks, Jeff McMenamy, Koetting Investments, and C2MP, Ltd., (collectively referred to as C2MP) on their claims of securities fraud. We reverse the summary judgment and remand to the trial court.

[1] Justice Patrick A. Pirtle not participating.

Standard of Review

The summary judgment motion was a traditional as opposed to a no-evidence motion. Thus, the onus lay with C2MP to prove the absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *See First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). In assessing whether this standard was met, we accept as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts regarding the evidence in the nonmovant's favor. *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015).

Background

The dispute arose from the sale of interests in a continuing care retirement facility. Mad Mag was selling those interests and approached C2MP as potential investors. C2MP invested and eventually discovered that the transaction was not to their satisfaction. Believing that Mad Mag had uttered various misrepresentations, C2MP sued, alleging causes of action arising under "Section 10(b) of the Exchange Act and Rule 10b-5" and "Section 33 of the Texas Securities Act."

Eventually, C2MP filed a traditional motion for summary judgment upon its claims. As stated in that motion, the misrepresentations entitling it to relief were as follows: (1) the Private Placement Offering Memorandum (PPM) "offered unknown interests in an entity (the "Company") that does not exist"; (2) "though the PPM referred the investors to the 'attached Company Agreement' for details of the Company, no Company Agreement was attached to the draft of the PPM"; (3) "[t]his omission is misleading and fraudulent because the Company Agreement contained material

information relevant to the Members' interests in the investment opportunity, and the investors should have had the opportunity to consider the terms of that Agreement when reviewing the PPM"; (4) "the PPM vaguely explained that 'some other Members who serve as officers . . . may own a disproportionately larger percentage of the Company's Member interests'"; (5) "the PPM failed to describe how that larger percentage would be calculated"; and (6) "[s]ince the sharing ratio exhibit was never shared with the investors, this language is misleading and fraudulent because it omitted material information that would have caused the investors to pause before proceeding with the investment."

In reading the record and evidence in the light most favorable to Mad Mag, we discern that the PPM, dated April 1, 2008, was distributed to C2MP via email in early April 2008. Though it referred to the Company Agreement, the latter was not attached to it. Nonetheless, copies of the Company Agreement were received and signed by C2MP by the end of April 2008. That agreement bore a date of April 2, 2008; yet, it did not contain an exhibit or other indication illustrating the percentage interest each investor would own in the entity or deal. They finally received documentation disclosing their respective interests in 2011. The documentation disclosing such happened to be appended as Exhibit A to a copy of the April 2, 2008 Company Agreement signed back in April of 2008.

Discussion

Before us, Mad Mag asserts that the trial court erred in granting C2MP's motion for summary judgment and, thereby, awarding C2MP monetary relief against Mad Mag. It also posits various grounds purporting to illustrate why the summary judgment was

improper. One of those grounds pertains to limitations and whether a material issue of fact existed regarding the expiration of limitations prior to the commencement of the lawsuit. We address that debate first because its resolution reveals that summary judgment was improper.

To clarify the matter, Mad Mag did not move for summary judgment on its claim of limitations. It merely broached the matter as a means of creating a material issue of fact that would prevent the trial court from granting C2MP's motion. We mention this because it affects how we view the topic.

A party asserting an affirmative defense in an effort to defeat a motion for summary judgment need not establish each element of the defense as a matter of law. Rather, the nonmovant defendant need only offer evidence establishing the existence of a fact issue on each element of the defense. *See Markovsky v. Kirby Tower, L.P.*, No. 01-13-00516-CV, 2015 Tex. App. LEXIS 12647, at *5–6 (Tex. App.—Houston [1st Dist.] Dec. 15, 2015, no pet.) (mem. op.) (stating that one "raising an affirmative defense to defeat a motion for summary judgment must . . . establish at least the existence of a fact issue on each element of his affirmative defense by summary judgment proof" and that an "affirmative defense will preclude a summary judgment only if each element of the affirmative defense is supported by summary judgment evidence"); *Bans Props., LLC v. Hous. Auth. of Odessa*, 327 S.W.3d 310, 313 (Tex. App.—Eastland 2010, no pet.) (stating that when a defendant contends that summary judgment is improper because of an affirmative defense, the "affirmative defense will prevent the granting of a summary judgment only if the defendant supports each element of the affirmative defense by

summary judgment evidence" which "requires evidence sufficient to establish at least a fact question on each element").

As previously mentioned, C2MP alleged three private causes of action. Two implicated article 581-33A(1) and (2) of the Texas Civil Statutes. *See* TEX. REV. CIV. STAT. ANN. art. 581-33A(1), (2) (West 2010) (stating, respectively, that a "person who offers or sells a security in violation of Section 7, 9, . . . 12, 23C, or an order under 23A or 23-2 of this Act is liable to the person buying the security from him" and a "person who offers or sells a security . . . by means of an untrue statement of a material fact or an omission to state a material fact . . . is liable to the person buying the security from him").

The limitations period applicable to a claim under article 581-33A(1) is "three years after the sale" unless a rescission offer is involved.[2] *Id.* art. 581-33H(1)(a). The period of limitations for a claim under article 581-33A(2) is "three years after discovery of the untruth or omission, or after discovery should have been made by the exercise of reasonable diligence" or "five years after the sale." *Id.* art. 581-33H(2)(a), (b). The five-year period is utilized as a "cut-off." *Id.* art. 581-33 cmt. § 33H (Statute of Limitations). That is, if suit is not initiated within five years of the sale of the security, it is barred even though the deception had yet to be discovered. *Id.* (stating that "[e]ach of the three paragraphs of § 33H contains three or four events, after any one of which suit is barred; thus the earliest event controls").

The third cause of action (that founded on federal securities law) carries a limitations period of "2 years after the discovery of the facts constituting the violation[] or

[2] No one suggested that an offer of rescission was involved here.

. . . 5 years after such violation." 28 U.S.C. § 1658(b)(1), (2). These periods apply in the same manner as those in article 581-33H; the earlier event controls. *See Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 975 (11th Cir. 2007).

According to the clerk's record, C2MP filed suit against Mad Mag on or about December 14, 2011. Evidence of record permits one to reasonably infer that the sale of the purported security was completed by the end of April 2008. Three years from April 2008 would be April 2011. December 14, 2011 falls about seven and a half months after April 30, 2011. So, some evidence appears of record creating a material fact issue on whether the article 581-33A(1) claim was time barred.

Regarding both the federal securities fraud and the article 581-33A(2) claims, the specific misrepresentations forming the basis of C2MP's summary judgment motion concerned (1) offering unknown interests in a nonexistent company through the PPM, (2) referring investors to a company agreement that was not attached to the PPM, (3) vaguely explaining in the PPM how some investors or company members may end up with disproportionately larger interests, and (4) failing to explain in the PPM how those or any other interests would be calculated. Other potential omissions or misrepresentations concerned (1) confusion whether the eventual company they would be investing in would be a limited partnership or limited liability company, (2) confusion whether the structure of the company would be a "member-managed limited liability Company," (3) the investors' ownership ratios failing to be calculated by the time of closing contrary to representations in the PPM, and (4) the investors being denied the opportunity to participate in the calculation of their ownership ratios by the time of closing and contrary to the terms of the PPM.

The evidence of record indicates that in one way or another all of the foregoing complainants either (1) implicated wording contained in documents all investors received by May 2008 (i.e., nature of the company, vague description regarding the manner of calculating certain ownership ratios, and omitted exhibits), (2) implicated duties or promises that were to be performed by the end of April 2008 but allegedly were not (i.e., investment ratio calculations and their manner of calculation), or (3) were addressed by documents all investors received by May of 2008 (i.e., formation of a nonexistent company and structure of the company in which they were investing). So, one can reasonably infer from the summary judgment record that, by May 2008, C2MP and the other investors had information or facts revealing the purported omissions, misrepresentations, and breached promises of which they complained in their motion for summary judgment.[3] Yet, they did not sue within three years of May 2008 but, rather, waited an additional seven months. At the very least, these circumstances are enough to create a material issue of fact regarding whether C2MP acted within the limitations period of both 28 U.S.C. § 1658 and article 581-33H.

There being a material issue of fact concerning C2MP's compliance with the applicable statutes of limitation, the affirmative defense was enough to preclude entry of summary judgment in their favor. And because that conclusion warrants reversal of the summary judgment, we need not address the other issues posed by Mad Mag on appeal that may or may not also warrant reversal.

[3] C2MP suggested in its reply brief that the ownership ratios ultimately disclosed in 2011 were somehow fraudulent or a misrepresentation. Yet, that allegation was not mentioned within the motion for summary, and a summary judgment may be affirmed or reversed only upon grounds encompassed within the motion for summary judgment and replies thereto. *See* TEX. R. CIV. P. 166a(c) (providing that a summary judgment shall be rendered on the "pleadings . . . on file at the time of the hearing, or filed thereafter and before judgment with permission of the court); *Denman v. Citgo Pipeline Co.*, 123 S.W.3d 728, 735 (Tex. App.—Texarkana 2003, no pet.).

The summary judgment is reversed and the cause is remanded to the trial court.

Brian Quinn
Chief Justice