IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2009-CA-00351 SCT RT

R. W. WHITAKER AND MONTY FLETCHER — **APPELLANTS**

VS.

LIMECO CORPORATION AND WILLIAM KIDD — **APPELLEES**

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INTRODUCTION

Appellees Limeco Corporation and William Kidd claim that the trial court's dismissal of Appellants' complaint was proper for two main reasons. First, the Appellees claim that the promissory notes in issue are not negotiable instruments under Mississippi law and therefore are not entitled to the six year statute of limitations provided by Miss. Code Ann. § 75-3-118. Appellees' Brief, pp. 4-5. Second, Appellees claim that Appellants' fraud claim is barred and not tolled by fraudulent concealment because Appellants failed to properly allege fraudulent concealment. Appellees' Brief, pp. 5-6. Both of these arguments are flawed. The trial court improperly dismissed these claims and improperly applied the Rule 12(b) dismissal standard to these facts.

First, the Mississippi statute governing promissory notes clearly states that a note is negotiable if it is made payable to an identified person or order. Miss. Code Ann. § 75-3-109(b) (emphasis added). Use of the disjunctive "or" clearly indicates a choice of alternatives. As such, a drafter following the plain reading of the statute when composing the contractual language of the note could believe it proper to draft it either to an identified person or to order. Second, Appellants timely brought their fraud claims in the original complaint, and then timely asserted a

fraudulent concealment defense to Appellees affirmative defense of the statute of limitations. This particular defense could only have arisen once Limeco and Kidd asserted the statute of limitations as an affirmative defense. Third, the Appellants clearly alleged fraudulent concealment as required by Mississippi law as they alleged both a subsequent act of concealment by Kidd and Limeco which was designed to prevent, and did prevent, the Appellants from learning of the fraud perpetrated upon them, and they performed due diligence.

The subsequent act was the presentation of the false financial books and records of Limeco and Kidd, after they made the false representations of their solvency and other acts believed upon information and belief to be revealed in discovery. Also, the Appellants performed the due diligence required of them by the fact that they requested to review the books and records rather than simply relying upon Kidd and Limeco's word that they were solvent and financially sound. Importantly, fraudulent concealment could not even have been raised by Appellants until after they learned of the falsity of the books and records, which was in March of 2007. Their claim was brought within a few months and well within three years of this date, in September of 2007. Thus, the trial court erred by dismissing the Appellants' claims. Accordingly, this Court should reverse the trial court's decision and remand this matter for further proceedings.

REPLY ARGUMENT

A. NEGOTIABLE INSTRUMENTS

The Appellees claim that the promissory notes in question are not negotiable instruments under Mississippi law. Appellees' Brief, p. 7. The Mississippi Code states that a promise or order that is not payable to bearer is considered "payable to order" if it is payable (i) to the order of an identified person or (ii) **to an identified person** or order. A promise or order that is payable to order is payable to the identified person. Miss. Code Ann. § 75-3-109(b). However,

Appellees assert that even though the notes were payable to an identified person, they do not meet the definition of a negotiable instrument.

Appellees attempt to contort grammatical English to support their interpretation of the statute. They state that subsection (b)(ii) contains a single preposition, "to," which is given two objects- -the identified person and order. As such, their argument follows, there are not two separate alternatives allowed, but only one - since the statute uses only one preposition. Appellees' Brief, p. 8-9. In other words, they claim that Appellants' interpretation is only valid if the statute included the preposition "to" in front of both objects of the sentence. Of course, this is a rather narrow and misleading interpretation of basic English. In compound structures, words are often omitted for economy. "Such omissions are perfectly acceptable as long as the omitted word is common to both parts of the compound structure." *See, A Writers Reference*, Diane Hacker, at 65 (1989). Indeed, the use of the preposition "to" at the introduction to subsection (b)(ii) modifies *both* "identifiable person" and "order." Not surprisingly, Appellees cite no support for their grammatical interpretation. Since the preposition "to" is common to both objects of the clause, it is properly omitted from the sentence. In other words, the inclusion or omission of a secondary preposition does not alter the interpretation of the sentence under proper English usage. Therefore, under a reasonable reading of the statute, a note can be negotiable if payable to either an identifiable person or to order. Use of a second preposition is redundant and is generally omitted in proper sentence structure.

Further, by using the disjunctive "or," two separate alternatives are allowed, one being that a note is negotiable if payable to an identified person. This is a standard convention in virtually all statutory, contractual or other English writings. See In re Branan, 419 So.2d 145, 146 (Miss. 1982) ("use of the disjunctive 'or' denotes a choice between alternatives.").

Furthermore, the notes in question can likewise be analogized to a check, which is considered a negotiable instrument. Just as with any check, if one endorses the back, one can negotiate it. Thus, the fact that it is only payable to an identified person does not prevent it from becoming a negotiable instrument. Similarly, either Whitaker or Fletcher should have been able to endorse the note and negotiate the instrument to other persons (just like a check).

Moreover, when drafting such a promissory note, an author ought to be able to rely upon a reasonable, grammatically correct interpretation of the negotiable instrument statute. At the very least, the use of the disjunctive in the statute creates an ambiguity as to how it should be interpreted. In the present case, Appellants would be justified in relying on a reasonable reading of the statue and as a result, the promissory notes in question should be considered negotiable (even if the Court determines another reading more palatable). If, in fact, reading the use of the disjunctive in the statute to permit alternative choices is one of multiple reasonable readings, a contract following that interpretation should not be invalidated after the fact due to some subsequent ruling of the Court. Indeed, the Mississippi Court of Appeals has held that where plaintiffs justifiably relied upon a trial court's order, it was error for a successor judge to vacate that order and dismiss their cause of action on service of process grounds. See Nelson v. Baptist Memorial Hospital-North Mississippi, Inc., 972 So.2d 667, 671-72 (Miss. App. 2007); Franklin v. Franklin, 858 So.2d 110, 122 (Miss. 2003) (attorneys were entitled to compensation for their work partly because they justifiably relied upon judge's order for over a year and a half.). Likewise, in the present case, the Appellants can clearly be assumed to justifiably rely upon the plain meaning of the statute and the contract's status as a negotiable instrument should not be removed based on this reasonable interpretation of the statute.

B. FRAUDULENT CONCEALMENT

Appellees inexplicably argue that Appellants fraudulent concealment defense was somehow not timely asserted. Apparently, Appellees confuse the assertion of a fraud claim with a fraudulent concealment defense. Strictly speaking, a fraudulent concealment claim is not a cause of action to be raised. The fraudulent concealment doctrine applies to any cause of action. Carder v. BASF Corp., 919 So.2d 258, 261 (Miss. App. 2005). It is a defense to an affirmative defense of the bar of the statute of limitations. See Windham v. Latco of Mississippi Inc., 972 So.2d 608, 613 (Miss. 2008) (citing Robinson v. Cobb, 763 So.2d 883, 887 (Miss. 2000)) ("fraudulent concealment of a cause of action tolls its *statute of limitations*.")(emphasis in original); Young v. Cook, 1855 WL 2568 (Miss. Err. App. 1855)(fraudulent concealment of a cause of action is a defense against the statute of limitations). Since the statute of limitations is an affirmative defense, which can be waived, such a defense cannot be asserted unless and until the limitations bar is appropriately raised. Appellees first raised a statute of limitations defense in their separate Answers, served on December 21, 2007. [R. 31-54.]

Prior to a discussion of the specific issues raised by Appellees to support the dismissal of the fraud claim, Appellants point out the error committed by the Court by improperly applying the Rule 12(b) standard. A motion to dismiss pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure tests the legal sufficiency of the complaint. Campbell v. Davis, 2009 WL 514208, at *2 (Miss. App. 2009) (citing Cook v. Brown, 909 So. 2d 1075, 1077-78 (Miss. 2005)). As such, a court's inquiry on such a motion is *not limited* solely to the allegations of the complaint, which must be taken as true. Children's Medical Group, P.A. v. Phillips, 940 So.2d 931, 934 (Miss. 2006) (citing Poindexter v. S. United Fire Ins. Co., 838 So.2d 964, 966 (Miss.

2003)) (emphasis added). Rather, a court is charged to consider whether *any set of facts* could support the plaintiff's claims. Phillips at 934 (citing Cook at 1078) (emphasis added). The survival of a motion to dismiss only requires the slightest evidence that plaintiffs are entitled to some form of relief. Carpenter v. Haggard, 538 So. 2d 776, 777 (Miss. 1989).

The Appellants properly asserted a fraudulent concealment defense by alleging a subsequent act of concealment and due diligence. Further, no discovery ever took place before the action's dismissal. For this reason, Appellants did not even have time to further support the two step inquiry into fraudulent concealment. Additionally, resolution of whether the plaintiff satisfies the two step burden is an issue for jury determination. Robinson at 889-89. As previously noted, the Cobb court stated: "[w]hether [defendant] concealed his participation . . . is a fact question that should have been left for the jury." Id. at 888. Further, "[w]hether [plaintiffs] were diligent in their efforts to discover [defendant's] participation . . . is a question of fact, not one of law." Id. at 889. In the present case, the trial court erred by removing these questions from the jury.

Moreover, the lower court erred by not allowing Appellants the opportunity to amend their complaint if it thought that the complaint failed to properly allege sufficient facts. Rule 15(a) states, in pertinent part: "On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), . . . leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion." Miss. R. Civ. Proc. 15(a). See also Bolton v. Equiprime, Inc., 964 So.2d 529, 534 (Miss. App. 2007) (had trial court considered only the complaint and then granted the motion to dismiss, it would have been required to allow the plaintiffs an opportunity to amend their complaint.). In the present case, the

Appellants were not provided the opportunity to amend their complaint even though there was no "undue delay, bad faith or dilatory motive" on the Appellants part, nor prejudice to the Appellees. See Hartford Casulty Ins. Co. v. Halliburton Co., 826 So.2d 1206, 1219 (Miss. 2001).

The Appellees further argue that Appellants are "apparently attempt[ing] to link the presentation of the financial records with both their fraud claim and their fraudulent concealment." Appellees' Brief, p. 15. Further, Appellees combine the separate fraud and fraudulent concealment actions into one when in fact the latter cannot be pled until the statute of limitations has been raised as an affirmative defense. See Smith v. Franklin Custodian Funds, Inc., 726 So.2d 144, 147 (Miss. 1998) ("Fraudulent concealment raised in response to the statute of limitations defense is not to be plead at all.").

The Appellants have made clear that their fraudulent concealment claim stemmed from Kidd and Limeco's presentation of the false set of books, which was not discovered until March of 2007. The actual fraud occurred when Kidd represented to Appellants that he and Limeco had sufficient assets to repay the notes. The subsequent act (i.e. fraudulent concealment) occurred when Kidd presented financial books and records portraying himself and Limeco as solvent. In other words, the fraud was the lie; the concealment was the falsifying of the books and other acts. Additionally, Kidd and his accountant both represented that Limeco's books and records were true and accurate. Indeed, the record evidence shows that negotiations began in 2001 when Kidd:

> represented that he had the money to satisfy the amount that the transaction was going to encompass. He also represented to the extent he did not have that money, Limeco did. Sometime in early 2002 the monies were advanced, lent, . . . the initial bank loan that was a continuing guaranty occurred. Then my clients, Mr. Whitaker and Mr. Fletcher, decided wait a second, we need to be sure about this. So Mr. Kidd presented his books and records. He brought in his accountant. They presented the

> books and records of Limeco and represented that they were true and accurate. That is the secondary accompanying concealment, Your Honor.

[Tr. pp. 15-16]. The record evidence clearly demonstrates that the presentation of the financial records was the affirmative, subsequent act. Further, Kidd failed to reveal the truth for five years, knowing that the Appellants relied on the validity of these documents. The truth of Kidd and Limeco's solvency was not discovered by the Appellants until Kidd was deposed on March 22, 2007. Once Appellant's learned that in fact Kidd and Limeco did not have sufficient assets at the time they entered into the notes, they brought their claim well within three years, on September 18, 2007.

Appellees also claim that the Appellants failed to perform due diligence in discovering the fraud. They state "[i]f in the present case, Appellants believed that they were owed money, they obviously were aware that a misrepresentation had occurred whenever they demanded payment and such payment was refused - - - they were certainly aware of it in December, 2003, when they filed the first set of lawsuits." Appellees' Brief, p. 18. However, this is simply untrue. The Appellants were aware in December of 2003 that Limeco and Kidd refused to tender payment of the notes. Thus, they were aware that they had a cause of action for breach of the promissory note, but not that any fraud had been committed upon them. Appellees' apparent implication that facts supporting a breach of contract claim automatically also support a fraud claim is legally flawed and rather disingenuous. Appellants only became aware that Limeco and Kidd *lied* about having sufficient assets to repay the notes and guaranty at Kidd's deposition in March of 2007.

Due diligence requires a plaintiff to make the best use of the facts available to him.

Anderson v. Equitable Life Assurance Soc. of the United States, 248 F.Supp.2d 584, 590 (S.D.Miss. 2003). Further, the test for whether to toll the statute of limitations is whether a reasonable person similarly situated would have discovered potential claims. See e.g. Pope v. Sorrentino, 992 So.2d 1194, 1199 (Miss. Ct. App. 2008). In the instant case, Appellants made the best use of the facts available to them at the time they made the decision to enter into the promissory notes and continuing guaranty. They requested the financial books and records of Limeco, they reviewed the books and records, and they made an informed decision that Limeco and Kidd would repay the notes when they became due based on the information (albeit false) presented to them by Kidd and his accountant. They performed the actions of a reasonable person similarly situated.

Once they learned that Limeco and Kidd never had the assets they represented, Appellants brought their new action. The determining question in this case relating to the statute of limitations should be whether the Appellants were on notice that the books and records presented by Kidd and Limeco at the time they entered into the notes were inflated and falsified. It is clear from the record evidence that they were not on notice in 2003, since they did not become aware of the falsity until March of 2007.

The Appellees further allege that Mississippi does not currently recognize self-concealing acts of fraud. However, even if that were true, Appellants submit that the Court should adopt a "self-concealing" exception to the fraudulent concealment doctrine in certain circumstances. This case typifies the classic example where courts have held that the acts performed by a defendant were self-concealing. See e.g. Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023, 1028 (6th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969) ("The original fraud is regarded as a

continuing affirmative act and mere silence of the defendant is treated as a concealment."); OBG Technical Services, Inc. v. Northrop Grumman Space & Mission Systems Corp., 503 F.Supp.2d 490 (D.Conn. 2007) (The fraudulent concealment doctrine does not require proof of affirmative act of concealment if fraudulent violation itself was self concealing.); Litle v. Arab Bank, PLC, 507 F.Supp.2d 267 (E.D.N.Y. 2007). In this case a corporate office presented falsified financial records of Limeco, which reflected Limeco as a solvent company with significant assets. What else can be required of a plaintiff in such circumstances? Does the law require that such a plaintiff continue to request the same falsified financial records? Certainly not. The Court should determine that this is a self-concealing act of fraud that requires no further proof. In any event, the trial court cut off all attempts at further obtaining support for the concealment allegations when it dismissed the Complaint on Rule 12 grounds. Such a dismissal was improper.

C. PIERCING THE CORPORATE VEIL

Appellees last argue that Limeco's corporate veil cannot be pierced because the claims against it are all barred by the statute of limitations. Citing Hardy v. Brock, 826 So.2d 71, 75 (Miss. 2002), Appellees state that ". . .in order for there to be alter ego liability placed on a shareholder of the corporation, there must be a claim in existence against the corporation." According to Limeco and Kidd, there is no claim in existence. However, Appellants have shown the Court that they have a viable fraudulent concealment claim that was brought within three years of its discovery. Therefore, Kidd should be held liable for Limeco's conduct because of his fraudulent misrepresentations while acting as managing director of Limeco.

CONCLUSION

It is clear from the record evidence that the trial court erred by dismissing Appellants' complaint. First, the promissory notes in issue are clearly negotiable instruments under Mississippi law as they were payable to an identified person. Second, Appellants properly pled a fraudulent concealment defense because they alleged a subsequent affirmative act and showed due diligence. These are fact issues best left for a jury determination. Further, the Appellants were denied the opportunity to engage in meaningful discovery to further develop their claims. In effect, by barring Appellants' claims, the trial court rewarded Kidd and Limeco for their dishonesty. This is an unjust result and as such, Appellants respectfully request this Court reverse the trial court's decision and remand the matter for further proceedings.

BY: 

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CERTIFICATE OF SERVICE

I, MICHAEL N. WATTS, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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I have also forwarded the original and three copies of the brief to:

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THIS, the 2 day of October, 2009.

Michael N. Watts

MICHAEL N. WATTS