Cite as 2011 Ark. App. 704

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA10-1053

KEVIN KACHIGIAN
APPELLANT

V.

MARION COUNTY ABSTRACT COMPANY and RANDAL JACKSON
APPELLEES

Opinion Delivered November 16, 2011

APPEAL FROM THE MARION COUNTY CIRCUIT COURT
[NO. CV-2008-10-3]

HONORABLE JOHN R. PUTMAN, JUDGE

REVERSED AND REMANDED

RITA W. GRUBER, Judge

Appellant Kevin Kachigian appeals from an order of the Marion County Circuit Court granting summary judgment to appellee Marion County Abstract and dismissing his complaint. In his complaint, he alleged that he entered into an escrow agreement with Marion County Abstract and deposited $150,000 and that Marion County Abstract breached the agreement by disbursing his monies without following the agreement's dictates. The circuit court dismissed the complaint because Mr. Kachigian failed to show that he deposited any money with Marion County Abstract. On appeal, he contends that there is a genuine issue of material fact regarding the source of the funds transferred to appellee on the date he signed the escrow agreement and, therefore, that the circuit court erred as a matter of law by granting summary judgment on this issue. We reverse the circuit court's order and remand for further proceedings.

Appellant initiated this action on January 18, 2008, by filing a complaint against Marion County Abstract and Randal Jackson,[1] essentially attempting to recover $150,000 that he alleges was wrongfully converted. Appellant, a resident of Michigan, alleged that Mr. Jackson owned real property in Boone County, Arkansas, called Diamond City Acres. According to appellant's complaint, certain Michigan residents, one of whom was Rodger Rowley, asked appellant to invest in the purchase of Diamond City Acres and promised that he would be added as a member of certain Michigan corporate and limited liability entities. Appellant also alleged that he had already filed suit against Rodger and others in Michigan for fraud, conversion, unjust enrichment, and civil conspiracy. He stated that it was his understanding that Mr. Jackson had agreed to take Diamond City Acres off the market for $150,000 earnest money.

Appellant claimed that on March 14, 2006, he deposited $150,000 and entered into an escrow agreement with appellee. The agreement stated in pertinent part as follows:

> Whereas, depositor [Mr. Kachigian] wishes to deposit with escrow agent and escrow agent wishes to accept from depositor funds to hold in the event depositor and Randal Jackson, seller of property known as Diamond City Acres in Boone County Arkansas enter into a contract to sell above stated property to Sugar Loaf of Arkansas, LLC, a Michigan Limited Liability Company under the following terms and conditions.

Pursuant to the agreement, appellee (as the escrow agent) agreed "to hold funds in the amount of one hundred fifty thousand dollars ($150,000.00) in its escrow account until escrow agent receives fully executed purchase agreement between Sugar Loaf of Arkansas,

[1]Mr. Kachigian filed a petition to nonsuit his claims against Mr. Jackson; the court entered an order dismissing those claims without prejudice on June 16, 2009.

LLC and Randall Jackson regarding property known as Diamond City Acres in Boone County Arkansas." The agreement also provided that if appellee had not received the fully executed purchase agreement within five business days, "the depositor may at his sole discretion demand in writing the funds be returned in full." The escrow agreement was signed by appellant and the president of Marion County Abstract.

Mr. Jackson and Sugar Loaf of Arkansas never executed a purchase agreement; rather, Mr. Jackson executed a purchase agreement to sell the property to Diamond City Acquisitions LLC, another Michigan limited liability company. Appellant alleged that appellee released the $150,000 to Mr. Jackson in violation of the escrow agreement. Finally, he claimed that appellee breached its contract with him and was negligent in failing to safeguard the money he deposited in escrow.

Appellant filed an amended motion for summary judgment and attached a copy of the escrow agreement and a copy of the sales agreement between Mr. Jackson and Diamond City Acquisitions LLC, signed by Rodger Rowley as managing member. In its response to the motion, appellee admitted that the escrow agreement was prepared and executed but denied that appellant had ever deposited any money with Marion County Abstract. Appellee filed its own motion for summary judgment, attaching two depositions of Mr. Kachigian—one from this lawsuit and one from Mr. Kachigian's Michigan lawsuit[2]—and the complaint from the Michigan case. Appellant filed a response, attaching the depositions of Rodger Rowley and Jill Linton-Jones, the Marion County Abstract employee who worked on the Diamond

[2]The Michigan lawsuit did not involve Marion County Abstract but factually overlaps this case.

City Acres file.

Appellant testified in the depositions that he had been in the real-estate business for twenty-three years and was a licensed real-estate broker in Michigan. He said that he had done a lot of business with Rodger Rowley, who owned Emerald Title and conducted the closings on appellant's sales. According to appellant, Rodger and his brother Mike Rowley approached him about finding investors for the "Arkansas project." He said that the Rowleys promised him an equity position in the deal. Thereafter, on March 14, 2006, appellant gave Rodger a check in the amount of $172,023.72 issued to appellant's mother, Margaret Kachigian, Trustee for the Margaret Kachigian Revocable Living Trust, which she had endorsed as payable to the order of Emerald Title Company. In his Michigan complaint, appellant alleged that Emerald Title issued a return check in the amount of $22,023.72, resulting in a net investment of $150,000 in the Arkansas project. While appellant alleged that the money was to be held in escrow with Emerald Title until legal documents were prepared reflecting his role as a partner in the project, he admitted that he never received any written documentation from the Rowleys.

He testified that he signed the escrow agreement with Marion County Abstract several days after he gave Rodger the money. He admitted that he did not know his money was in Marion County Abstract and that his instruction to Rodger was to hold his money in Emerald Title's trust account until satisfactory documents were prepared and approved. Finally, he testified that he had never spoken with anyone at Marion County Abstract before the lawsuit was filed, that he was unaware of any written or oral instructions that would have placed Marion County Abstract on notice that the funds wired to them from Emerald Title

were his funds, and that he had never spoken with Randal Jackson.

Jill Linton-Jones testified in her deposition that no one at Marion County Abstract had ever spoken with Mr. Kachigian. She said that she had worked with Rodger in 2005 when he and Paul Van Gamper attempted to purchase the Diamond City Acres property, but the deal fell through. She said that Rodger called on February 24, 2006, indicating that he and Mr. Van Gamper "were getting another deal going" to purchase Diamond City Acres. Rodger wired $10,000 to Marion County Abstract that day. On March 14, 2006, Ms. Linton-Jones received the escrow agreement signed by Mr. Kachigian and a wire transfer of $140,000 from Emerald Title. Roy C. Linton, president of Marion County Abstract, executed the escrow agreement that same day. When Ms. Linton-Jones spoke with Rodger on March 17, 2006, Rodger told her to disregard the escrow agreement because the sale was between Randal Jackson and Diamond City Acquisitions LLC, of which Rodger was the managing member. She did not request or receive any written confirmation from Rodger that Mr. Kachigian was no longer involved in the transaction. After the closing of the sale between Randal Jackson and Diamond City Acquisitions, Marion County Abstract wired a total of $150,000 to Randal Jackson.

The court denied appellant's motion for summary judgment, granted appellee's motion for summary judgment, and dismissed the complaint. Specifically, the court found that there was no genuine issue of material fact regarding whether Mr. Kachigian deposited funds with Marion County Abstract pursuant to the escrow agreement: "He did not." The court found that, without a showing that he deposited any money, Mr. Kachigian could not prevail under either theory: negligence or breach of contract. The court noted further, "It

appears to the court that Mr. Kachigian may well have been wronged, but not by Marion County Abstract."

A circuit court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated and that the party is entitled to judgment as a matter of law. *Mitchell v. Lincoln*, 366 Ark. 592, 596, 237 S.W.3d 455, 458 (2006). Once the moving party has established a prima facie case showing entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id*. at 597, 237 S.W.3d at 458. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id*. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id*. at 597, 237 S.W.3d at 459.

Appellant contends that the circuit court erred as a matter of law because there is a question of fact regarding whether he provided monies to appellee. He agrees that there is no proof that he provided money "directly" to appellee, but he argues on appeal that Emerald Title was acting as his agent when it wire-transferred the sum of $10,000 to appellee on February 24, 2006, and the sum of $140,000 to appellee on March 14, 2006. He claims that appellee received the escrow agreement and the $150,000 from Rodger, who, appellant alleges, appellee knew was acting as an agent. Thus, appellee owed a fiduciary duty to him. He claims that there is "no doubt in his mind that it was his money that was wired from Emerald Title to Marion County Abstract."

The undisputed facts are that Rodger wired $10,000 to Marion County Abstract on

February 24, 2006, for a yet-to-be-explained transaction to purchase Diamond City Acres. On March 14, 2006, Rodger provided an escrow agreement regarding the purchase of Diamond City Acres signed by Mr. Kachigian. Marion County Abstract executed the escrow agreement, which agreement stated that $150,000 was to be held in escrow. That same day, Rodger wired an additional $140,000 to Marion County Abstract. Three days later, Marion County Abstract "disregarded" the escrow agreement with Mr. Kachigian because Rodger told it to do so. The circuit court's finding that Mr. Kachigian did not personally deposit any money with Marion County Abstract does not resolve this matter. The material fact in dispute was whether Rodger was acting as Mr. Kachigian's agent when he deposited the $150,000 with Marion County Abstract and, if he was, whether Marion County Abstract knew, or should be charged with knowledge, that these funds were the subject of the escrow agreement between it and Mr. Kachigian. *See Undem v. First Nat'l Bank of Springdale*, 46 Ark. App. 158, 879 S.W.2d 451 (1994). Accordingly, we reverse and remand for further proceedings.

Reversed and remanded.

HART and BROWN, JJ., agree.