

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CA09-1177

LEON MILETELLO, JR., JAMES E.  
WORTHY, JR., L.S.M. GAMING, INC.  
and LOGAN'S PORT GAMING, INC.  
APPELLANTS

V.

THOMAS R. PUGH, JR., VALUE  
PROPERTIES LTD. PARTNERSHIP,  
and DUCK RICH, LLC

APPELLEES

**Opinion Delivered** June 23, 2010

APPEAL FROM THE ASHLEY  
COUNTY CIRCUIT COURT  
[CV06-201-4]

HONORABLE DON E. GLOVER,  
JUDGE

REVERSED AND REMANDED

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## DAVID M. GLOVER, Judge

Appellants, Leon Miletello, Jr., James Worthy, Jr., LSM Gaming, Inc., and Logan's Port Gaming, Inc., appeal from the summary judgment awarded in favor of appellees, Thomas Pugh, Jr., Value Properties Ltd. Partnership, and Duck Rich, LLC. As their sole point of appeal, they contend that the trial court erred in ruling as a matter of law that they could not have restitution for improvements made by them to land they held under contract of sale prior to that contract being rescinded. We agree, and therefore reverse and remand.

In the amended and substituted complaint filed by appellants, they alleged that at all relevant times, appellee Value Properties owned hunting properties in Desha County, Arkansas, commonly known as Three Rivers Lodge, and in Ashley County, commonly

known as Black Pond. According to the complaint, in 2002-03, appellants Miletello and Worthy engaged in discussions with appellee Pugh to lease Three Rivers Lodge for hunting purposes, resulting in a written lease agreement dated May 9, 2003, with appellee Duck Rich. Duck Rich had leased the subject property from Value Properties. Both Value Properties and Duck Rich are owned/controlled by appellee Pugh. The lease was for a period of three years.

After the lease agreement was entered, Miletello and Worthy engaged in discussions with Pugh to purchase the Three Rivers Lodge and Black Pond properties. As alleged in the complaint, an oral purchase agreement was reached in the summer of 2004, superseding the lease on Three Rivers Lodge. Under the oral purchase agreement, Miletello and Worthy were to transfer to Value Properties an interest in a truck-stop gaming operation that they controlled through appellant LSM Gaming in exchange for Three Rivers Lodge and Black Pond. In accordance with their agreement, appellants alleged that they began making monthly payments to Value Properties in July 2004, that those payments were commensurate with the revenues that were being derived from the gaming interest that was to be transferred to appellees, and that Pugh accepted and deposited those payments. Appellants also asserted in their complaint that, concurrent with the making of the purchase agreement and the commencement of these monthly payments, the parties made efforts through their respective attorneys and agents to reduce the purchase agreement to writing, and appellants took possession of the properties and constructed substantial structures and other improvements on the Black Pond property at a cost of \$98,892.33.

The complaint further alleged that the parties began to experience difficulties in getting the purchase agreement reduced to writing, that the discussions eventually reached an impasse, and that Pugh directed them to vacate the properties and appellants requested reimbursement for the improvements made to Black Pond. When their request for reimbursement was denied, they filed the instant complaint. They asserted their belief that the payments they made to appellees, totaling \$171,342.26, exceeded and therefore satisfied any and all obligations they owed in the way of lease payments and the reasonable value of use of the property for the time that it was occupied, leaving appellees indebted to them for the amount of the improvements made to the property. The complaint sought \$98,892.23 in restitution, plus pre- and post-judgment interest, attorney fees, and costs, contending that if appellees were allowed to retain the improvements they would be unjustly enriched.

In answer to the amended and substituted complaint, appellees denied the majority of allegations made by appellants, asserted several defenses, and affirmatively pleaded other matters. In particular, appellees affirmatively pleaded that appellants “were never authorized in any way to engage in construction nor to make alterations or ‘improvements’ to the real property ....”

Appellees asserted two basic grounds in support of their motion for summary judgment. First, they contended that under the Arkansas Betterment Act, one claiming entitlement to damages for improvements made to land belonging to another must believe himself to be the owner of the property *and* must hold the property under color of title. They argued that appellants’ claim for reimbursement failed because they did not hold the

property under color of title. Alternatively, appellees contended that in the event the trial court determined that the Betterment Act did not apply in this case, appellants could not establish entitlement to damages for the purported improvements because “under an equitable theory of unjust enrichment, an essential element of Plaintiffs’ claim is that Plaintiffs held a belief that no other person possessed superior legal title to Black Pond at the time Plaintiffs made improvements,” and that it was “undisputed that Plaintiffs were aware Defendants had not conveyed legal title to Black Pond to Plaintiffs at the time of any improvements.”

In support of their motion, appellees attached excerpts from the depositions of appellants Miletello and Worthy. In Miletello’s deposition, he asserted that he believed he owned the property because Pugh had told him he did; that Pugh had told him it was his and he could do with it as he pleased; that he discussed the buildings with Pugh before he placed them there; that he asked Pugh to come by and see the improvements, but he did not know if Pugh ever did; and that “[a]t the time I was building the buildings at Black Pond, I could not have sold the property to another party because I did not have the title to anything at that time.” In Worthy’s deposition, he asserted that appellants had established an agreement with appellees where they were sending Pugh payments for the property even though they had not received any documents conveying the property; that the agreement was oral; that he believed he could turn around and sell the property at Black Pond to someone else; that the title documents were being attended to by the attorneys; that the only documents he was aware of were “checks that went back and forth where we purchased the property”; that he had discussions with Pugh regarding improvements to Black Pond; that Pugh had told them Black

Pond was theirs and “to ‘do what you want to with it’”; that “we felt like we owned the property”; and that “we had received a rental check from the farm for the crop land for the year before.”

Miletello also attached his affidavit to appellants’ response to the motion for summary judgment. He explained again the terms of the oral agreement and stated that Pugh directed payment to him of crop rents on the portion of Black Pond that was being farmed; that he sent monthly payments to Pugh for eighteen months (copies of the cancelled checks were attached to the affidavit); that he constructed additional hunting-lodge facilities on the Black Pond property after he took possession (copies of the invoices for labor and materials were attached to the affidavit, along with photographs of the facilities); and that he vacated the premises when directed to do so by Pugh but asked to be reimbursed for his actual out-of-pocket costs incurred in the facilities construction.

Following a hearing, the trial court granted appellees’ motion for summary judgment, explaining that it did not regard the case to involve a factual dispute, but rather a legal issue.

Summary judgment “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 on the issues specifically set forth in the motion.” Ark. R. Civ. P. 56.

Once a moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Jackson v. Sparks Reg’l Med. Ctr.*, 375 Ark. 533, 294 S.W.3d 1 (2009). After

reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable minds might reach different conclusions from those undisputed facts. *Id.* On appeal, 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 question of 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.* Moreover, we review a circuit court's conclusion on a question of law *de novo* and give it no deference on appeal. *Helena-West Helena Sch. Dist. v. Fluker*, 371 Ark. 574, 268 S.W.3d 879 (2007).

Here, the trial court determined that it did not need to decide the summary-judgment motion on a factual basis because what was at issue was a question of law, not fact. In reaching its legal conclusion, the trial court did not explain, in either its comments from the bench or its order granting summary judgment, exactly what legal basis it was relying upon to reach its decision:

The court has pondered whether the Arkansas Betterment Act applies or whether an alternative equitable theory applies. The court has reached a conclusion that, irrespective of the theory that is presented, color of title is an element that is missing. I think you need the two elements basically: that's color of title, plus the good faith. As the jurisprudence suggests, from my appreciation, that the color of title means some form of writing. I think it's explained well in the *Foltz* case or that my title is better than somebody else's. But having said that, I do find that there is a missing element. It's a lack of color of title and some of the cases say if there is not color of title it cannot be good faith. I do find this to be, not a factual dispute, but a legal issue and I find that there is merit to the motion for summary judgment. I normally can find some facts, but I just think this is a law issue.

The order granting summary judgment did not provide any further explanation.

Arkansas's "Betterment Act" is codified at Arkansas Code Annotated section 18-60-213 (Repl. 2003). A person seeking reimbursement under this statute for improvements made to land that later turns out not to belong to him must clearly establish that he believed himself to be the owner "under color of title." However, the Betterment Act only applies in certain circumstances that do not exist in the instant case. In the *Foltz v. Alford* case, referenced by the trial court in its comments following the hearing, our supreme court quoted the following explanation with approval: "One making improvements on another's land through a bona fide mistake as to the boundary or location after due diligence to ascertain it is entitled to compensation for such improvements." 102 Ark. 191, 194, 143 S.W. 905, 906 (1912). In *Hudson v. Hilo*, 88 Ark. App. 317, 321, 198 S.W.3d 569, 572 (2004), our court explained that "the Betterment Act applies in cases where a party, believing himself to be the owner of land and under color of title, peacefully improves land later discovered to belong to another. . . . [T]he Hilos made improvements to land that they purchased under an installment contract, not land that actually belonged to others. The Betterment Act is inapplicable in such cases."

Here, appellants made no claims for relief under the Betterment Act in their complaint. Moreover, as in *Hudson v. Hilo, supra*, appellants did not make improvements to the land upon a bona fide mistake as to the property's boundary or location; rather, they made improvements to property pursuant to an oral purchase agreement involving that very property. Accordingly, to the extent that the trial court based its legal conclusion upon the Betterment Act, it erred in doing so. In addition, without further explanation from the trial

court concerning its conclusion that color of title is a missing element regardless of the theory presented, we cannot agree with that legal conclusion either.

Finally, from our review, we are not convinced that the record before us is devoid of questions of material fact. The critical factor in the resolution of this matter concerns Pugh's knowledge regarding whether, and to what extent, improvements were being made on the property. In opposition to Pugh's motion for summary judgment, both Miletello and Worthy claim that they informed Pugh of the construction; Pugh does not refute their contention. In reaching its decision to grant summary judgment, the trial court short-circuited its analysis. For this reason, we do not have a sufficient explanation from the trial court concerning its basis for granting summary judgment to review the decision on appeal. We therefore reverse the order granting summary judgment and remand this case to the trial court for further proceedings.

Reversed and remanded.

PITTMAN and GLADWIN, JJ., agree.