

Cite as 2024 Ark. App. 342

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CV-21-540

ADVANTAGE PROPERTY
MANAGEMENT
APPELLANT/CROSS-APPELLEE

V.

CHRISTOPHER BURKARD
APPELLEE/CROSS-APPELLANT

Opinion Delivered May 29, 2024

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. 23CV-19-1615]

HONORABLE CHARLES E.
CLAWSON III, JUDGE

AFFIRMED ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL

BART F. VIRDEN, Judge

Appellant Advantage Property Management (“APM”) appeals from a Faulkner County jury verdict in favor of appellee Christopher Burkard on his action for breach of contract and breach of fiduciary duty. The jury awarded Burkard \$149,025 in compensatory damages and \$72,000 in punitive damages. On direct appeal, APM argues that (1) the trial court erred in finding that Burkard’s breach-of-contract claim as to APM’s failure to withhold and pay property taxes was not barred by the statute of limitations; (2) the trial court erred in denying its motion for a directed verdict on Burkard’s breach-of-contract claim because the property-management agreement did not require APM to withhold and pay property taxes; (3) all of Burkard’s claims fail on the issue of damages; and (4) the jury’s punitive-damages award and the trial court’s award of attorney’s fees to Burkard should be reversed.

On cross-appeal, Burkard argues that the trial court abused its discretion in denying his motion for default judgment. We affirm on direct appeal and on cross-appeal.¹

I. *Factual Background*

In June 2011, Burkard, a resident of California, purchased certain real property located in Conway, Arkansas (“Property”), which he then rented to tenants pursuant to lease agreements. On June 24, 2014, Burkard signed a property-management agreement with APM in which APM agreed to take all necessary actions to rent, manage, operate, and maintain the property.

In June 2019, Burkard contacted APM regarding missing rent payments and was informed that the Property was under new ownership. The Arkansas Commissioner of State Lands had sold the Property for nonpayment of property taxes in May 2018. In October 2018, APM had entered into a property-management agreement with the subsequent purchaser of the Property, ARChoice, LLC (“ARChoice”), and had further assisted ARChoice with posting notice on the Property with respect to its quiet-title action, which resulted in a decree entered in March 2019 confirming and quieting title to the Property in ARChoice.

On December 19, 2019, Burkard filed a complaint against APM, alleging breach of contract and negligence for failing to notify him of the tax sale of the Property, contracting

¹In the companion case also decided today, *Advantage Property Management v. Burkard*, 2024 Ark. App. 343, ___ S.W.3d ___, we address APM’s argument that we should reverse the trial court’s award of attorney’s fees to Burkard. Consequently, that point will not be discussed in this appeal.

with ARChoice without notice to him, failing to notify him of the quiet-title action, and assisting ARChoice in the quiet-title action. In the complaint, Burkard identified duties owed by APM in the property-management agreement and under common law, including providing Burkard with mailed notice of the service of any papers, notices, subpoenas, summonses, or other legal documents concerning the property. He alleged that the duty could be discharged only in accordance with paragraph 3 of the property-management agreement, which provides that

[a]ny delivery by Managing Agent of correspondence, municipal notices, service of process, or other information shall be deemed effectively delivered to Owner by Managing Agent so long as Managing Agent has, within two (2) business days of receipt, deposited such information in the United States mail, with sufficient postage to ensure delivery, addressed to Owner at the above address.

Burkard contended that he suffered damages equal to the fair market value of the Property and the loss of the monthly rental payments on the Property. APM filed its answer, generally denying the claims and asserting affirmative defenses, including statute of limitations.

On May 13, 2021, Burkard filed an amended complaint adding that APM had further breached the property-management agreement by failing to withhold and pay the property taxes on the Property on his behalf in accordance with paragraph 3 of the agreement, which provides the following:

[I]f Owner is not an Arkansas citizen or domestic Arkansas entity, Owner shall deliver to Managing Agent all filings required by Arkansas law to eliminate the need for income tax withholding, including without limitation filings with the Arkansas Department of Finance and Administration pursuant to Act 1982 of 2005 (and regulations thereunder), or, in the alternative, Owner understands, acknowledges, agrees and instructs Managing Agent to withhold for taxation purposes all sums

required by law and, in addition, agrees to reimburse Managing Agent for all tax or accounting expenses incurred in determining the withholding amount and for preparation and filing of applicable forms.

Burkard also asserted a cause of action for breach of fiduciary duty and sought punitive damages. When APM failed to timely answer his amended complaint, Burkard moved for a default judgment, which the trial court denied.

At a pretrial hearing, the trial court concluded that the parties' property-management agreement was ambiguous. Also, the trial court ruled that Burkard's contract claim was not barred by the statute of limitations and thus granted his motion for partial summary judgment on that issue. The trial court further granted Burkard's motion to dismiss with prejudice his cause of action for negligence.

At a jury trial in July 2021, Burkard testified that he had purchased multiple "distressed" properties in several states, including Arkansas; he had renovated those properties; and he had rented them to tenants. Burkard stated that he regularly used property-management companies and negotiated the property-management agreement at issue with APM. Burkard testified that he typically financed his rental properties, so the taxes were automatically paid by the lender through the escrow account. Burkard stated that he had paid cash for the Property and was unaware that Arkansas collects annual real estate taxes. Burkard testified that he did not receive a tax bill in either the year he bought the Property or the following year when he transferred the Property to his limited-liability company because the taxes had been paid as a part of those transactions. Burkard stated that in the third year he owned the Property, he did not receive a tax bill, so he contacted the

Faulkner County Tax Collector and was informed that he did not owe taxes on the Property. Burkard asserted that he did not receive any communications from Faulkner County or the State of Arkansas regarding the tax status of the Property. Burkard testified that he had never had any other property sold for the nonpayment of taxes. Burkard acknowledged that no APM employee had told him that APM would pay the property taxes on his behalf and that he did not ask any APM employee who was responsible for paying the property taxes.

Burkard also testified that APM had an owner portal where monthly statements concerning deposits, repairs, commissions, old rentals, and new rentals were disclosed. Burkard conceded that the monthly statements from APM did not reflect that taxes were being paid out of his rents. Burkard noticed that it had been a few months since he had received any emails from APM's owner portal, so he checked his bank statement to determine whether he had been receiving rent payments. When he noticed rental payments had not been made, he contacted APM in June 2019 and was informed that the Property was under new management. Burkard testified that APM's employee had told him that the renters had brought APM a tax-sale notice in February 2018. Burkard also spoke with Belinda Boyd, APM's owner and manager, who said that APM had attempted to phone him about the tax-sale notice but was unable to reach him.

Burkard testified that he had also not received a copy of the deed conveying his Property to ARChoice and that he had not received notice from APM that it had entered into a property-management agreement with ARChoice. Burkard stated that APM did not notify him that it was terminating his property-management agreement and that he had not

received a final accounting. Burkard testified that he had last received a monthly statement from APM in the owner portal in January 2019. Burkard further testified that APM did not forward the notice regarding entry of the March 2019 decree of confirmation and quiet title on the Property that ARChoice had provided to APM.

Burkard stated that, had he received notice of the pending tax sale, he would have called the Faulkner County Tax Collector and paid the taxes immediately. Burkard testified that the value of the Property in March 2019 would have been about \$125,000 based on comparable sales in the area, square footage, price per square foot in the area, and public-records searches. Burkard further testified that he had lost \$24,025 in rental payments through the time of trial for a total of \$149,025 in actual damages. Including his request for punitive damages, Burkard stated that \$298,050 was the total amount of damages that would compensate him.

Boyd testified that APM manages over 300 properties for seventy-three owners in Little Rock, Cabot, Vilonia, Greenbrier, Conway, and Morrilton. She said that APM does not pay property taxes for any of its other clients and that Burkard had not asked who would pay the property taxes. Boyd insisted that APM had not received notice of the tax sale of the Property in early 2018. She conceded that APM was aware of the tax sale by October 2018 but that she had no evidence that APM had notified Burkard of the tax sale in October. She testified that the Property's tenant had received a letter that ARChoice had purchased the Property and that the tenant had given that letter to APM. Boyd testified that she contacted ARChoice and learned that ARChoice had purchased the Property in June 2018.

Boyd admitted that APM had continued to send Burkard cash-flow statements for three months after it knew that the tax sale had occurred. Boyd testified that APM had sent a final accounting to Burkard as part of the cash-flow statements but that she did not have any evidence to establish that the report had been sent. Boyd said that APM entered into a property-management agreement with ARChoice in late October 2018.

Boyd further admitted that APM had received a copy of the “reg-tag” notice informing it of the quiet-title action in March 2019. She stated that her process server had signed the “red-tag” notice but that ARChoice’s maintenance person had posted the notice on the Property and photographed it. Boyd testified that she assumed Burkard was aware of the tax sale and the quiet-title proceedings.

Boyd acknowledged that, pursuant to the Arkansas Real Estate Commission’s regulations, APM was required to protect and promote Burkard’s interest, deal honestly with him, avoid self-dealing, and disclose conflicts of interest to Burkard. She conceded that under the property-management agreement, APM was required to mail Burkard municipal notices, service of process, code notices, or any other information about the Property. She also admitted that this requirement was unrelated to Burkard’s payment of property taxes.

Boyd admitted that, although APM had received a limited warranty deed from ARChoice in late October 2018, she had not provided it to Burkard. Likewise, she conceded that APM had not provided Burkard with a copy of the code notice in March 2019. She conceded that Burkard had provided a valid change of address to APM and that Burkard’s email address had not changed during the term of the property-management agreement.

Boyd testified that she had called Burkard but that his phone number had changed. She admitted that she did not contact Burkard via email but insisted that she had sent him a text message; however, she had no evidence that she had sent this message. Boyd admitted that she did not attempt to contact Burkard by any other means. She further conceded that APM should have provided Burkard with information concerning ARChoice's purchase of the Property but that it had failed to do so.

The trial court denied APM's motions for directed verdict. The jury was instructed on Burkard's two theories for breach of contract: (1) APM failed to provide him with notice of legal matters concerning the Property, and (2) APM failed to withhold and pay property taxes. The jury was also instructed on Burkard's claim that APM breached its fiduciary duty and on damages. The jury returned a unanimous general verdict in favor of Burkard and awarded \$149,025 in compensatory damages and \$72,000 in punitive damages. The trial court entered judgment accordingly, and APM filed this appeal.

II. *Discussion*

A. Direct Appeal

APM contends that the trial court erred in denying its motions for a directed verdict on Burkard's claim for breach of contract because the property-management agreement did not require it to pay property taxes on Burkard's behalf. To prove a breach of contract, one must show the existence of an agreement, a breach of the agreement, and resulting damages. *Summers Drilling & Blasting, Inc. v. Goodwin, Inc.*, 2020 Ark. App. 194, 598 S.W.3d 853. A person standing in a fiduciary relationship with another is subject to liability to the other for

harm resulting from a breach of the duty imposed by the relationship. *Long v. Lampton*, 234 Ark. 511, 922 S.W.2d 692 (1996).

A directed-verdict motion is a challenge to the sufficiency of the evidence, and when reviewing a denial of a motion for a directed verdict, we determine whether the jury's verdict is supported by substantial evidence. *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004). In determining whether there is substantial evidence, we view the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Advanced Env't Recycling Techs., Inc. v. Advanced Control Sols., Inc.*, 372 Ark. 286, 275 S.W.3d 162 (2008). Because APM challenges the damages element as to both theories of Burkard's breach-of-contract claim and his claim for breach of fiduciary duty, we discuss damages first.

APM asserts that, even if a breach occurred, Burkard's damages were caused by his own failure to pay his property taxes. APM also argues that it had no notice of the tax sale until after the sale had already occurred, so its alleged wrongful acts occurred after Burkard's damages resulting from the sale of the Property were incurred. APM contends that, even if it had received a copy of the notice of tax sale in February 2018 before the property was sold, Burkard had sufficient notice in June 2019 of the quiet-title proceedings; thus, his damages arose from his failure to contest the quiet-title proceedings by March 2020.

In general, damages recoverable for breach of contract are those damages that would place the injured party in the same position as if the contract had not been breached. *Greenway Equip., Inc. v. Johnson*, 2020 Ark. App. 336, 602 S.W.3d 142. Damages must arise

from the wrongful acts of the breaching party. *Id.* Moreover, the judgment must have some relationship to the damages proved. *Id.* Proximate cause is that which, in a natural and continuous sequence, produces damage. *Phillippy v. ANB Fin. Servs., LLC*, 2011 Ark. App. 639, 386 S.W.3d 553. Proximate cause is generally a question of fact, unless the evidence is such that reasonable minds cannot differ. *Id.* Moreover, the burden of proving that a nonbreaching party could have avoided some or all of the damages by acting prudently rests on the breaching party, not only on the question of causation of damages for failure to avoid harmful consequences, but also on the question of the amount of damage that might have been avoided. *Taylor v. George*, 92 Ark. App. 264, 212 S.W.3d 17 (2005). The determination of whether one has acted reasonably in mitigating damages is a question of fact. *Quality Truck Equip. Co. v. Layman*, 51 Ark. App. 195, 912 S.W.2d 18 (1995).

Here, the jury rendered a general verdict—to which APM did not object; therefore, there is no way to allocate the damages award between breach of contract and breach of fiduciary duty. When the jury verdict is rendered on a general-verdict form, we will not speculate about what the jury found if special interrogatories on damages are not requested and a general-verdict form is used. *Aceva Techs., LLC v. Tyson Foods, Inc.*, 2013 Ark. App. 495, 429 S.W.3d 355.

At the pretrial hearing, the trial court concluded that the parties' property-management agreement was ambiguous. Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one equally reasonable interpretation. *Tri-Eagle Enters. v. Regions Bank*, 2010 Ark. App. 64, 373 S.W.3d 399. The

determination of whether ambiguity exists is ordinarily a question of law for courts to resolve. *Id.* When a contract is ambiguous as to the intent of the parties, and the meaning of the language depends on disputed extrinsic evidence, the issue is a question of fact for the jury. *Roetzel v. Coleman*, 2010 Ark. App. 206, 374 S.W.3d 166.

Here, the jury was charged with resolving ambiguities in the parties' property-management contract, and it must have resolved those ambiguities in Burkard's favor. Also, there was no dispute that APM owed a fiduciary duty to Burkard. Whether Burkard could have mitigated his damages was a factual question for the jury, and it found in favor of Burkard. APM argues the weight and credibility of the evidence, but those matters are left to the jury to determine. *Cadillac Cowboy, Inc. v. Jackson*, 347 Ark. 963, 69 S.W.3d 383 (2002). Boyd made several concessions at trial regarding APM's failures with regard to its contract and relationship with Burkard. Burkard testified about the damages he sustained as a result of APM's breach, and the jury apparently believed him in that it awarded compensatory damages commensurate with the amount of economic loss he claims to have sustained. The jury awarded Burkard damages that would put him in the same position that he would have been, had a breach not occurred. Accordingly, we affirm the jury's award of compensatory damages.²

²As for punitive damages, APM argues only that such award should be overturned if the underlying judgment is reversed, but we affirm the judgment. We otherwise express no opinion on the propriety of the award of punitive damages with respect to Burkard's breach-of-contract claim. Punitive damages are not ordinarily recoverable for breach of contract. *McClellan v. Brown*, 276 Ark. 28, 632 S.W.2d 406 (1982).

We next direct our attention to APM's second point on appeal concerning the element of breach. APM argues that the language in the property-management agreement relied on by Burkard, which provided that APM would withhold "for taxation purposes all sums required by law," clearly referred to income taxes—not property taxes. In *Ford Motor Co. v. Washington*, 2013 Ark. 510, 431 S.W.3d 210, our supreme court affirmed when an appellant challenged only one theory of liability when more than one theory had been presented to the jury. Here, APM did not challenge the other bases for liability found by the jury—specifically, the breach of contract related to notice and the breach of fiduciary duty.

In any event, because the jury's finding was rendered on a general verdict form, we have no way of knowing the particular theory on which the jury found APM liable. Thus, if substantial evidence supports the verdict on any one theory, we will affirm. *Bradshaw v. Alpha Packaging, Inc.*, 2010 Ark. App. 659, 379 S.W.3d 536. Here, the jury was presented with substantial evidence that APM's acts and omissions constituted a breach of the property-management agreement on the issue of notice. Viewing the evidence in the light most favorable to the jury's verdict, APM had been placed on notice of the tax sale as early as February 2018. Although Boyd claimed to have attempted to contact Burkard by telephone about the tax sale, the jury was not required to believe her. Moreover, she admitted that she had not tried to contact him by any other means to provide him with pertinent information about the Property as required by the property-management agreement. We conclude that there was substantial evidence that APM breached the property-management agreement by

not providing Burkard with notice of legal issues related to the Property. Accordingly, we affirm the judgment.

APM also argues, albeit separately, that the trial court erred in finding that Burkard's breach-of-contract claim with respect to the withholding and payment of property taxes was not barred by the five-year statute of limitations for written agreements. Ark. Code Ann. § 16-56-111(a) (Repl. 2005). Below, the trial court granted Burkard's motion for partial summary judgment and dismissed with prejudice APM's statute-of-limitations affirmative defense. APM contends on appeal that the trial court erred because Burkard's cause of action accrued October 16, 2014, given that property taxes become delinquent after October 15 of any given year, and Burkard did not file his initial complaint until December 19, 2019. Given the jury's general verdict and our holding on the sufficiency of the evidence to support the jury's verdict, it is not necessary to reach APM's argument. *Trakru v. Mathews*, 2014 Ark. App. 154, 434 S.W.3d 10. Even if the trial court erred in concluding that Burkard's breach-of-contract claim was barred by the statute of limitations with respect to one theory, the jury's verdict still stands as to Burkard's second theory for breach of contract and his claim for breach of fiduciary duty.

B. Cross-Appeal

Burkard contends that the trial court abused its discretion in denying his motion for default judgment because APM failed to timely answer his amended complaint. Because we affirm the judgment in favor of Burkard on direct appeal, his cross-appeal is moot. A case is moot when any judgment rendered would not have any practical legal effect upon a then-

existing legal controversy and presents no justiciable issue for determination by the court.

Ark. Dep't of Human Servs. v. Ledgerwood, 2019 Ark. 100, 571 S.W.3d 1.

Affirmed on direct appeal; affirmed on cross-appeal.

GLADWIN and HIXSON, JJ., agree.

Taylor & Taylor Law Firm, P.A., by: *Andrew M. Taylor* and *Tasha C. Taylor*, for appellant/cross-appellee.

Quattlebam, Grooms & Tull PLLC, by: *Thomas H. Wyatt* and *Meredith A. Powell*, for appellee/cross-appellant.