REL: January 24, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180887

Ex parte Dow AgroSciences LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Andalusia Farmers Cooperative

v.

Robert Ward)

(Conecuh Circuit Court, CV-16-003)

MENDHEIM, Justice.

Dow AgroSciences LLC ("DAS"), a counterclaim defendant below, petitions this Court for a writ of mandamus challenging

the Conecuh Circuit Court's refusal to dismiss a fraud claim filed against it by defendant Robert Ward in an action filed by Andalusia Farmers Cooperative ("AFC") against Ward. Specifically, DAS contends that Ward's fraud claim is plainly barred by the applicable statute of limitations. We agree, and we grant the petition.

I. Facts

Ward, a farmer in Conecuh County, alleges that he has done business with AFC for several years and that AFC

> "send[s] agents or employees including representatives or salesmen from chemical companies and seed providers to my farm to recommend and offer for sale certain seed, fertilizer, chemicals and other goods. On the occasion when I agree to purchase goods from [AFC], they deliver said acceptance of the goods and agreement to pay for them on my account."

On February 1, 2016, AFC sued Ward in the Covington Circuit Court alleging that Ward owed it $99,275.92 for cotton seed it had sold and delivered to him. Ward moved to transfer the case to Conecuh County, and the case was transferred in April 2016.

On August 1, 2018, Ward filed an answer and a counterclaim against AFC. Ward asserted two claims against AFC: "Malicious Prosecution/Abuse of Process" and

"Fraud/Misrepresentation." With respect to the fraud/misrepresentation claim, Ward alleged that in the spring of 2015, before the planting season, "a field representative acting as the agent of [AFC]" visited Ward and "highly recommended" that Ward purchase and plant a "new, expensive" cotton-seed product that "would produce 1000-1500 lbs. of lint cotton per acre." Ward purchased approximately 40 bags of the new seed, which he ultimately planted on approximately 280 acres of farmland. Ward further alleged:

> "When harvest time came [in 2015, he] made about one-third of what he should have, judging this very conservatively. By his estimation the 280 acres, more or less, should have produced at least 900 lbs per acre based on the representation made by [AFC's] agent which at 68 cents per pound should have yielded $171,360.00. What he actually made at harvest was 330 lbs, more or less, per acre which yielded only $62,832.00, a loss to Ward of $108,528.00."

Ward sought compensatory and punitive damages under his fraud/misrepresentation claim.

On October 12, 2018, AFC filed a motion to join DAS as an indispensable party under Rule 19, Ala. R. Civ. P. AFC alleged that the "field representative whom [Ward] incorrectly states is an employee of [AFC] is actually an employee of [DAS]." Thus, AFC asserted that DAS, not AFC, was responsible

for the fraud/misrepresentation alleged by Ward. On October 15, 2018, Ward filed a response in opposition to the motion to join DAS an indispensable party. Ward contended that, although he would not oppose AFC's filing a third-party complaint against DAS, who actually employed the field representative "is immaterial if the said field representative was acting as an agent of [AFC]." Ward argued that DAS was not an indispensable party because the "field representative did not seek or suggest a contractual relationship with Ward on behalf of [DAS]" and because "Ward did not enter into any contract with [DAS] for the purchase of the cotton seed. Ward only contracted with [AFC]." On November 20, 2018, the circuit court granted AFC's motion to join DAS as an indispensable party in the action.

On February 28, 2019, DAS filed a motion to dismiss in which it contended that it should be dismissed from the case because no party had asserted a claim against it. According to DAS, the circuit court held a hearing on this motion on April 12, 2019, and ruled that it would dismiss DAS from the action if neither AFC nor Ward filed a claim against DAS within 10 days.

On April 29, 2019, Ward filed what he styled a "cross-claim" against DAS, asserting the same facts against DAS that he had asserted against AFC in his fraud/misrepresentation claim in the original counterclaim. On May 29, 2019, DAS filed a motion to dismiss Ward's claim, arguing that the claim on its face was barred by the two-year statute of limitations for fraud claims provided in § 6-2-38(l), Ala. Code 1975.[1] DAS elaborated that Ward's allegations plainly indicated that he discovered the alleged fraud no later than "harvest time" in 2015 when the yield for the cotton seed was lower than had been represented to him but that he filed his claim against DAS on April 29, 2019, which was well beyond the two-year statute of limitations. DAS also noted that Ward's claim was not properly a "cross-claim," which is a claim "by one party against a co-party," Rule 13(g), Ala. R. Civ. P., but rather was an "amended counterclaim," a claim originally filed against the opposing party, AFC, that he then also asserted against DAS, which was

[1]Section 6-2-38(l), Ala. Code 1975, provides: "All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years." It is undisputed that a standard fraud claim falls within this subsection.

later added as a party to the case. See Rule 13(h), Ala. R. Civ. P.

On June 19, 2019, Ward filed a response in opposition to DAS's motion to dismiss. In that response, Ward conceded that his claim against DAS was properly denominated an amended counterclaim rather than a cross-claim as he had denominated it in his April 29, 2019, filing. Ward also did not dispute that his claim against DAS was filed more than two years after he had discovered the alleged fraud. Ward argued, however, that his claim was not barred by the two-year statute of limitations "because it was a legal subsisting claim at the time the underlying right of action accrued to [Ward]. Counterclaims relate back to the date [Ward's] action accrued. See Ala. Code (1975) § 6-8-84. Also see Sharp Electronics Corp. v. Shaw, 524 So. 2d 586 (1987)."

On June 21, 2019, the circuit court held a hearing on DAS's motion to dismiss. On June 25, 2019, the circuit court entered an order denying DAS's motion; the order did not explain the circuit court's reasoning. This mandamus petition by DAS followed the circuit court's ruling, and this Court subsequently ordered answers and briefs.

II. Standard of Review

> "A writ of mandamus is an extraordinary remedy, and is appropriate when the petitioner can show (1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court. Ex parte Inverness Constr. Co., 775 So. 2d 153, 156 (Ala. 2000)."

Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001).

III. Analysis

DAS contends that the circuit court erred in denying its motion to dismiss because, it says, by its plain language § 6-8-84, Ala. Code 1975, does not apply to the claim Ward filed against DAS. Therefore, DAS insists, Ward's claim is barred by the two-year statute of limitations in § 6-2-38(l).

In response, Ward contends that a petition for a writ of mandamus is an inappropriate avenue for DAS to seek relief from the circuit court's denial of its motion to dismiss Ward's fraud claim against it. Ward makes two arguments concerning whether a petition for a writ of mandamus is available to review the denial of DAS's motion to dismiss Ward's claim. First, Ward contends that DAS does not have a "clear legal right" to mandamus relief because, he says, the

question "whether the statute of limitations defense was suspended by the operation of Ala. Code [1975,] § 6-8-84 ... is anything but established in case law or long settled." Second, Ward argues that that review by petition for a writ of mandamus is not available because, he says, DAS has another adequate remedy: to file a petition for permissive appeal under Rule 5, Ala. R. App. P. We will defer discussion of Ward's second argument until we have fully explored whether DAS has a clear legal right to the relief it requests, i.e., the dismissal of Ward's claim based on the applicable two-year statute of limitations.

A. Clear Legal Right to Relief

In Ex parte U.S. Bank National Ass'n, 148 So. 3d 1060 (Ala. 2014), we previously entertained -- and rejected -- the argument that a "clear legal right" to relief means that there must be prior definitive statements from this Court on the issue raised by the petitioner. Assuming for the sake of argument that the meaning and application of § 6-8-84 is not well settled, that fact alone does not preclude mandamus relief. As we noted in U.S. Bank:

> "Although the legal issue before us has not been definitively settled, this does not mean that

> mandamus relief is unavailable. In other words, the mere fact that a legal issue is debatable does not change the responsibility of this Court, as a 'court of law,' to decide the law and provides no basis for denying relief."

148 So. 3d at 1065. The U.S. Bank Court went on to explain: "'[T]he limitation of mandamus remedies to refusals to perform clear, mandatory duties is not intended to forestall judicial review of difficult legal issues, but primarily to prohibit intrusion on discretionary functions.'" 148 So. 3d at 1066 (quoting Georgevich v. Strauss, 772 F.2d 1078, 1093 (3d Cir. 1985) (emphasis omitted)). Thus, a lack of authority pertaining to the applicability of § 6-8-84 to the circumstances in this case does not preclude review by petition for a writ of mandamus.

Ward is correct that there are no Alabama cases directly addressing whether § 6-8-84 applies to the circumstances presented in this case. The main cases that have interpreted § 6-8-84 are Sharp Electronics Corp. v. Shaw, 524 So. 2d 586 (Ala. 1987), which Ward cited in the circuit court in support of his position, and Romar Development Co. v. Gulf View Management Corp., 644 So. 2d 462 (Ala. 1994), which overruled Shaw. Both Shaw and Romar involved traditional counterclaims,

that is, counterclaims asserted by a defendant in response to a plaintiff's claim. Thus, those cases do not speak to whether § 6-8-84 applies to Ward's claim against DAS.[2] However, the lack of authority does not impede our inquiry, which is answered by a plain reading of the statute.

Section 6-8-84 provides:

> "When the defendant pleads a counterclaim to the plaintiff's demand, to which the plaintiff replies the statute of limitations, the defendant is nevertheless entitled to his counterclaim, where it was a legal subsisting claim at the time the right

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[2]In Shaw, Sharp Electronics Corporation ("Sharp") filed an action against Stanleigh Shaw to collect a debt on copiers it had sold to Shaw that Shaw allegedly had not paid for. Shaw eventually filed a counterclaim "alleging fraud and misrepresentation as to the quality, serviceability, and productivity of Sharp's copiers." Shaw, 524 So. 2d at 589. The Shaw Court ultimately concluded that § 6-8-84 applied to both permissive and compulsory counterclaims. See Shaw, 524 So. 2d at 590. In Romar, Gulf View Management Corporation ("Gulf View") filed a lawsuit against Romar Development Company, Inc. ("Romar"), and Interim Land Company ("Interim") -- the owners of a road known as "Loop Road" -- seeking an injunction to remove a blockade that agents of Interim had placed on the entrance of Loop Road. Romar and Interim asserted counterclaims against Gulf View seeking restitution for expenses they allegedly incurred in providing sewer taps and for performing maintenance on Loop Road. The Romar Court engaged in an extensive historical analysis of § 6-8-84 and its predecessor statutes as well as the statute's interplay with the Rules of Civil Procedure, and the Court concluded that statutes of limitations are inapplicable to compulsory counterclaims and that, as such, § 6-8-84 applies only to permissive counterclaims.

> of action accrued to the plaintiff on the claim in the action."

DAS argues that, by its plain language, § 6-8-84 does not apply to Ward's claim against it because, it argues, DAS is not a "plaintiff," it has not made any "demand" against Ward, and no "right of action accrued" to DAS because it had no claim against Ward. Instead, DAS contends that it is a "person" that was made a party to Ward's existing counterclaim against AFC under Rule 13(h), Ala. R. Civ. P., which provides: "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20[, Ala. R. Civ. P.]."[3] In short, DAS argues that, because Ward's claim against it is not a "counterclaim to the plaintiff's demand," § 6-8-84 simply does not apply. DAS admits that by "technical formalit[y]" Ward's claim against it is styled as a

[3]The claim by Ward against DAS is not a "third-party" claim under Rule 14, Ala. R. Civ. P., because DAS was already a party to the action at the time Ward asserted his claim against DAS. See Rule 14(a), Ala. R. Civ. P. (stating, in part, that "[a]t any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." (emphasis added)).

"counterclaim" under Rule 13(h), but it maintains that the claim is not a "counterclaim" as that term is intended in § 6-8-84 because, it argues, DAS is not a "plaintiff" who had first filed a claim against Ward. We agree with DAS.

> "The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."

IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992). See, e.g., Tuscaloosa Cty. Comm'n v. Deputy Sheriffs' Ass'n, 589 So.2d 687, 689 (Ala. 1991) (stating that, where plain language is used, a court is bound to interpret the language to mean exactly what it says). The plain language of § 6-8-84 addresses a "counterclaim to the plaintiff's demand, to which the plaintiff replies the statute of limitations."

Rule 13(a), Ala. R. Civ. P., provides, in part:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the

> subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

(Emphasis added.) Rule 13(b), Ala. R. Civ. P., provides that "[a] pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." (Emphasis added.) The common denominator in both of the foregoing subsections of Rule 13 is that a "counterclaim" is a claim against an "opposing party." In Little Narrows, LLC v. Scott, 1 So. 3d 973, 977 (Ala. 2008), this Court concluded that "the term 'opposing party' as used in Rule 13(a) should be read strictly to mean a named party who has asserted a claim against the prospective counterclaimant in the first instance." See also Ex parte Water Works & Sewer Bd. of Birmingham, 738 So. 2d 783, 792 (Ala. 1998) (quoting with approval Champ Lyons, Jr., Alabama Rules of Civil Procedure Annotated § 13.3, pp. 281-82 (3d ed. 1996), for the observation that "'[t]he most obvious determination as to who is an "opposing party" relates to status as an adversary. This question has been answered by inquiry as to whether the person asserting the counterclaim against a party has first

been made the object of a claim by that party.'"). Moreover, at the time the legislature enacted the current version of § 6-8-84 in the 1975 recodification of Alabama's statutory law, the Black's Law Dictionary definition of "plaintiff" was "a person who brings an action; the party who complains or sues in a personal action and is so named on the record." Black's Law Dictionary 1309 (4th ed. 1968).

DAS does not fit the ordinary understanding of a "plaintiff" or of an "opposing party" against whom a "counterclaim" is brought. DAS did not bring an action or any claim against Ward. Instead, DAS is a party that was involuntarily joined as an indispensable party to the case. Consequently, § 6-8-84 -- Ward's only defense in the circuit court to the two-year statute of limitations in § 6-2-38(l) -- does not apply to Ward's claim against DAS.

> "'The very basic and long settled rule of construction of our courts is that a statute of limitations begins to run in favor of the party liable from the time the cause of action "accrues." The cause of action "accrues" as soon as the party in whose favor it arises is entitled to maintain an action thereon.'"

Ex parte Floyd, 796 So. 2d 303, 308 (Ala. 2001) (quoting Garrett v. Raytheon Co., 368 So. 2d 516, 518-19 (Ala. 1979)).

A cause of action for fraud accrues, and "the limitations period begins to run[,] when the plaintiff was privy to facts which would '"provoke inquiry in the mind of a [person] of reasonable prudence, and which, if followed up, would have led to the discovery of the fraud."'" Auto-Owners Ins. Co. v. Abston, 822 So. 2d 1187, 1195 (Ala. 2001) (quoting Willcutt v. Union Oil Co., 432 So. 2d 1217, 1219 (Ala. 1983), quoting in turn Johnson v. Shenandoah Life Ins. Co., 291 Ala. 389, 397, 281 So. 2d 636, 643 (1973)).

It is clear from the facts alleged in Ward's original counterclaim that his fraud/misrepresentation claim accrued at harvest time in 2015. Ward did not file his fraud claim against DAS until April 29, 2019. Therefore, it is clear from the face of Ward's counterclaim that his claim against DAS was filed outside the applicable two-year statute of limitations. Accordingly, DAS has a clear legal right to the dismissal of Ward's fraud/misrepresentation claim against it.

B. Other Adequate Remedy

Ward also argues that mandamus review is not available for the denial of DAS's motion to dismiss because, he says, DAS has another adequate remedy, which is to file a petition

for permissive appeal under Rule 5, Ala. R. App. P. In Ex parte Hodge, 153 So. 3d 734 (Ala. 2014), we entertained, and rejected, this type of argument in the context of a statute-of-limitations defense. In Hodge, this Court permitted mandamus review of a trial court's denial of a motion to dismiss contending that the plaintiff's malpractice claim was barred by the four-year statute of repose contained in § 6-5-482(a), Ala. Code 1975. Like Ward, the plaintiff in Hodge argued that the defendants' petition "should be denied because the defendants failed to seek a permissive appeal pursuant to Rule 5, Ala. R. App. P." 153 So. 3d at 745. Quoting with approval Justice Murdock's special concurrence in Ex parte Alamo Title Co., 128 So. 3d 700, 714 (Ala. 2013), the Hodge Court explained:

> "'Rule 5 is ... limited to rulings involving "questions of law" and, specifically, unsettled questions for which there is a ground for substantial difference of opinion. Such uncertainty simply is not characteristic of most disputes over subject-matter jurisdiction, in personam jurisdiction, immunity, venue, discovery, and fictitious-party practice in the context of a statute-of-limitations concern, all of which are subjects as to which legal principles are well established and as to which we repeatedly have held

> that mandamus relief may be appropriate. ...
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> "'... [T]here is no right to a Rule 5 certification. Granting "permission" to appeal an interlocutory order is within the wide discretion of the trial judge, and a question exists as to whether appellate relief would even be available on the ground that the trial court exceeded some measure of discretion. Even if the trial court gives its consent, this Court must agree to accept the question certified. See Rule 5(c), Ala. R. App. P.'"

153 So. 3d at 746-47 (quoting Ex parte Alamo Title Co., 128 So. 3d at 714-15 (Murdock, J., concurring specially) (first emphasis added)).

The Hodge Court's reasons for rejecting a Rule 5 appeal as an adequate remedy apply in this case. "The question presented here is not the type of unsettled question of law for which there is a ground for substantial difference of opinion that is generally considered in a Rule 5 permissive appeal." 153 So. 3d at 748. As we explained in Part A of this analysis, the question of the applicability of § 6-8-84 to Ward's claim against DAS is straightforwardly settled by applying the plain language of the statute. There is no ground for a substantial difference of opinion that the statute does not apply to Ward's claim. As DAS put it, "[t]he

legal question presented in this petition is not 'unsettled,' even if it is unaddressed." Furthermore, "there is no guarantee of Rule 5 certification," because both certification by the circuit court and granting consent to appeal by this Court are discretionary. 153 So. 3d at 748. Finally, "[i]f appeal [was its] only remedy [DAS] would potentially face the substantial expense, time, and effort of litigating a matter as to which [it has] demonstrated from the face of [Ward's counterclaim] a clear legal right to have dismissed." 153 So. 3d at 749. As we have said, it is clear from the face of Ward's counterclaim that his fraud/misrepresentation claim against DAS is barred by the two-year statute of limitations in § 6-2-38(l). Thus, just as this Court did in Hodge, we conclude that a Rule 5 appeal is not an adequate remedy and that mandamus is DAS's only adequate remedy for review of the circuit court's judgment.

IV. Conclusion

DAS has demonstrated on the face of Ward's counterclaim a clear legal right to the dismissal of Ward's claim against it because Ward filed the claim beyond the two-year statute of limitations for fraud claims and § 6-8-84 plainly does not

apply to negate the statute of limitations here. For the reasons articulated in Hodge, neither an appeal pursuant to Rule 5 nor an appeal from a final judgment following further litigation is an adequate remedy in this case. Therefore, we grant DAS's petition and direct the circuit court to enter an order dismissing Ward's fraud/misrepresentation claim against DAS.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, and Stewart, JJ., concur.

Shaw, J., concurs in the result.

Mitchell, J., recuses himself.