IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60147
(Summary Calendar)

GERARD J.W. BOS & CO. and
TRUSTMARK NATIONAL BANK,

Plaintiffs-Appellants,

v.

HARKINS & COMPANY, ET AL.,

Defendants,

HARKINS & COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
(No. J90-0263(W))

(January 25, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[*]

In this appeal, Plaintiffs-Appellants Gerard J.W. Bos & Co. ("Bos") and Trustmark National Bank ("Trustmark") appeal the district court's order granting summary judgment in favor of Defendant-Appellee Harkins & Company ("Harkins"), based on that court's alternative holdings that Harkins owed no duties to Bos or

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Trustmark and that the claims were time barred. Agreeing that the claims are barred by the statute of limitations, we affirm.

I

FACTS AND PROCEEDINGS

In 1978, Harkins petitioned the Mississippi State Oil and Gas Board ("Board") to force-integrate into a single drilling unit all mineral interests in an 640-acre tract in Jefferson Davis County, Mississippi (the "Unit"). The Board granted Harkins' petition, designated that company as the "unit operator," and vested it with the exclusive right to drill for and produce oil and gas from the Unit.[1] Bos is entitled to receive royalty payments for minerals extracted from some of the acreage located in the Unit.[2] Trustmark is an assignee of Bos' right to receive those royalties.

Located at various depths beneath the surface of the Unit are several geological strata containing natural gas. Pertinent to the instant appeal are the gas zones referred to as the First Hosston ("First Hosston") and the Harker ("Harker").

In May 1979, Harkins drilled the "17-8 Well" to extract various minerals in which Bos owns a royalty interest. This well was completed in the Harker zone, from which over 9.8 billion cubic feet of gas was ultimately recovered and for which gas Bos was paid its proportionate share as royalties.[3]

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[1]For additional background on this order, see Gerald J.W. Bos & Co. v. Harkins & Co., 883 F.2d 379 (5th Cir. 1989).

[2]See MISS. CODE ANN. § 53-3-7 (1972).

[3]Production from the 17-8 Well ceased in 1987.

The 17-8 Well drilled through the First Hosston on its way to the Harker and total depth. Harkins initially tried to complete the well in the First Hosston, but gave up after several unsuccessful attempts and concentrated solely on completing in and producing gas from the Harker. Harkins recovered gas from the First Hosston through other wells in the vicinity in which it owned a mineral interest, but in which Bos apparently owned no interest.

One month after drilling the 17-8 Well, Harkins filed with the Board a well completion report which stated that the 17-8 Well had been completed in the Harker. In that document Harkins did not report that it had attempted unsuccessfully to complete in the First Hosston.

Harkins also compiled numerous logs for the 17-8 Well that recorded certain characteristics of the geological conditions encountered at various depths. Information contained in these logs is often used by petroleum engineers to predict whether a well can and should produce gas at a particular depth from a specific zone. Many of the logs for the 17-8 Well were made available to the public in mid-1979 by the Geological Data Center's Electric Log Library ("Log Library"), and by Ridgway, Inc. ("Ridgway"), a private company that maintains a library of well logs.[4] Harkins could have requested that this information remain confidential for a year and thirty days, but instead made it publicly available less than three months after completing the 17-8 Well.

[4]Ridgway charges a nominal fee of $10 per copy of well logs. The Board also provides logs on an "established and published cost basis."

According to Board rules, Harkins also was required to file the logs for the 17-8 Well with the Board within 30 days after well completion,[5] but it failed to do so. It ultimately filed the logs with the Board in November 1982.

In mid-1988, Bos and Trustmark hired a petroleum engineer, Kent Ford, to make various calculations pertinent to another lawsuit that they were then prosecuting against Harkins. To perform those calculations, Ford obtained copies of the logs of the 17-8 Well from the Board and Ridgway. Ford stated that in May 1988, while he was reviewing those logs, "it just jumped out at me that here's a zone [the First Hosston] that looks like a tremendous producer," and he was surprised that Harkins had not attempted to tap into that pool from the 17-8 Well. Ford noted that other wells in the area had been "dual completed," i.e., completed to produce simultaneously from two separate gas zones, and expressed his professional opinion that Harkins should have attempted to perforate both the First Hosston and the Harker from the 17-8 Well. Soon thereafter Ford reported these findings and opinions in a written report to Bos and Trustmark.

In the spring of 1989, Bos and Trustmark obtained copies of Harkins' daily drilling reports (known as "morning reports") for the 17-8 Well. From these reports, Ford learned that Harkins had indeed tried to complete the 17-8 Well in the First Hosston, but that the company had encountered difficulties and abandoned these

[5]See Board R. 21(a), Well Logs ("Copies of electrical surveys or logs or radioactive surveys or logs . . . shall be filed with the Board within thirty (30) days . . . .").

efforts. Based on the information contained in those reports, Ford later stated that he maintained "basically the same opinion. It was just slightly changed in that before I felt like [Harkins] should have attempted a completion in the First Hosston. After I found out . . . they did attempt a completion . . . then my opinion was that they didn't go far enough. . . . They did not use all the available procedures that a prudent operator, in my mind, would have used to make the First Hosston commercial in that well."

Bos and Trustmark filed the instant suit in Mississippi state court in April 1990 from which court the case was subsequently removed to federal court. In their complaint, Bos and Trustmark raise various claims sounding in tort, including, inter alia, that Harkins violated various duties it owed to Bos by "fail[ing] to complete the [17-8 Well] in the First Hosston." In response, Harkins moved for summary judgment, arguing, inter alia, that the claims were time barred. Bos and Trustmark responded that (1) it was not until May 1988 that they learned of Harkins' decision not to attempt to produce gas from the First Hosston even though the geological and engineering information then available to Harkins indicated that doing so might be commercially practicable, and (2) the limitations period was tolled because (a) Harkins fraudulently concealed the cause of action by failing to "fully disclose . . . the presence of a producible strata in the First Hosston" and (b) Bos and Trustmark could not by reasonable diligence have earlier discovered Harkins' concealment.

The district court disagreed, concluding, inter alia, that the

claims were time barred, and granted Harkins' motion for summary judgment. This appeal followed.

II

ANALYSIS

A. Standard of Review

On appeal from a summary judgment, we apply the same standard as the district court did below.[6] Summary judgment will be granted if the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[7]

B. Statute of Limitations

The Mississippi statute applicable to the instant claims provides that an action claiming a breach of a fiduciary duty (or negligence for failure to act as a prudent operator) "shall be commenced within six years next after the cause of such action accrued."[8] Under Mississippi law, claims generally accrue upon breach of a duty arising in tort.[9]

Bos and Trustmark assert that Harkins breached a duty allegedly owed to them by failing to complete or test sufficiently the 17-8 Well in the First Hosston. It is undisputed, however,

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[6] Ruiz v. Whirlpool, Inc., 12 F.3d 510, 513 (5th Cir. 1994).

[7] Fed. R. Civ. P. 56(c).

[8] Miss. Code Ann. § 15-1-49 (1972) (amended 1989). For causes of action accruing on or after July 1, 1989, § 15-1-49, as amended, applies.

[9] M.T. Reed Constr. Co. v. Jackson Plating Co., 222 So. 2d 838, 840 (Miss. 1969).

that by May 1979 the 17-8 Well was completed in the Harper and was not completed in any other zone, including the First Hosston. Even assuming arguendo that Harkins did injure Bos and Trustmark by breaching a duty owed them (an issue that is far from clear based on the present record), such a claim would be barred by the statute of limitations because the instant action was not commenced until April 1990))almost eleven years after the date of the alleged breach))unless the limitations period had been earlier tolled.

C. FRAUDULENT CONCEALMENT

Bos and Trustmark insist that the limitation period was tolled because the information upon which the claims are based was fraudulently concealed by Harkins. Under Mississippi law,

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.[10]

The district court concluded that Bos and Trustmark failed to establish that (1) Harkins concealed Bos and Trustmark's cause of action, and (2) Bos and Trustmark through reasonable diligence could not have discovered the cause of action.

At the outset we must identify precisely what it is that Bos and Trustmark complain of in this suit. In their complaint, they allege, inter alia, that "Harkins did not fully disclose to [Bos and Trustmark] the presence of producible strata in the First

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[10]MISS. CODE ANN. § 15-1-67 (1972); see Stevens v. Lake, 615 So. 2d 1177, 1181 (Miss. 1993).

Hosston Pool." The failure to complete in and produce from that zone, continue Bos and Trustmark, deprived them of the royalties from their share of the commercially producible gas from the First Hosston.

This claim is timely, contend Bos and Trustmark, because they were totally unaware that Harkins had acted in a manner that adversely affected their interests in the First Hosston until May 1988, when they retained Ford to study the logs of the 17-8 Well in relation to another matter. But the district court disagreed, finding that by no later than July 1979, Harkins had made available publicly the information upon which the instant claims are founded. We in turn agree with the district court.

It is undisputed that as of July 1979, well logs readily available to Bos and Trustmark (and to the general public) from the Log Library and Ridgway revealed that the 17-8 Well might be capable of producing from the First Hosston stratum, but the well completion report showed that Harkins had not caused that to be done. In fact, Bos and Trustmarks' own expert testified that based on these same well logs it "jumped out" at him that Harkins should have attempted to perforate the First Hosston from the 17-8 Well. And even if filing with the Log Library and Ridgway were not sufficient, these logs became a matter of public record when they were filed with the Board in November 1982))over seven years before this suit was filed. Under Mississippi law, "the rule of concealed

fraud can not apply to those things that are of public record."[11] As the evidence is uncontroverted that the information essential to the current claims was available to the general public in 1979))and became a matter of public record in 1982 when it was filed with the Board))Bos and Trustmark have failed to raise a genuine issue that Harkins in any manner whatsoever concealed or failed to disclose the instant cause of action.

On appeal, Bos and Trustmark point out that it was not until they obtained and reviewed the morning reports that they learned that Harkins had attempted but failed to recover First Hosston gas from the 17-8 Well. Bos and Trustmark contend that Harkins' failure to report this information was tantamount to fraudulent concealment as Harkins allegedly owed them fiduciary duties.[12] This argument fails for at least two reasons.

First, Bos and Trustmark did not raise this particular theory of fraudulent concealment below; they argued consistently that Harkins actively hid the cause of action by concealing the logs for the 17-8 Well))not by concealing the morning reports.[13] It is well

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[11]McMahon v. McMahon, 157 So. 2d 494, 500 (Miss. 1963); see Howard v. Sun Oil Co., 404 F.2d 596, 600 (5th Cir. 1968).

[12]Bos and Trustmark do not argue that Harkins was required to provide the morning reports to them; they argue only that Harkins concealed the potential to extract gas from the First Hosston through the 17-8 Well.

[13]In their complaint and in briefs, Bos and Trustmark repeatedly maintained that they first became aware of their claims in May 1988, when Ford was reviewing the logs for the 17-8 Well in relation to another matter. As the morning reports were not produced until the spring of 1989, they clearly were not the key to the cause of action.

established that parties to an appeal from a summary judgment cannot advance new theories to secure reversal of that judgment.[14]

Second, Bos and Trustmark's position is not supported by the record. The record makes clear that, as early as July 1979 and no later than 1982, the information essential to recognition of the existence of the cause of action alleged here was publicly available: (1) logs readily available to Bos and Trustmark reflected that the 17-8 Well might be capable of producing gas from the First Hosston, and (2) the completion report for the 17-8 Well stated that Harkins completed the well in the Harker only))and not in the First Hosston or any other zone. The subsequent discovery of the information contained in the morning reports may have helped to explain why Harkins never dually completed the 17-8 Well in the Harker and the First Hosston, but the data available prior to 1983 were sufficient to alert Bos and Trustmark to the claims that they eventually advanced in this suit))that the 17-8 Well had encountered a potentially producible stratum in the First Hosston, but that Harkins had chosen not use the 17-8 Well to extract gas from that pool.[15]

It is equally clear that the district court correctly concluded that Bos and Trustmark failed to introduce sufficient

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[14]See Little v. Liquid Air Corp., 37 F.3d 1069, 1071 n.1 (5th Cir. 1994) (en banc).

[15]The information contained in the morning reports describes Harkins' operation of the 17-8 Well, but it does not reveal the existence of facts creating a new cause of action. But even if it did, Bos and Trustmark failed to plead (or amend their complaint to include) any new or different cause of action based those operations.

evidence to raise a jury issue regarding their diligent pursuit of their claims. As discussed above, they could have obtained from publicly accessible sources all of the information necessary to reveal and pursue their current claims as early as July 1979. It was not until almost nine years later))in April 1988))that they finally retained a petroleum engineer to analyze the publicly available information regarding the 17-8 Well. And even then it took two more years for Bos and Trustmark to bring their claims to court! Such torpid factfinding and pursuit of claims falls well short of the reasonable diligence that is required of a plaintiff seeking to invoke the fraudulent concealment tolling provision available under Mississippi law.

As we conclude that the district court correctly ruled that the claims of Bos and Trustmark are barred by the statute of limitations, we need not))and therefore do not))reach the issues of the nature and existence of Harkins' duty to Bos and Trustmark or of its alleged breach thereof. The district court's summary judgment dismissing with prejudice all claims of Bos and Trustmark is

AFFIRMED.