5-9-2008

Order on Defendants' Motion to Strike (JAMES & JACKSON LLC)

Alice D. Bonner
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES & JACKSON LLC, individually and derivatively on behalf of MBC, GOSPEL NETWORK, LLC., Plaintiffs, v. EVANDER HOLYFIELD, JR., WILLIE E. GARY, CECIL FIELDER, LORENZO WILLIAMS, THOMAS WEIKSNAR, CHAN ABNEY, LORI METOYER-BROWN, and RICK NEWBERGER, Defendants.	Civil Action No.: 2006CV124372

ORDER ON DEFENDANTS' MOTION TO STRIKE

This case is before the Court on Defendants' Motion to Strike portions of Plaintiff's First Amended Complaint. Specifically, Defendants petition this Court to strike Plaintiff's characterizations of the Delaware proceeding between it and Willie Gary, LLC over MBC as instructing, determining, or deciding that MBC should be judicially dissolved and an auction conducted.

A motion to strike is governed by O.C.G.A. § 9-11-12(f) where a party may move "within 30 days after the service of the pleading upon him" to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." O.C.G.A. § 9-11-12(f) models the language of Section 12(f) of the Federal Rules of Civil Procedure, thus federal cases addressing motions to strike may be relevant to this Court's analysis. Contrary to Defendants' position, however, Georgia's case law is clear that a motion to strike made by counsel outside of the 30 day window expressly provided in O.C.G.A. § 9-11-12(f) is untimely. Potpourri of Merrick, Inc., v. Gay Gibson, Inc., 132 Ga.

App. 565, 566 (1974) ("As the motion here was not made within 30 days of service upon plaintiff, the court did not abuse its discretion in refusing to strike these defenses, even if they were legally insufficient."). Accordingly, Defendants' Motion to Strike is hereby **DENIED** as untimely filed.

In addition, Defendants urge the Court, under O.C.G.A. § 9-11-12(f), to strike language from a pleading "upon a Court's own initiative at any time". Thus, the Court will review Plaintiff's Complaint to determine if any language is "redundant, immaterial, impertinent, or scandalous." O.C.G.A. § 9-11-12(f).

As highlighted by Defendants, the Court focused upon the portions of the Complaint construing the Delaware action as recommending judicial dissolution of MBC. After carefully reviewing the portions of the Delaware Chancery Court transcripts provided, it is clear that the Chancery Court contemplated either a mediated resolution of the dispute or dissolution of MBC, possibly through an auction (rather than a put or call option). The transcripts of the proceedings convey that dissolution was a very real possibility and that the parties were taking initial steps to investigate and structure an auction to facilitate it. It is also important to note that at the time of the Delaware action, Willie Gary, LLC was the party requesting judicial dissolution.

While Plaintiff's characterization in its Compliant in this action that Chancellor Strine "instructed", "determined", or "decided" that dissolution and an auction were the appropriate remedies for the parties is an extrapolation of the direction of the case, it is also typical puffing and posturing found in pleadings. It is not, however, grounds to strike the pleadings because such characterizations are not patently false, nor, is it clear that the Delaware action will "have no possible bearing upon the subject matter of the litigation... ." Medlin v.

Carpenter, 174 Ga. App. 50, 55, (1985); see also Smith v. Morris, Manning, & Martin, 254 Ga. App. 355, 357 (2002) (Upholding a trial court's order to strike language in a pleading because it was "patently false and [a] sham pleading"). Because such motions are not favored in Georgia and the case law urges the Court to exercise caution in striking pleadings, the Court declines the opportunity to act "upon its own initiative" and strike Plaintiff's Complaint. See Northwestern Mut. Life Ins. Co. v. McGivern, 132 Ga. App. 297, 302 (1974) (holding that "if there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied...").

SO ORDERED this 8 day of May, 2008.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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