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Order on Defendant Katten's Motion to Dismiss (ALTHEIDA MAYFIELD)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
OCT 12 2009
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ALTHEIDA MAYFIELD, as an Individual; and as Trustee of the TRUST; et al.,

Plaintiffs,

v.

SUSSEX FINANCIAL GROUP, INC. et al.,

Defendants,

Civil Action File No. 2009CV166048

ORDER ON DEFENDANT KATTEN'S MOTION TO DISMISS

Defendant Katten, Muchin, Zavis (known as Katten, Muchin, Roseman, LLP since May 2, 2005) ("Katten") has filed a Motion to Dismiss. The applicable standard is "whether the allegations of the complaint, when construed in the light most favorable to the plaintiff with all doubts resolved in the plaintiff's favor, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts." Baker v. McIntosh County Sch. Dist., 264 Ga. App. 509, 509 (2003); Croxton v. MSC Holding, Inc., 227 Ga. App. 179, 180, (1997); Mathews v. Greiner, 130 Ga. App. 817,821(1974).

Plaintiffs consist of Altheida Mayfield, a co-trustee and a beneficiary, and other beneficiaries of the Mayfield Family Trust ("the Trust"). The Trust was set up by Curtis Lee Mayfield, Jr. and organized under the laws of the state of Georgia. Mr. Mayfield was a famous American singer-songwriter and record producer who died in 1999. This case arises out of controversies over the handling of the Trust assets by Defendants.

Marvin Heiman ("Heiman") served as a co-trustee of the Trust from 1999-2003. Heiman is not named in this suit because the parties settled with him in an earlier suit.

Defendant Arnold Harrison ("Harrison") is an attorney in Chicago, Illinois who performed legal services for the Trust. Harrison was a partner with the law firm Katten, Muchin, Zavis (known as Katten, Muchin, Roseman, LLP since May 2, 2005) ("Katten") from 1981 to June, 2001 and with Jenner & Block, LLP ("Jenner & Block") from June 2001 to the present. Defendant Friduss, Lukee, Schiff & Co., P.C. ("Friduss") performed accounting services for the Trust

Most of Plaintiffs' Complaint centers on a loan transaction which closed in May 2000. In that transaction, the Trust received proceeds from a loan to be repaid from the royalties from certain copyright interests held by the Trust. Plaintiffs allege that all of the Defendants owed them fiduciary duties with respect to the work they performed on behalf of the Trust, and that Defendants have breached those fiduciary duties. Plaintiffs are also alleging breach of trust.

Plaintiffs filed this case as a purported renewal action of a case they filed in 2004 under civil action number 2004-CV-95253 ("2004 Action"). Plaintiffs voluntarily dismissed their 2004 Action without prejudice in November 2008 and filed this case on March 16, 2009.

Also on March 16, 2009, two of Curtis Lee Mayfield Jr.'s other children filed a case under civil action number 2009-cv-166043 as a purported renewal action of a case they brought in 2007 under civil action number 2007-CV-128087 ("2007 Action"). The 2007 Action was voluntarily dismissed without prejudice in November 2008. The purported renewal action filed by Curtis Lee Mayfield, Jr.'s two other children asserts virtually identical claims as those asserted in this case against these Defendants.

Plaintiffs state vehemently that they are not claiming that Katten committed legal malpractice; they also stated at oral argument that they are not claiming fraud or conspiracy. Rather, they contend that there was a breach of fiduciary duty or breach of trust by Katten.

Katten's Motion to Dismiss sets forth several different grounds for dismissal. It claims that this case is barred by operation of O.C.G.A. §9-11-41(a)(3). This statute provides that the second dismissal of an action operates as an adjudication on the merits. Both the 2004 Action and the 2007 Action were dismissed by the respective plaintiffs and Katten was a defendant in both cases. However, the plaintiffs in the 2004 Action are not the same as the plaintiffs in the 2007 Action, and therefore, O.C.G.A. §9-11-41(a)(3) is not applicable because there has not been two dismissals by the same plaintiffs.

Katten also contends that the statute of limitations has run on the breach of fiduciary duty claim and the breach of trust claim. The statute of limitations for a breach of fiduciary duty is 4 years from the date Plaintiffs knew of the claim and 6 years for a breach of trust claim. In November 2002, Plaintiffs sued Heiman, the co-trustee, alleging essentially the same claims, thus Plaintiffs knew of the claims against these Defendants in November 2002. The Complaint in this case was filed March 16, 2009, therefore the statute for both claims would have run by the time the Complaint in this case was filed. Plaintiffs, however, contend that this case is a renewal of the 2004 Action and therefore, relates back to the 2004 Action for purposes of the statute of limitations. Katten counters that this case cannot be a renewal of the 2004 Action because service was never proper in the 2004 Action. Under Georgia's Long Arm Statute, service upon an out-of-state defendant must conform to the law of the state where service is had. Illinois permits service by a sheriff or, for Cook County, by a special process server appointed by the court. Here a Fulton Superior Court judge issued an order appointing a special process server. Katten argues that the appointment must be by a Cook County judge and that the number of the certificate issued to the process server must be on the order.

> [T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint

> and present defenses and objections. Henderson v. United States, 517 U.S. 654, 671-672 (1996) quoted in Georgia Pines Community Svc. Bd. v. Summerlin, 282 Ga. 339, 343 (2007).

This Court will not dismiss a case upon such a technical ground where Katten had notice of the claims. In Takiff v. Takiff, 683 So.2d 595 (Fla.App. 3 Dist 1996), a Florida appellate court made much the same decision. Thus, despite Katten's argument regarding service, the Court finds that this case may relate back to the 2004 Action for purposes of the statute of limitations.

At oral argument, Katten's attorney argued that this court has no personal jurisdiction over Katten. Harrison who was a partner at Katten served as the attorney for the Trust. Although Harrison was hired by Heinman, the co-trustee and an Illinois resident, he and Katten provided legal services to the Trust which is a Georgia trust. If one decides to represent a Georgia trust, one should recognize the possibility of being haled into a Georgia court. Since its contacts with the Trust are the gravamen of the claims here, its representation of a Georgia trust and the contacts with the Georgia co-trustee and the former attorney for Plaintiffs in Georgia are sufficient to determine that it was transacting business within Georgia under section (1) of O.C.G.A. §9-10-91.

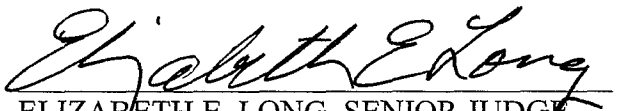
Turning to the substantive claims of Plaintiffs, neither the Complaint nor the Amended Complaint allege any roles of the co-trustee Heiman that were delegated to Harrison or Katten. Harrison and Katten performed legal services for the Trust, not trust duties. Thus, the breach of trust claim must be dismissed.

As lawyers for the Trust, Harrison and Katten had a fiduciary relationship with the Trust. Plaintiffs argue that having a fiduciary relationship with the Trust does not necessarily equate with Harrison having a fiduciary relationship with Plaintiffs, beneficiaries of the Trust, citing Rhone v. Bolden, 270 Ga.App. 712 (2004). In Rhone, the appellate court found that the attorney

defendants owed no duty to Bolden, a beneficiary of the estate, because Bolden's interests were antagonistic to their client's (the estate administrator) interests. This case is more analogous to the example that court gave of a lawyer representing the guardian ad litem of a minor where the attorney owes a duty also to the minor, who is the real party at interest. The facts alleged seem to sound in malpractice, if anything, but Plaintiffs are insisting that they are not claiming malpractice. Thus, on a motion to dismiss, this Court cannot dismiss the breach of fiduciary claim against Katten.

The breach of trust claim only is hereby **DISMISSED**.

SO ORDERED this 12th day of October 2009.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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