11-17-2008

Corrected Order on Motion for Summary Judgment (LISA WALSH)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

LISA WALSH AND HARRY WALSH,

Plaintiffs,

v.

JOHN WOODS, ET AL.,

Defendants,

Civil Action File No. : 2007CV135987

CORRECTED ORDER ON MOTION FOR SUMMARY JUDGMENT

The parties in the above-styled action appeared before the Court on October 3, 2008, to present oral argument on Defendants' Motion for Summary Judgment. At the summary judgment hearing, the Court authorized the production of certain work email records of Defendant John Woods held by Oppenheimer & Co., Mr. Woods' primary employer. In addition, the Court granted the parties leave to file supplemental briefs based upon such documents and in response thereto. After reviewing the briefs submitted on this motion, including the supplemental briefs; the record of the case; and the oral arguments presented by counsel, the Court finds as follows:

This case involves a series of investments by Plaintiffs Lisa and Harry Walsh into various sport training and apparel businesses (the Corporate Defendants) with Defendant John Woods.

In the fall of 2005, Defendant Woods, a securities broker, invested in and developed several Velocity Sports franchise locations operating as sports agility training centers in Chattanooga ("Chattanooga") and Nashville ("Cool Springs"). In addition, Defendant Woods bought Honeycutt Sports Inc.,[1] ("Honeycutt"), to develop sporting apparel retail opportunities at the franchise locations. Around this same time, Plaintiffs, former car dealership owners, became interested in investing in

[1] Honeycutt Sports, Inc., is the named Defendant in this action although there is some question regarding whether this is the entity's official registered name.

Velocity Sports and attended a Velocity Sports corporate meeting to learn about franchise ownership opportunities. Plaintiffs arranged for a meeting with Defendant Woods in December, 2005, because Plaintiffs were interested in obtaining franchise rights and opening a location in nearby Lawrenceville while Defendant Woods was interested in a Duluth location. In early 2006, Plaintiffs and Defendant Woods agreed to invest together to develop a single franchise location in the Duluth area. In addition, Plaintiffs invested in several other related entities formed by Defendant Woods and operating within the sports training and apparel industries. Plaintiffs first invested $296,000.00 in Sports Science CH, Inc., ("Sports Science")[2] and soon thereafter increased their investment in Sports Science and other related entities to a total of $946,000.00.

After Plaintiffs' initial investment in April, 2006, Plaintiffs were elected directors of Sports Science. In addition, Lisa Walsh was elected President, a paid position, in addition to Secretary, and Harry Walsh was elected Vice President. Both continue to serve as directors, however, as of January, 2008, neither is serving as an officer of the company.

In May, 2006, Plaintiffs expressed to Defendant Woods their concern regarding their large investment in the various entities. In a May 10, 2006, email from Lisa Walsh to Defendant Woods she communicated their concerns over their exposure and a desire to be bought out by Defendant Woods. The parties' relationship became increasingly strained over the course of the summer. While no complaints were raised during this time period, Plaintiffs now complain of incomplete information, employee incompetence, and low-performing franchises discovered during this time period. By August, 2006, the parties' relationship had completely deteriorated. About this time, Defendant Woods purchased Velocity Sports under the belief that the franchises would operate better under different management.

[2] At a shareholder meeting in April 2006, the individual franchise locations of Chattanooga, Cool Springs, and Duluth became subsidiaries of Sports Science.

In this lawsuit, Plaintiffs allege that they were given false information before investing with Defendant Woods and incomplete information after investing with him. In addition, Plaintiffs allege that they do not know how their equity investment was spent or whether proper corporate forms were observed. Plaintiffs also challenge several transactions as inappropriately benefiting Defendant Woods personally. Finally, Plaintiffs complain of Defendant Woods' mismanagement, of his exclusion of Plaintiffs from management, and of his taking certain actions without their approval. Specifically, Plaintiffs allege that Defendant Woods breached his fiduciary duties owed to them, committed fraud, and acted negligently. In addition, Plaintiffs petition this Court to dissolve the Corporate Defendants for misappropriation or waste of assets.

STANDARD

To prevail on a motion for summary judgment, the moving party must demonstrate that "there is no genuine issue of material facts, viewed in the light most favorable to the non-moving party, to warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491 (1991). See also, Danforth v. Bullman, 276 Ga. 531, 532 (2005).

COUNT 1: BREACH OF FIDUCIARY DUTY

Plaintiffs allege that Defendant Woods failed to use their investments properly and solely for corporate purposes.

Prior to their investment, Defendant Woods did not owe Plaintiffs a fiduciary duty. Bogle v. Bragg, 248 Ga. App. 632 (2001). In Bogle, the Court of Appeals affirmed a trial court's grant of summary judgment to defendants holding that the director defendants did not owe the investing plaintiffs a fiduciary duty during the pre-investment arm's length negotiation period. Id. at 636. Thus, the breach of fiduciary duty claim can only focus on actions occurring after Plaintiffs' initial investment in March, 2006.

Access to Corporate Financial Information:

Lisa Walsh's affidavit testimony states that she did not have access to the corporate accounts, check writing authority, or access to financial statements.[3] Defendants, however, assert that Lisa Walsh had full access to corporate financial information.[4] It is undisputed that Lisa Walsh was elected President of Sports Science and held out by Defendant Woods to be "the" leader of the organization in charge of daily management. In addition, Defendants submitted into the record various email instructions from Defendant Woods to third parties (accountants, banking institutions, etc.) requesting full access to financial records for Lisa Walsh. Kathleen Lloyd, a consultant who provided human resources and accounting services for the various entities, provided affidavit testimony that she met with Lisa Walsh on a daily basis to discuss, among other things, financial information and that Lisa Walsh had online access to the various corporate bank accounts.[5]

Actions Taken Without Authorization or Notice:

Plaintiffs also allege that Defendant Woods engaged in transactions without their knowledge or consent. The first such claim relates to the reorganization of the Chattanooga, Cool Springs, and Duluth franchises as three subsidiary entities under Sports Science with an initial capitalization of $30,000 for each subsidiary provided by Sports Science. The minutes of the April 24, 2006 special meeting of the Shareholders and Board of Directors of Sports Science, however, demonstrate that these actions were taken in accordance with proper corporate procedure and with the participation in and approval of Plaintiffs. Plaintiffs assert that the reorganization occurred on April 5, 2006, not April 24th, but provide the Court with no documentation of this allegation. Regardless, any allegations of wrong doing occurring on April 5th were ratified by Plaintiffs' approval of the reorganization on the

[3] See Affidavit of Lisa Walsh, ¶¶ 11-15, 24.
[4] See Affidavit of John Woods, ¶¶ 45-52 and Exhibit 26.
[5] See Affidavit of Kathleen Lloyd, ¶¶ 6-7.

24th.

Plaintiffs also challenge Defendant Woods' acquisition of Velocity Sports, the franchisor. Plaintiffs allege that Defendant Woods purchased Velocity Sports without their knowledge or approval in breach of his fiduciary duties owed to them. The undisputed record, however, is that Defendant Woods informed Plaintiffs of his intention to purchase Velocity Sports no later than May, 2006.[6] Therefore, this claim fails.

Challenged Bank Transactions:

Plaintiffs challenge a series of bank transactions as a violation of Defendant Woods' fiduciary duty of loyalty as codified at O.C.G.A. § 14-2-860. The first allegation relates to a $100,000.00 transfer out of Honeycutt's bank account into Defendant Woods' personal bank account. Three days later, however, $100,000.00 was transferred from Defendant Woods' personal account and deposited into the bank account for E Sports, LLC, ("E Sports"), a related entity. Defendant Woods explained in his deposition that when the mistaken transfer was discovered, it was corrected.[7] Plaintiffs have pointed to nothing in the record to refute this explanation. Finally, there is no evidence of harm to either the corporate entity or to Plaintiffs, or an actionable intent by Defendant Woods.

Second, Plaintiffs challenge a transaction concerning a $6,000,000.00 loan that Defendant Woods acquired to purchase Velocity Sports. It is undisputed that the $6,000,000.00 loan was personal to Defendant Woods despite the fact that he deposited $500,000.00 of this loan into Sports Science as additional capital.[8] Inadvertently, however, $1,187,175.00 was deposited in Sports Science (instead of $500,000), causing Defendant Woods to redirect the excess $687,175.00 out of Sports Science's account and into his personal bank account.

Finally, Plaintiffs challenge the way in which their capital investments were used within the

[6] Affidavit of John Woods, ¶ 68; App. Ex. 34.
[7] Deposition of John Woods, pp. 157-160.
[8] Affidavit of Kathleen Lloyd ¶ 20; App. Ex. 33.

various entities. Despite making broad claims about improper transfers, Plaintiffs offer no evidence to support their contentions. Lisa Walsh, in paragraph 14 of her Affidavit, questions three transactions in the respective amounts of $25,000.00 transferred from a company account to Defendant Woods' personal account, $7,153.21 transferred from a company account to Defendant Woods' personal account; and a $75,000.00 counter debit from E Sports' account. To support their allegations, however, Plaintiffs submit bank records with these transaction amounts highlighted, but without any evidence or theory as to how these transactions were improper. Without more, these allegations cannot form the basis of Plaintiffs' breach of fiduciary claims. Finally, at the time these transactions occurred, Plaintiffs constituted a majority of the Board of Directors and were officers of the corporation. They had tools available to investigate and monitor their investments.

Miscellaneous Allegations Regarding Breach of Fiduciary Duty:

Plaintiffs allege that the undercapitalization of E Sports at the time of their investment constituted a breach of fiduciary duty by Defendant Woods. Plaintiffs complain that E Sports was undercapitalized, but Plaintiffs' deposition testimony demonstrates that they had the opportunity to perform due diligence on the company and that they knew that it was a start-up company without a significant history. Plaintiffs' deposition testimony also states that they were allowed to review any E Sports information requested, and that Defendant Woods neither prevented them from viewing nor hid information from them.[9] Thus, Plaintiffs failed to identify any duty owed to them that was breached by Defendant Woods with regard to the capitalization of E Sports.

Finally, Plaintiffs challenge Defendant Woods' acceptance of a $50,000.00 investment from Nicole and Alex Meyer in Sports Science as a violation of his fiduciary duties owed to them. Plaintiffs cite no provision of the operating agreement preventing this type of action, nor do they provide the Court with any information concerning this investment. Without more, the Court determines that this

[9] See Deposition of Harry Walsh pp. 88-90; Deposition of Lisa Walsh pp. 272-275.

claim cannot proceed.

COUNT 2: FRAUD

Plaintiffs claim that Defendant Woods promised them a 12% return on their investment, overstated the financials of the companies before they invested, and misrepresented the financials of Honeycutt.

To prevail on a fraud claim, a plaintiff must demonstrate five essential elements: (1) that the defendant made the representation, (2) that at the time he knew they were false; (3) that he made them intending to deceive the plaintiff; (4) that the plaintiff justifiably relied on the representations; and (5) that the plaintiff sustained the alleged loss and damage as the proximate result of their having been made. Parrish v. Jackson W. Jones, P.C., 278 Ga. App. 645, 647-648 (2006).

Any statement regarding projected investment returns are not actionable statements of fact. See Bogle v. Bragg, 248 Ga. App. 632 (2001) (finding that a statement regarding a "safe" investment was "a statement of opinion" and plaintiff was not entitled to rely upon it for fraudulent misrepresentation).

Similarly, Plaintiffs' allegations that Defendant Woods overstated the financial conditions of the companies before Plaintiffs invested must also fail. As addressed above, before Plaintiffs invested with Defendant Woods, the parties were not in a confidential relationship and therefore only ***false*** information (rather than mere omissions) provided by Defendant Woods to Plaintiffs would be actionable. See O.C.G.A. § 23-2-53. Plaintiffs received financial information including books, records, and documents from Defendant Woods.[10] At the time that Plaintiffs invested in the various entities, they knew the entities were operating at a "substantial" loss.[11] Plaintiffs' undisputed access

[10] See Affidavit of Mr. Woods Exhibits 26-40; Deposition of Harry Walsh, pp. 75-76; Deposition of Lisa Walsh, pp. 272-273, 288, and 321-322.
[11] Deposition of Lisa Walsh, pp. 321-322.

to financial information before investing combined with the absence of particularized allegations of pre-investment misrepresentations, warrant dismissal of their general pre-investment fraud claims. See Bogle v. Bragg, 248 Ga. App. 632 (affirming a trial court's grant of summary judgment for defendants where the plaintiff failed to support specific allegations of fraud, had knowledge of the company's previous operational history, and was owed no fiduciary duty during negotiations); Thrift v. Maxwell, 162 Ga. App. 237 (1982) (finding that a minority shareholder's access to financial records which demonstrated losses prevented the shareholder from recovering on allegations of investment fraud).

Plaintiffs' fraud claims regarding Honeycutt relate to inaccuracies in booking orders, payables, and customer receivables found by Lisa Walsh after their investment. During the course of Lisa Walsh's tenure as President, she discovered several accounting and reporting errors concerning Honeycutt, which she concluded resulted from incompetence or theft situations.[12] In their supplemental brief, Plaintiffs direct the Court to Lisa Walsh's deposition[13] where she testified to accounting inaccuracies she discovered such as inaccurate write offs, unstated liabilities, and unaccounted for expenses (e.g., sponsorships). Lisa Walsh reported these errors to Defendant Woods, who was "concerned and unhappy" to learn about the situation.[14] Plaintiffs, however, were neither prevented from reviewing additional financial information, including the actual booking orders, receivables, etc., nor from interviewing Ms. Viva who prepared the financial statements. Rather, Plaintiffs relied upon the information summarized in the financial statements, even after Mr. Walsh noticed missing financial details.[15]

In their supplemental brief, Plaintiffs provide the Court with a copy of a January 4, 2006, email sent by Defendant Woods to a Honeycutt employee, which contained corporate policies to be included

[12] Id., pp. 343-344.
[13] Id., pp. 269, 356, 343, 345, 355, and 360.
[14] Id., pp. 348-349.
[15] Deposition of Harry Walsh, pp.76-80.

in a new "manual" for the business. Included in the list of policies was a statement that "Aged Receivables is a problem in any company. Any receivable 90 days overdue (120 days from date of invoice) will be written off and expenses split between the company and the Sales Rep."[16] Plaintiffs rely on this email and the policy statement attached as evidence that the financials provided Mr. Woods, which did not accurately reflect "write offs," were misrepresentations of the actual financial condition of Honeycutt (rather than omissions) and, therefore, constituted fraud. The policy regarding receivables, however, was not yet adopted by the company,[17] and even if it was in effect, the Walshes do not allege that they relied upon the receivables policy in performing their due diligence or investing.

Plaintiffs, therefore, have failed to demonstrate "due diligence" sufficient to establish the justifiable reliance element of a fraud claim. See e.g., Citizens of Ball ground v. Johnson, 191 Ga. App. 155 (1989). In addition, there is no evidence in the record linking the accounting errors to Defendant Woods or the Corporate Defendants. Thus, there is nothing in the record to support the scienter element of fraud with this allegation.

Finally, Plaintiffs allege additional acts of fraud after they made their investment as a result of their limited access to financial information and Defendant Woods' "autocratic" management style. As discussed above, the record demonstrates that Lisa Walsh was given full access to the financial records of the entities. Additionally, Defendant Woods supplied the Court with numerous exhibits demonstrating that he frequently communicated financial and business information to Plaintiffs. In Georgia, as a matter of law, one cannot assert fraud where one's exercise of ordinary diligence could have prevented the results of the alleged fraud. Harish v. Raj, 222 Ga. App. 248, 251 (1996). Lisa Walsh, as President and a Director, who, with her husband, constituted a majority of the Board of Director, is, as a matter of law, prevented from asserting fraud as a result of alleged mismanagement

[16] Exhibit 85 to Defendants' Motion for Summary Judgment.
[17] Second Affidavit of John J. Woods, ¶¶ 10-11.

during her tenure.

In accordance with the above-stated reasoning, Plaintiffs' pre and post-investment fraud claims fail as a matter of law.

COUNT III: NEGLIGENCE:

Plaintiffs allege negligence claims against Defendant Woods asserting that he breached duties owed to Plaintiffs causing their investments to be devalued. Citing paragraphs 9-13 of Lisa Walshes' Affidavit, Plaintiffs assert that Defendant Woods "negligently supplied false information to Plaintiffs, Plaintiffs relied on the false information supplied to them, and Plaintiffs suffered a financial injury as a result." Paragraphs 9-13 relate to the circumstances under which they invested in Sports Science, the information Defendant Woods provided them regarding their investment in E Sports, the circumstances under which E Sports obtained its software licenses, the limitations on Lisa Walsh's management power, and the challenged banking transactions.

The Court has already addressed the bulk of the claims levied against Defendants. Claims of negligence regarding pre-investment fail because Defendant Woods did not owe Plaintiffs a fiduciary duty ***prior*** to their investment and because the record demonstrates that Plaintiffs had access to financial information prior to investing in the entities.[18] See Bogle v. Bragg, 248 Ga. App. at 636. Similarly, the Court has already addressed the challenged banking transactions and found Plaintiffs' mere suspicion of irregularity, without more, is insufficient to form the basis of an actionable claim.[19] Additionally, the Court has already found that the record establishes that Lisa Walsh was both a director and officer of the entities; that she had authority to access company information, and that she was held out to be the daily manager of the entities. Thus, the alleged limitations on Lisa Walsh's

[18] Plaintiffs allege that they were not given complete or accurate information. The deposition testimony of both Plaintiffs is that they received everything they asked to receive from Defendant Woods. Additionally, Plaintiffs have failed to allege with particularity an actionable fraud claim regarding pre-investment information. Thus, these allegations fail to sustain Plaintiffs' negligence claims. See supra pp. 4, 7.

[19] See supra p. 8.

management power were an inaccurate perception that is not supported by the record before the Court.

Finally, Plaintiffs' allegations regarding the capitalization and licensing acquisition of E Sports fail to state an actionable negligence claim. E Sports was a start up business when Plaintiffs invested in it and their deposition testimony reveals that they had access to due diligence documents as requested with regard to this investment. Thus, the level of capitalization prior to their investment cannot form the basis of a negligence claim. Additionally, the circumstances under which E Sports acquired its software license (by purchasing it from Honeycutt and transferring $100,000.00 from E Sports to Honeycutt) did not breach any duty owed by Defendant Woods to Plaintiffs at the time of the transaction because it appears to be a valid transfer.

Therefore, as a matter of law, Plaintiffs failed to state an actionable claim for negligence.

COUNT IV: DISSOLUTION:

Plaintiffs petition the Court to dissolve the Corporate Defendants because of misappropriation or waste of corporate assets. Plaintiffs cite Thomas v. Dickson, 250 Ga. 772 (1983) for the proposition that the sole-injured shareholder may maintain an action for misappropriation of corporate funds as a direct action. Richard Garofalo, a former Sports Science employee, alleged, however in a separate lawsuit that he is a shareholder of Sports Science. Additionally, Lisa Walsh testified in her deposition that Mr. Garofalo and Mr. Gatewood may still be shareholders in Sports Science.[20] Lisa Walsh also testified that she believes the Honeycutt shareholders include Messrs. Parker, Honeycutt, and Costo.[21] Finally, Harry Walsh provided deposition testimony that Mr. David Little is a shareholder in E Sports.[22] Accordingly, Thomas v. Dickson, is inapplicable to the derivative claims stated in Plaintiffs' Complaint because Plaintiffs are not the sole injured shareholders and Plaintiffs must therefore follow the appropriate procedures for bringing a derivative claim under O.C.G.A. § 14-2-742 in the name of

[20] Deposition of Lisa Walsh, pp. 304-307; see also Deposition of Harry Walsh, pp. 85-87.
[21] Deposition of Lisa Walsh, pp. 442-445; see also Deposition of Harry Walsh, pp. 85-87.
[22] Deposition of Harry Walsh, pp. 85-87.

the corporation. This they have not done and therefore their claim for dissolution fails.

COUNT V & VI: PUNITIVE DAMAGES, FEES AND EXPENSES:

These claims, which are dependent on claims already discussed, fail as a matter of law.

CONCLUSION:

Defendants' Motion for Summary Judgment is hereby **GRANTED** on all counts in accordance with the above-stated reasons and the case is hereby **DISMISSED WITH PREJUDICE.**

SO ORDERED this 17th day of ~~October~~ November, 2008.

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

Copies to:
H. King Buttermore, III, Esq.
Peter V. Hasbrouck, Esq.
MARTENSON, HASBROUCK & SIMON LLP
3379 Peachtree Road, NE, Suite 400
Atlanta, GA 30326

Gerald B. Kline, Esq.
SIMS MOSS KLINE & DAVIS LLP
Three Ravinia Drive, Suite 1700
Atlanta, GA 30346