5-21-2008

Order on Motion to Dismiss (SLEEP SERVICES OF AMERICA, INC.)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SLEEP SERVICES OF AMERICA, INC. and DO YOU SNORE OF MARYLAND, LLC,	
Plaintiffs,	
v.	**Civil Action File No. 2007-CV-143860**
RENEE MCPHEE, RANDAL A. LENZ, JEFFREY KUNKES, M.D. and MCPHEE PROPERTIES, LLC,	
Defendants,	

ORDER ON MOTION TO DISMISS

On May 14, 2008, Counsel appeared before the Court to present oral argument on Defendant Lenz's Motion to Dismiss. After reviewing the briefs submitted on the Motion, the arguments of counsel, and the record of the case, the Court finds as follows:

FACTS

This case arises from an Asset Purchase Agreement ("APA"), dated April 2, 2007, entered into between Defendant McPhee and the Plaintiffs for the purchase of substantially all of the assets of three of McPhee's companies ("GA Sleep Services"). Defendant Lenz was not a party to the APA. Defendant Lenz was involved in the negotiation of the APA as a certified public accountant and attorney representing Defendant McPhee. In addition, Defendant Lenz was involved in the operations of GA Sleep Services, although the degree of his involvement is disputed by the parties. His involvement, however, is evidenced by the APA definition of "Sellers' Knowledge" which includes the knowledge of Defendant Lenz.

STANDARD

"A motion to dismiss for failure to state a claim should be sustained if the allegations of the complaint reveal, with certainty, that the Plaintiff would not be entitled to relief under any state of provable facts asserted in support of the Complaint." LaSonde v. Chase Mortgage Co., 259 Ga. App. 772, 774 (2003).

FRAUD

Defendant Lenz argues that the merger clause in the APA prevents Plaintiffs' recovery under fraud. See Estate of Sam Farkas, Inc. v. Clark, 238 Ga. App. 115, 118 (1999) ("Where the party ... affirms the contract, however, he or she is bound by its terms. In this case, the contract's " merger" provision would estop a party bound by the terms of the contract from arguing that he or she relied on representations other than those contained in the contract."). Plaintiffs argue that their claims against Defendant Lenz, who was not a party to the APA, are not limited by the merger clause. In GSA Strategic Investment Fund, Ltd. v. Joseph Charles & Associates, Inc., 245 Ga. App. 460 (2000), a case cited by Defendant Lenz, the Georgia Court of Appeals held that it was an error for the trial court to dismiss fraud claims against the broker. The Court of Appeals reasoned that "[t]he broker cannot rely on the merger clause to bar those claims because the broker was not a party the Agreement." Id. at 463. Thus, the merger clause in the APA does not limit Plaintiffs' ability to bring fraud claims against Defendant Lenz.

Additionally, Plaintiffs argue that their fraud claims against Defendant Lenz are based upon misrepresentations contained in the representations and warranties of the APA. Specifically, Plaintiffs allege Defendant Lenz had knowledge that representations such as those regarding the financial statements and side agreements with Dr. Kunkes were false. Assuming the veracity of Plaintiffs' claims on this Motion to Dismiss, such misrepresentations would be incorporated into the APA and

recoverable by a fraud claim notwithstanding the merger clause. Estate of Sam Farkas, Inc., 238 Ga. App. at 118 (holding that the merger clause only bars claims of misrepresentation "not contained within the contract.").

Defendant Lenz argues that he is shielded from any fraud liability because he included appropriate accountant disclaimers to the financial statements attached to the APA. Defendant Lenz directs the Court to First National Bank of Newton County v. Sparkmon, 212 Ga. App. 558, 559 (1994), where the Court of Appeals held that the accountant's disclaimers were "effective to preclude any justifiable reliance by a third party...". Accountant disclaimers are effective to preclude negligence liability because an unaudited compilation statement, "does not involve an independent examination by the accountant of the financial information... ." Dakota Bank v. Eiesland, 645 N.W.2d 177 (Minn. Ct. App. 2002) (discussing accountant negligence liability and adopting the reasoning in First Nat'l Bank of Newton Co. v. Sparkmon). In First National Bank of Newton County, 212 Ga. App. 558, the accountant was an unrelated and uninvolved third party. In the instant case, however, Defendant Lenz not only served as the accountant creating the APA financial statements, but he also acted as the attorney negotiating the APA and was involved in the operations of GA Sleep Services prior to the APA. Furthermore, the APA defines "sellers' knowledge" as the actual knowledge of Defendant Lenz.

Additionally, the cases relied upon by Defendant Lenz are professional negligence suits where the Court of Appeals addressed accountant liability in the absence of "intentional misrepresentations or fraud." Id.; see also MacNerland v. Barnes, 129 Ga. App. 367 (1973); Robert & Co. Assoc. v. Rhodes-Haverty Partnership, 250 Ga. 680 (1983); Badische Corp. v. Caylor, 257 Ga. 131 (1987). Here, Plaintiffs claim intentional misrepresentation and fraud alleging that Defendant Lenz had actual knowledge that the financial statements and the underlying data were inaccurate.

Finally, Defendant Lenz argues that the Exclusive Remedy section of the APA bars Plaintiffs from seeking recovery against him. This argument is without merit because Defendant Lenz was not a party to the APA and because the language provides a fraud exception to the exclusivity of the remedies. Accordingly, it does not limit Plaintiffs' remedies on fraud claims against any party whether or not a party to the APA.

Because of Defendant Lenz's involvement with the companies being sold, his role in negotiating the APA, and the allegations of intentional misrepresentation, the Court hereby **DENIES** Defendant Lenz's Motion to Dismiss the fraud claims against him.

GA RICO

Defendant Lenz petitions the Court to dismiss the Georgia RICO count against him because he alleges that the single transaction event contemplated in the APA is insufficient, as a matter of law, to establish a "pattern" of racketeering activity. Plaintiffs counter that their Complaint alleges several predicate acts of mail and wire fraud which culminated in the asset sale under the APA. In 2002, the Georgia Legislature amended the definition of "pattern" to including [e]ngaging in at least two acts of racketeering activity in furtherance of **one or more incidents**, scheme, or transactions that have the same or similar intents, results...". O.C.G.A. § 16-14-3(8) (emphasis added). The language of the amended statute contemplates the very scenario Defendant argues is excluded from the statute. In the absence of case law limiting such language, this Court is bound by the statute's clear directive. Defendant's Motion to Dismiss for failure to allege a pattern sufficient to sustain an actionable RICO claim is hereby **DENIED**.

AIDING AND ABETTING FRAUD

Defendant Lenz petitions the Court to dismiss the aiding and abetting fraud claim against him on the grounds that Georgia case law does not recognize such an action. Defendant Lenz's argument highlights an important legal development in Georgia. Since the 2006 decision in Insight Technology, Inc., v. FreightCheck LLC, 280 Ga. App. 19 (2006), the Court of Appeals opened the door to recognize an aiding and abetting cause of action in Georgia. In a 2008 decision, the Southern District of Georgia held that Georgia recognizes an action for aiding and abetting fraud finding that "[f]raud is certainly an "actionable wrong" within the language of O.C.G.A. § 51-12-30, and therefore the Court will apply the tort of aiding and abetting fraud..." In re Friedman's Inc., 2008 WL 131163, *34 (S.D.Ga. 2008); cf. Hays v. Paul, Hastings, Janofsky & Walker LLP, 2006 WL 4448809, *8 (N.D.Ga. 2006) (declining to recognize the tort of aiding and abetting fraud and basing it, in part, on the requirement for such claims in other states to allege actual knowledge of fraud). Here, Plaintiffs allege that Defendant Lenz had actual knowledge of Defendant McPhee's fraud, which would be sufficient to survive a motion to dismiss under a traditional aiding and abetting fraud claim. See ZP No. 54 Ltd. Part. v. Fidelity and Deposit Co. of Maryland, 917 So.2d 368, 372 (Fla. Dist. Ct. App. 2005) ("Virtually all courts that have acknowledged the existence of aiding and abetting a fraud state that the following are the elements that must be established by the plaintiff: (1)[t]here existed an underlying fraud, (2)[t]he defendant had knowledge of the fraud, [and] (3) [t]he defendant provided substantial assistance to advance the commission of the fraud."). In light of the developing body of Georgia law on the claim of aiding and abetting fraud, the Court hereby **DENIES** Defendant Lenz's Motion to Dismiss.

CONSPIRACY & PUNITIVE DAMAGES

In light of the Court's ruling on the substantive claims, the Court hereby **DENIES** Defendant Lenz's Motion to Dismiss the conspiracy to commit fraud and punitive damages counts. See Cook v. Robinson, 216 Ga. 328 (1960); Trust Co. Bank v. C&S Trust Co., 260 Ga. 124 (1990).

SO ORDERED this 21 day of May, 2008.

Alice D. Bonner

ALICE D. BONNER *for*
ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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