

3-7-2012

# Order on Motion to Dismiss, alternatively for Summary Judgment

Melvin K. Westmoreland  
*Superior Court of Fullton County*

Follow this and additional works at: <https://readingroom.law.gsu.edu/businesscourt>

---

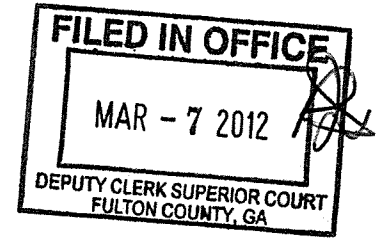
## Institutional Repository Citation

Westmoreland, Melvin K., "Order on Motion to Dismiss, alternatively for Summary Judgment" (2012). *Georgia Business Court Opinions*. 223.  
<https://readingroom.law.gsu.edu/businesscourt/223>

This Court Order is brought to you for free and open access by Reading Room. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

**COPY**



Civil Action File No.  
NO. 2011-CV-203283

COWETA SUMMIT ASSOCIATES, LLC; )  
OUT-MED, LLC; JUNCTION LANES )  
REAL ESTATE LLC; JUNCTION LANES LLC; )  
DAYCARE AT THOMAS CROSSROADS )  
REAL ESTATE, LLC; DAYCARE AT THOMAS )  
CROSSROADS LLC; DAVID LAGUARDIA; )  
CLIFF CRANFORD; FRANK POWELL; )  
STEVE MCLAIN and JAMES VAN MOTTOLA )

Plaintiffs, )

vs. )

SUNTRUST BANK and )  
SUNTRUST ROBINSON HUMPHREY, INC., )

Defendants. )

**ORDER ON DEFENDANTS' MOTION TO DISMISS AND, IN THE ALTERNATIVE,**  
**MOTION FOR SUMMARY JUDGMENT**

On February 7, 2012, counsel appeared before the Court to present oral arguments on Defendants' Motion to Dismiss and, in the Alternative, Motion for Summary Judgment. Upon consideration of the motion, the briefs submitted therewith, and the arguments of counsel, this Court finds as follows:

This dispute arises out of Defendants' alleged mismanagement of various financing arrangements, including derivative agreements that were entered into in connection with bond financing associated with a multi-tenant medical facility in Newnan, Georgia (the "Complex"). In July 2005, Coweta Summit Associates ("CSA"), the owner of the Complex, entered into an adjustable rate bond transaction with SunTrust Bank ("SunTrust") that generated \$19,250,000, in financing for the Complex. The transaction also included certain "derivative instruments"—

specifically, an “interest rate swap” and “collar” arrangement that were designed to guard against fluctuations in the interest rate owed by CSA under the bond financing.

On July 3, 2008, CSA sold the Complex for approximately \$26 million, which allowed it to pay off the bond financing in full. Nevertheless, CSA continued to be charged monthly derivative fees. CSA alleges that SunTrust and SunTrust Robinson Humphrey, Inc. (“Robinson Humphrey”), SunTrust’s investment affiliate, failed to adequately disclose to CSA the consequences of paying off the bond financing in full or the risk associated with the early termination of the derivative agreements.

In response to CSA’s concerns over the derivative fees and the potential of a large “unwind” fee, SunTrust and Robinson Humphrey allegedly advised CSA that it could avoid substantial early termination fees if CSA’s majority owner, Out-Med, LLC (“Out-Med”), assumed the derivative instruments through novation agreements. According to Plaintiffs, SunTrust also represented that it would release \$3.4 million, which it held in a reserve account.<sup>1</sup> Relying on this advice, CSA and Out-Med executed the novation agreements. Under the novation agreement, CSA signed a release that provides that “the Remaining Party and the Transferor are each released and discharged from further obligations to each other under each Old Transaction with respect to the Novated Amount and their respective rights against each other thereunder are cancelled.”

Despite SunTrust’s representations to the contrary, Out-Med contends that, due to interest rate fluctuations, it was forced to pay much larger fees than would have been assessed had it not assumed the derivative instruments and simply paid the early termination fee. Because the payments were so excessive, Out-Med contends that it was ultimately forced to terminate the

---

<sup>1</sup> CSA contends that \$1 million was deposited into a reserve account in connection with a bond financing and that it agreed to deposit an additional \$2.4 million at SunTrust’s insistence that the deposit was required under the derivative agreements.

derivative agreements for \$3 million, significantly more than the termination fee quoted to the Plaintiffs when the bond financing was initially repaid. Under the Termination Agreement, Out-Med agreed that “it is hereby agreed that the rights and obligations of the parties arising out of the Swap Transaction are terminated and waived effective October 16, 2009, and the parties agree that they shall be under no further liability to each other with respect to the Swap Transaction, except in respect of any amounts that have become due and payable prior to October 16, 2009....”

At the same time as the novation transaction, Out-Med also contends that it agreed, to its detriment, to refinance with SunTrust other fixed-interest loans held by small community banks. As part of the refinance package, Out-Med offered as collateral real property owned by Plaintiff Junction Lanes Real Estate LLC and Plaintiff Daycare at Thomas Crossroad LLC, as well as real property owned by Out-Med and personal guaranties of Plaintiffs LaGuardia, Cranford, Powell, McLain and Mottola. According to Plaintiffs, because of the course of action engineered by Defendants, the Plaintiffs face financial distress, with SunTrust threatening to foreclose on the collateral.

To prevent foreclosure, all Plaintiffs with the exception of CSA executed a Forbearance Agreement, as well as a First Amendment to Forbearance Agreement, pursuant to which they agreed to release SunTrust “from all liabilities, claims, demands, actions or causes of action of any kind...that the Releasing Parties now have or ever have had against the Released Parties, arising under or in any way relating to the Loan Documents or the indebtedness evidenced thereby.”

Plaintiffs have asserted the following claims against Defendants: 1) Breach of Contract By SunTrust; 2) Fraud by SunTrust and Robinson Humphrey; 3) Negligence and Breach of Duty

of Care by SunTrust and Robinson Humphrey; 4) Negligent Misrepresentation by SunTrust; 5) Negligent Misrepresentation by Robinson Humphrey; 6) Conversion by SunTrust; 7) Prejudgment Interest; 8) Attorneys' Fees and 9) Punitive Damages.

Defendants have moved to dismiss and, alternatively, for summary judgment as to all claims in this case. As evidence in support of summary judgment, Defendants submit the Affidavit of Sarah Scott attaching the relevant agreements.

A court should grant a motion to dismiss when a plaintiff "would not be entitled to relief under any state of facts that could be proven in support of his claim." Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield of Georgia, Inc., 297 Ga. App. 28, 29 (2009). In ruling on such a motion, the Court must accept as true all of plaintiff's well-pleaded factual allegations, and draw all reasonable inferences in plaintiff's favor. Baker v. McIntosh County Sch. Dist., 264 Ga. App. 509, 509 (2003).

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991). "[A] trial court is not required to wait until the completion of discovery to rule on a motion for summary judgment, if the case is otherwise ripe for a ruling thereon." Bregman-Rodoski v. Rozas, 273 Ga. App. 835, 837 (2005).

### **1. Breach of Contract/ Implied Covenant of Good Faith and Fair Dealing**

Plaintiffs contend that SunTrust breached Section 3(d) of the ISDA Master Agreement ("Agreement"), which requires that "any...document as the other party may reasonably request from time to time... be true, accurate, and complete in every material respect." Plaintiffs argue

that information provided to CSA both before and after it entered into the derivative agreements was not true, accurate and complete. Among other things, they contend that they were not adequately apprised of the risks of the agreements or the financial benefits to SunTrust that would inure under the agreements. Plaintiffs also allege that SunTrust breached the implied covenant of good faith and fair dealing in the performance of the derivative agreements.

In contrast, SunTrust argues that Section 3(d) does not create an affirmative duty to provide information, only a duty to ensure that certain categories of written information are true once furnished. Moreover, according to Defendants, the terms of the agreements make clear that CSA disclaimed reliance on any communication of the other party. SunTrust also contends that the risks of the agreements were provided to Plaintiffs in the written terms of the agreements themselves. With regard to Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing, Defendants argue that Plaintiffs' allegations are too conclusory to satisfy even the notice pleading standard and that this implied covenant cannot create additional obligations under the contract. According to Defendants' interpretation of Plaintiffs' allegations, Plaintiffs have not complained that SunTrust failed to perform pursuant to the express language of the contract. Therefore, Defendants submit that the implied covenant of good faith and fair dealing must fail.

In any event, Defendants argue that even if Plaintiffs have adequately pled claims for a breach of contract and breach of the implied covenant of good faith and fair dealing, Plaintiffs' claims against SunTrust are barred by the releases contained in the Novation Agreement and the Termination Agreement signed by CSA and Out-Med.

Turning to CSA's breach of contract claim against SunTrust, the Court hereby **DENIES** Defendants' motion. Applying the motion to dismiss standard, the Court finds that Defendants

have failed to show that Plaintiffs cannot prove under any set of facts that the information supplied by SunTrust is not “true, accurate and complete in every material respect” in breach of Section 3(d) of the Agreement. Because the determination of whether SunTrust committed a breach of contract is not foreclosed as a matter of law, CSA’s claim for implied duty of good faith and fair dealing may also proceed. Additionally, because the Court finds an ambiguity in the scope of the release under the Novation Agreement, summary judgment is not appropriate at this stage.

Turning to Out-Med’s breach of contract claim against SunTrust, the Court hereby **GRANTS** Defendants’ motion. The language of the release set forth in the Termination Agreement makes clear that the parties agreed to broadly release all rights and obligations arising under the derivative agreements with the exception of certain amounts that came due prior to the effective date of the Termination Agreement. The Court finds that this language forecloses Out-Med’s claim for breach of contract against SunTrust.

## **2. Negligence/Breach of Duty of Care**

Plaintiffs allege that Defendants acted negligently in connection with the advice and financial dealings with Plaintiffs. Defendants move the Court to dismiss this claim on the basis that Plaintiffs have failed to identify a legitimate duty of care owed to Plaintiffs.

“[T]he law is clear that a bank owes no legal duty to act as a customer’s legal or financial advisor.” First Union Nat’l Bank v. Gurley, 280 Ga. App. 647, 648 (1993). Nevertheless, Plaintiffs argue that a duty can arise out of a contractual relationship between the parties, citing Construction Lender, Inc. v. Sutter, 228 Ga. App. 405 (1997) and Proctor & Gamble Co. v. Bankers Trust Co., 925 F. Supp. 1270, 1289 (S.D. Ohio 1996).

“It is well settled that misfeasance in the performance of a contractual duty may give rise to a tort action. But in such cases the injury to the plaintiff has been an independent injury over and above the mere disappointment of plaintiff's hope to receive the contracted-for benefit. Mere breach of the contract's terms is insufficient to create a tort cause of action; the defendant must also breach an independent duty created by statute or common law. Construction Lender, Inc., 228 Ga.App. at 409 (finding that the “duty” that arises under a contract sounds in contract, not tort). See also, Proctor & Gamble v Bankers Trust Co., 925 F. Supp 1270 (1996) (“Where the parties’ relationship is contractual, and the duty of good faith and fair dealing is implied in the contract, a negligence claim is redundant.”).

As to Plaintiffs’ claims against SunTrust, the Court is not inclined, upon review of the cases cited by Plaintiffs, to find a separate tort duty sufficient to sustain a negligence claim where, as here, the Plaintiffs are relying on the obligation SunTrust had to perform a contract in “good faith.” Moreover, summary judgment is supported as to claims brought by Out-Med and the other Plaintiffs (with the exception of CSA) for the independent reason that such claims were released against SunTrust under the Termination Agreement and the Forbearance Agreement. Accordingly, Defendants’ motion is **GRANTED**.

With respect to claims against Robinson Humphrey, the Court finds that it is premature at the motion to dismiss stage to consider the exact nature of the relationship between CSA/ Out-Med and Robinson Humphrey and to address whether a duty could have existed such to support a negligence claim against it. Therefore, Defendants’ motion is **DENIED**.

### **3. Fraud/Negligent Misrepresentation**

Plaintiffs allege that Defendants deceived them in connection with Out-Med’s assumption of the derivative financing instruments, SunTrust’s retention of \$3.4 million in



reserve funding, and a purported “collateral swap” that was designed to replace the Complex, which had been sold, with certain real property collateral to secure the derivative instruments.

Defendants argue that Plaintiffs failed to plead fraud with sufficient particularity. They also argue that, to the extent that Plaintiffs’ claims center on the alleged unfair terms contained in the agreements, this claim is flawed because the risks and benefits of the agreement are contained within the disclosed terms of the agreement. Moreover, Defendants claim that Plaintiffs are unable to prove justifiable reliance because Plaintiffs fail to allege that SunTrust did anything other than enter into arms’ length business transactions with Plaintiffs. Defendants also contend that the terms of the agreements themselves, which expressly disclaim that Plaintiffs relied on any representations of Defendants in entering into the challenged transactions, foreclose Plaintiffs’ claims. Finally, Defendants seek summary judgment on the grounds that Plaintiffs’ fraud claims are barred by the releases.

As to fraud and negligent misrepresentation claims against SunTrust brought by Out-Med and the other Plaintiffs (with the exception of Coweta), the Court **GRANTS** summary judgment in favor of SunTrust because the Court finds that these claims were released. With respect to the claims of fraud and negligent misrepresentation claims against SunTrust brought by CSA, Defendants’ motion is **DENIED** because it is premature to rule on the issue of reliance at the pleading stage. Finally, the Court **DENIES** Defendants’ motion as to claims against Robinson Humphrey because these claims were not subject to a release, and it is too early to ascertain the exact nature of the relationship between CSA/ Out-Med and Robinson Humphrey in order to address the reliance element.

#### **4. Conversion**

Plaintiffs claim SunTrust converted \$3.4 million, which, according to Plaintiffs, SunTrust wrongfully refused to release from a “reserve” account held in connection with the bond financing and the derivative instruments.

In contrast, SunTrust argues that they had a right under the derivative agreements to debit an identified account of CSA and Out-Med to apply to payments due under the derivative agreements. They also cite Cotton States Mut. Ins. Co. v. Citizens & S. Nat’l Bank, 168 Ga. App. 83 (1983) for the proposition that a bank is entitled to set off amounts held in a general deposit funds against any matured indebtedness.

Here, the Court is not persuaded that the record unequivocally shows that SunTrust was entitled to withhold \$3.4 million to apply to future payments or that the funds constitute “general deposit” funds subject to set off. Accordingly, the Court **DENIES** Defendants’ motion with respect to CSA’s conversion claim against SunTrust. As to Out-Med’s claims against SunTrust, the Court **GRANTS** Defendants’ motion on the basis that its claims were released under the Termination Agreement and the Forbearance Agreement.

In conclusion, pursuant to the Court’s ruling herein, the following substantive claims may proceed in this case: 1) Count One—CSA’s breach of contract claim against SunTrust; 2) Count Two—CSA’s fraud claim against SunTrust and all Plaintiffs’ fraud claims against Robinson Humphrey; 3) Count Three—all Plaintiffs’ negligence claims against Robinson Humphrey; 4) Count Four—CSA’s negligent misrepresentation claim against SunTrust; 5) Count Five—all Plaintiffs’ negligent misrepresentation claim against Robinson Humphrey; and 6) Count Six—CSA’s conversion claim against SunTrust.

SO ORDERED, this 7<sup>th</sup> day of March, 2012.

  
MELVIN K. WESTMORELAND, SENIOR JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

Copies sent electronically to:

<b>Attorneys for Plaintiffs</b>	<b>Attorneys for Defendants</b>
Stephen J. Anderson Steven E. Harbour ANDERSON DAILEY LLP 2002 Summit Boulevard, Suite 1250 Atlanta, GA 30319	S. Lawrence Polk, Esq. Bryan M. Ward Sarah E. Scott SUTHERLAND ASBILL & BRENNAN LLP 999 Peachtree Street, NE Atlanta, GA 30309 404-853-8000