

1-9-2012

Order on Motions to Dismiss and Motions for Summary Judgment (MEADOW SPRINGS RECOVERY)

Elizabeth E. Long
Fulton County Superior Court

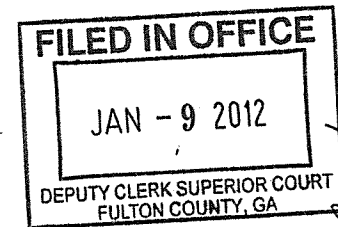
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



COPY

MEADOW SPRINGS RECOVERY, LLC, as)
assignee of MEADOW SPRINGS, LLC, FIVE)
PACES DEVELOPMENT PARTNERS, LLC,)
McCHESNEY INVESTMENT ADVISORS,)
LLC, RIVERDALE CAPITAL)
INVESTMENTS, LLC, MICHAEL)
McCHESNEY, McCHESNEY CAPITAL)
PARTNERS, LLC and HOMESTEAD)
CONSTRUCTION, LLC)

Plaintiff,)

vs.)

M. RUSSELL WOFFORD, JR., ALEXANDER)
SUTTO, and ALSTON & BIRD LLP,)

Defendants.)

CIVIL ACTION FILE
NO. 2011CV203473
BUS 2

ORDER ON MOTION TO DISMISS
AND MOTIONS FOR SUMMARY JUDGMENT

On December 21, 2011, Counsel appeared before the Court to present oral argument on Plaintiff's Motion to Dismiss Defendants' Counterclaims, Defendants' Motion for Summary Judgment Based on the Preemptive Effect of Georgia's "Abusive Litigation Statute," Defendants' Motion for Summary Judgment Based on the Statute of Limitations, and Plaintiff's Motion for Partial Summary Judgment. Upon consideration of the motions, the briefs submitted on the motions, oral arguments of counsel and the record of the case, the Court finds as follows:

This case arises out of Defendants' conduct in representing the interests of IH Riverdale ("IH") and Geoffrey Nolan ("Nolan") in a 2003 case. Defendants, on behalf of Nolan and IH, filed a complaint against Plaintiff's predecessor in interest, Meadow Springs, LLC, and others, alleging that they had "exercised improper, wrongful and

illegal dominion and/or control over property and property interests belonging to IH/Nolan, including... [a parcel of real property in Clayton County, Georgia].”

The next day, Defendants recorded a lis pendens in Clayton County in which they claimed that their clients had an interest in the property and that the complaint filed sought relief involving the property. On the same day, Defendants delivered a letter to Regions Bank, notifying it of the pending litigation and enclosing a copy of the complaint and lis pendens (the “Regions Bank Packet”). Sometime after receiving the Regions Bank Packet, Regions Bank refused to close on a construction loan. Thereafter, Meadow Springs, LLC lost the property through foreclosure. In the summer of 2004, Defendants withdrew as counsel for IH and Nolan.

In 2005, Meadow Springs, LLC filed a complaint against Nolan and IH asserting claims for slander of title and tortious interference with business and contractual relationships premised on the filing of the lis pendens and the delivery of the Regions Bank Packet. The case was transferred to this Court in December 2007. On January 15, 2008, this Court granted summary judgment to IH and Nolan (represented by different counsel) on the slander of title claim finding that the filing of the lis pendens was proper. The Court of Appeals affirmed the ruling. Meadow Springs, LLC v. IH Riverdale, LLC, 296 Ga. App. 551 (2009). The Georgia Supreme Court reversed, holding that the right to invest in a real estate development through a limited liability company did not sufficiently “involve” real estate within the meaning of the lis pendens statute, thereby rendering the lis pendens invalid. Meadow Springs, LLC v. IH Riverdale, LLC, 286 Ga. 701 (2010). Currently, several claims in the 2005 case remain pending before this Court,

including Meadow Springs, LLC's claim for slander of title and tortious interference with business and contractual relations.

On January 27, 2011, Plaintiff as second assignee of Meadow Springs, LLC, initiated this action, asserting claims against Defendants for slander of title and tortious interference arising out of the 2003 case. Defendants answered and counterclaimed for declaratory relief seeking a declaration that some or all of Plaintiff's claims were not validly assigned. Currently, the following motions are before the Court: 1) Plaintiff's Motion to Dismiss Defendants' Counterclaims, 2) Defendants' Motion for Summary Judgment Based on the Preemptive Effect of Georgia's "Abusive Litigation Statute," 3) Defendants' Motion for Summary Judgment Based on the Statute of Limitations, and 4) Plaintiff's Motion for Partial Summary Judgment.

1. Plaintiff's Motion to Dismiss

Plaintiff seeks the dismissal of Defendants' counterclaims on the basis that the request for declaratory relief is improper. Specifically, Plaintiff contends that Defendants are not in a position of uncertainty with respect to the validity of the assignments. Rather, all rights under the assignment either have or have not vested, thus making a request for court guidance regarding future course of action unnecessary.

Defendants counter by pointing out that they face uncertainty as to whether Plaintiff is validly asserting claims under its control or whether a third-party may possibly assert the same or similar claims in the future.

Whether the rights of the parties have already accrued is determinative of whether the petition sets forth a cause of action for a declaratory judgment. Baker v. City of Marietta, 271 Ga. 210 (1999). Declaratory judgment will not be entertained where the

rights of the parties have accrued and where no facts or circumstances are alleged showing the necessity of adjudication so as to relieve the claimant from the risk of taking future undirected action that, without such action, would jeopardize the claimant's interest. Chambers of Georgia, Inc. v. Dept. of Natural Resources, 232 Ga. App. 632 (1998).

Here, Defendants ask the Court to disapprove of past conduct taken by Plaintiff and its assignors. Contrary to Defendants' contentions, the Court is not persuaded that Defendants are in need of guidance with respect to future actions. Whether or not Plaintiff is the valid assignee of some or all of the claims raised in this action is a matter that should be raised as a defense. A request for declaratory relief under such circumstances is misplaced. Accordingly, the Court **GRANTS** Plaintiff's motion, and Defendants' counterclaims stand dismissed.

2. Defendants' Motion for Summary Judgment Based on Abusive Litigation

Defendants move for summary judgment on Plaintiff's claims for slander of title and tortious interference with business and contractual relationships based on the preemptive effect of O.C.G.A. § 51-7-85, which provides that no claim, other than a claim for abusive litigation brought pursuant to O.C.G.A. § 51-7-80, et seq., is allowed for torts based on the malicious use of civil proceedings, malicious abuse of civil process or abusive litigation. Defendants contend that, notwithstanding the fact that Plaintiff has attached other names to the claims, the claims are only premised on Defendants' conduct during the prosecution, discovery and defense of claims on behalf of their clients and therefore, are preempted under O.C.G.A. § 51-7-85.

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).

Plaintiff's Complaint targets conduct of Defendants in advancing their former clients' interest in real property that was eventually found by the Georgia Supreme Court to be not well-founded. Plaintiff cites Defendants' assertions in the complaint and lispens that their client had a right to the property at issue as support for its claims for slander of title and tortious interference with business and contractual relationships in this case.

Where "the gravamen of a [plaintiff's claim] is the defendants' act of filing an abusive lawsuit, the abusive litigation statute provides the exclusive remedy." Nairon v. Land, 242 Ga. App. 259, 261 (2000). "A claim for tortious interference with contractual relations cannot be predicated upon an allegedly improper filing of a lawsuit." Phillips v. MacDougald, 219 Ga. App. 152, 155 (1995). "The proliferation of unnecessary causes of action for the alleged improper filing of lawsuits would have a chilling effect on the exercise by citizens of their right of access to the courts." Id. at 157.

In O'Neal v. Home Town Bank of Villa Rica, 237 Ga. App. 325, 331 (1999), the Court considered whether a letter from a bank president to 900 shareholders regarding a former employee could be libelous and defamatory or whether, because the letter contained quotations from court pleadings, it was entitled to privilege under O.C.G.A. § 51-5-8. In describing the propriety of a claim for abusive litigation in the context of the

case, the Court noted that “[t]his section applies only to any person who takes an active part in the initiation, continuation or procurement of civil proceedings, not to a person who publishes a libelous letter.” Id., 237 Ga. App. at 333.

The actions that form the basis of Plaintiff’s claims were committed by Defendants in the course of representing their clients’ interests in litigation. Defendants filed a lawsuit on August 6, 2003, that sought relief with respect to real property. As good advocates on behalf of their clients, the following day, they filed a notice of lis pendens with respect to the property to give notice to the world. That same day, they delivered the Regions Bank Packet to Regions Bank, giving actual notice to Regions Bank which was in the process of issuing a construction loan associated with the property. In contrast, in O’Neal, months after the employee was terminated and weeks after the initiation of the lawsuit, the bank president, who was not a direct participant in the lawsuit at issue, sent a letter to 900 shareholders, which was unrelated to the advancement of litigation. Applying the guidance in O’Neal, the Court finds that Plaintiff’s claims are pre-empted by the abusive litigation statute. The Court holds that Defendants’ actions in filing the lawsuit and the lis pendens and delivering the Regions Bank Packet were committed by counsel taking “an active part in the initiation, continuation or procurement of civil proceedings.” O’Neal, 237 Ga. App. at 333. Accordingly, Defendants’ motion is **GRANTED**.

3. Defendants’ Motion for Summary Judgment Based on the Statute of Limitations

Although Sections 1 and 2 of this Order dispose of this case, the Court is proceeding to address the two remaining motions.

Defendants also move the Court for summary judgment contending that Plaintiff's claims are time-barred. There is no dispute that the alleged tortious conduct of Defendants occurred at the earliest on or about August 6 or 7, 2003. The parties are also in agreement as to the relevant limitations period associated with Plaintiff's claims for slander of title and tortious interference with business and contractual relations—four years. At issue is whether or not a tolling agreement, entered into by Defendants and Plaintiff's predecessors in interest is assignable to Plaintiff.

On August 10, 2010, Defendants and Plaintiff's predecessors executed a tolling agreement that specifically provided "the passage of time between March 15, 2007 and October 15, 2010, shall not be considered in the computation of any time limitation for the assertion of any claims... arising from or growing out of the alleged tortious and/or wrongful interference with their respective economic opportunities and contracts, and any and all claims for cloud on title, slander of title...." The agreement further provides that "no statute of limitations, statute of repose, laches, or any other similar defense based upon the passage of time between March 15, 2007 and October 15, 2010 shall be raised in any litigation initiated by any of the parties to this Agreement."

Defendants contend that the contract language precludes Plaintiff, who is not a party to the agreement, from availing itself of the benefit of the tolling agreement. The Court is not persuaded. No where does the tolling agreement restrict its assignability, and "the rights and duties under a contract are generally freely assignable." Corbin v. Regions Bank, 258 Ga. App. 490 (2002).

Defendants also contend that the chain of assignments from Plaintiff's predecessors to Plaintiff was not effective to assign the rights under the tolling

agreement. The assignment passed the “right, title and interest in and to claims for harm [Plaintiff’s predecessors] suffered as a result of the actions undertaken by Alston & Bird, LLP, Alexander Suto, M. Russell Wofford, Jr... and any other attorney or related consultant involved with the commencement and continued prosecution of the [lawsuits] and delivery of the lis pendens and a copy of one of the lawsuits to Regions Bank.”

Defendants argue that this language was not sufficient to pass rights under the tolling agreement, just rights in the claims. The Court finds this argument unavailing. “In the absence of a contrary intention, an assignment usually passes as incidents all ancillary remedies and rights of action which the assignor had or would have had for the enforcement of the right or chose assigned.” Allianz Life Ins. Co. of N. America v. Riedl, 264 Ga. 395 (1994). Defendants’ motion is **DENIED**.

4. Plaintiff’s Motion for Partial Summary Judgment

Plaintiff moves for summary judgment as to Defendants’ liability for slander of title. Plaintiff’s position is that by filing the complaint and notice of lis pendens, which turned out to be improper (reversing the ruling of two trial judges and three appellate judges), in connection with Defendants’ representation of Nolan and IH in the 2003 case, Defendants slandered Meadow Springs’s title. As support, Plaintiff relies exclusively on language in the Georgia Supreme Court’s and the Court of Appeal’s opinions that the lis pendens was improper and that Defendants are not entitled to the privilege associated with statements made in pleadings.

In response, Defendants argue that Plaintiff cannot rely on factual findings in appellate decisions in a case in which none of the Defendants were a party. Defendants contend that res judicata is not appropriate because: 1) there has not been a judgment in

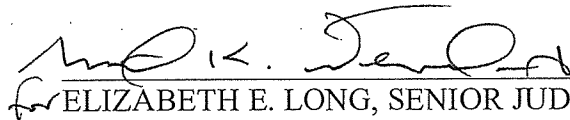
the prior case; 2) the actions do not involve the same parties or parties in privity; and 3) Defendants, as counsel for Nolan and IH, did not have the same interests as their clients. Therefore, their interests have never been represented in the 2003 case.

Defendants likewise argue that collateral estoppel is not available because there is no identity of parties and no judgment in the other case. Similar to res judicata, collateral estoppel prevents issues subject to prior litigation from being re-litigated in a second action. It also “requires identify of parties or their privies in both actions....” Karan, Inc. v. Auto-Owners Ins. Cnty., 280 Ga. 545, 546 (2006).

A “privy has generally been defined as one who is represented at trial and who is in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right.” Butler v. Turner, 274 Ga. 566, 568 (2001). Here, Defendants and their clients had different interests. Defendants are interested in proving that they did nothing wrong in 2003-2004, while their clients were interested in enforcing their property rights.

Defendants represented IH and Nolan for only nine months roughly eight years ago. Since then, Nolan and IH have secured other counsel to continue the 2003 case through all phases of the appellate process regarding the propriety of the lis pendens and the other matters in this litigation. Therefore, Plaintiff is not entitled to summary judgment relying on the factual findings in the cases in which Defendants were not parties. Plaintiff’s motion is **DENIED**.

SO ORDERED this 9th day of January, 2012.


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

Copies to:

Attorneys for Plaintiffs:

David H. Flint,
Michelle R. Kraynak
Andrew J. Lavoie
SCHREEDER, WHEELER & FLINT
1100 Peachtree Street, N.E.
Ste. 800
Atlanta, GA 30309

William Leonard
TAYLOR ENGLISH DUMA LLP
1600 Parkwood Circle, Ste. 400
Atlanta, GA 30339

Attorneys for Defendants:

A. Stephens Clay
Stephen E. Hudson
Robert E. Buckley
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street N.E., Ste. 2800
Atlanta, Georgia 30309