

2-1-2012

Order on Motions for Summary Judgment

Elizabeth E. Long
Fulton County Superior Court

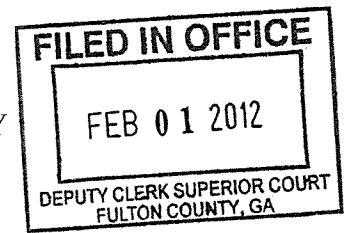
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



MEADOW SPRINGS, LLC,

Plaintiff,

v.

IH RIVERDALE, LLC and
GEOFFREY NOLAN,

Defendants, Third-Party Plaintiffs

v.

MCCHESNEY CAPITAL PARTNERS, LLC
GEORGE MCCHESNEY and
NICK WALDORFF,

Third-Party Defendants

Civil Action No.: 2007CV143869

COPY

**ORDER ON IH RIVERDALE, LLC'S AND GEOFFREY NOLAN'S MOTION FOR
SUMMARY JUDGMENT**

On January 13, 2012, counsel appeared before the Court to present oral arguments on Defendants IH Riverdale, LLC's and Geoffrey Nolan's Motion for Summary Judgment. Upon consideration of the briefs and materials submitted in connection with the motion, the arguments of counsel, and the record of the case, this Court finds as follows:

This is the second dispositive motion filed with respect to the remaining issues in a group of cases arising out of disputes among former business partners involved in a real estate venture. Following years of protracted litigation and an arduous appellate journey, many of the claims have been resolved by settlement or by rulings of this Court, the Georgia Court of Appeals or the Georgia Supreme Court. Currently, all that remain are Plaintiff Meadow Springs, LLC's ("Meadow Springs") claims for tortious interference with business and contractual relations and

slander of title associated with a lis pendens filed by IH Riverdale, LLC (“IH”) and Geoffrey Nolan (“Nolan”) against property located in Clayton County, Georgia.

In 2003, IH/Nolan filed a complaint against Meadow Springs 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, IH/Nolan recorded a lis pendens in Clayton County in which they claimed that they had an interest in the property and that the complaint filed sought relief involving the property. On the same day, IH/Nolan 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 lost the property through foreclosure.

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/Nolan 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).

On September 1, 2011, this Court issued an Order on, among other things, Meadow Springs's motion for summary judgment on its claims of tortious interference and slander of title. In the September 2011 Order, this Court denied summary judgment to Meadow Springs, finding that an issue of fact remained regarding whether Meadow Springs had authority to pursue this claim against IH/Nolan. The Court also ruled in an Order dated October 27, 2011, that issues of fact remained regarding whether IH/Nolan acted with the requisite malice necessary to sustain summary judgment on Meadow Springs's claims for slander of title and tortious interference with business and contractual relationships.

Now, IH/Nolan seek summary judgment on Meadow Springs's claims on the basis that: 1) Meadow Springs's claims are compulsory counterclaims that should have been raised in IH/Nolan's 2003 action against Meadow Springs; 2) Meadow Springs is estopped from proceeding with its claims based on representations from 90% of the owners of McChesney Capital Advisors, LLC ("MPC"), to whom the sole member of Meadow Springs owes a fiduciary duty; 3) The record contains no evidence of special damages; and 4) The record contains no evidence of actual malice.

1. Standard

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).

2. Compulsory Counterclaims

O.C.G.A. § 9-11-13 requires a defendant, at the time he files an answer, to raise "any claim which at the time of serving the pleading the pleader has against any opposing party, if it

arises out of the transaction or occurrence that is the subject matter of the opposing party's claim....” IH/Nolan contend that Meadow Springs's claims arose prior to the date Meadow Springs submitted its answer, and therefore are compulsory counterclaims. A cause of action for slander of title “accrues when the false, slanderous, and malicious words impugning the title of the person's land are first published, *causing special damages*. The owner can recover in such action only such special damages as he actually sustained as a consequence of the wrongful acts.” Sanders v. Brown, 257 Ga. App. 566, 568 (2002) (emphasis added).

IH/Nolan contend that because the Regions Bank loan apparently failed to close prior to September 22, 2003, the date Meadow Springs filed its answer, its cause of action for slander of title had accrued. As an initial matter, the Court notes that IH/Nolan have failed to point to evidence in the record of the exact date that the Regions Bank loan offer was rescinded. Instead, IH/Nolan contend that, because Meadow Springs claims that the wrongfully filed lis pendens caused the Regions Bank loan to fall through, the cause of action can be traced back to August 7, 2003, when the Regions Bank Packet was delivered to Regions Bank. The Court is not persuaded that any special damages can be traced all the way back to the date the Regions Bank Packet was received.

In fact, it appears that Meadow Springs was actively trying to resolve the title issues, presumably in the hopes of salvaging the Regions Bank loan, with the filing on August 20, 2003 of the Emergency Motion for Cancellation of the Lis Pendens and the subsequent appeal. In short, the Court finds that an issue of fact remains regarding the date on which Regions Bank issued the loan.

3. Promissory Estoppel

IH/Nolan contend that Meadow Springs is estopped from pursuing its claims because of statements made by Jed Beardsley, the sole owner of Huntington Westfield Holdings, Inc., which was the sole owner of Meadow Springs. MCP provided funding for Meadow Springs. According to Beardsley's affidavit, he tried to respect and follow the wishes of the three members of MCP, Michael McChesney, George McChesney and Nicholas Walldorff in operating Meadow Springs.

IH/Nolan point to deposition testimony in which Beardsley explains his authority to act on behalf of Meadow Springs, as follows: "[a]uthority is a very limited term here, because my functions were administrative in nature. I was still subject to the direction of MCP in a lot of respects. So I would not have as much authority as you might typically find in an arm's length transaction where the parties were not part of an attorney/client relationship." (Deposition of Jed Beardsley dated September 27, 2004, Page 111, LL 8-18). Because the majority owners of MCP testified that they did not instruct Meadow Springs to proceed with the pursuit of its claims, IH/Nolan argue that Meadow Springs lacks authority or is estopped from pursuing these claims now because, they argue, that they relied on these statements in agreeing to enter into a settlement agreement.

"The elements of promissory estoppels are: (1) the promisor made certain promises; (2) the promisor should have expected that the party would rely on the promises; and (3) the party relied on those promises to its detriment." F&W Agriservices, Inc. v. UAP/GA. AG Chem., Inc., 250 Ga. App. 238, 241 (2001).

It is undisputed that Jed Beardsley, regardless of the extent to which he would defer to the owners of MCP with regard to the management of Meadow Springs, had sole authority to speak on behalf of Meadow Springs. IH/Nolan have not pointed to any statements in the record

where Jed Beardsley, himself, made a promise to IH/Nolan in the context of the settlement that Meadow Springs would not pursue its claims without unanimous consent. Additionally, in emails attached to Beardsley's affidavit, IH/Nolan's attorney clearly understood that Meadow Springs would not participate in the settlement.

4. Special Damages

Turning to the actual merits of the claims at issue, IH/Nolan contend that Meadow Springs's claims are deficient because of Meadow Springs's failure to establish that it suffered special damages due to the alleged slander of title or tortious interference with business and contractual relations.

This issue has already been decided adversely to IH/Nolan, and the law of the case prohibits summary judgment in their favor:

IH and Nolan argue entitlement to summary judgment on the ground that there is no evidence showing that the tortious acts alleged in the complaint damaged Meadow Springs. Meadow Springs, however, has pointed to evidence that Regions Bank refused to fund the pending construction loan after learning of the improperly-filed notice of lis pendens and the allegations therein. Summary judgment is not proper on this ground.

Meadow Springs, LLC v. IH Riverdale, LLC, 307 Ga. App. 72, 76 (2010).

5. Malice

Finally, IH/Nolan contend that Meadow Springs is unable to establish malice, an essential element of claims of slander of title and of tortious interference with contractual and business relations, because the lis pendens was filed in good faith, with a purely economic motivation, and without knowledge of the false statements contained therein. In contrast, Meadow Springs argues that IH/Nolan's purported good faith is irrelevant to the analysis because malice can be implied from the issuance of the false statements. Additionally, even under the actual malice

standard, Meadow Springs claims that it has pointed to evidence that IH/Nolan acted with actual malice.

Malice is an element of all the claims asserted by Meadow Springs. First, slander of title requires a plaintiff to prove the “(1) publication of slanderous or libelous words; (2) with malice; (3) causing special damages; and (4) regarding property in which the plaintiff has an ownership interest. OCGA § 51-9-11. A false lien may support a cause of action for defamation of title under OCGA § 51-9-11, but the statements in the lien must be false and the claimant must be aware of their falsity.” Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, (2006). Tortious interference with business relations requires evidence that the defendant “(1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) for which the plaintiff suffered some financial injury.” Second Continental, Inc. v. Atlanta E-Z Builders, 237 Ga. App. 304, 305 (1999). Finally, “[t]he elements of tortious interference with contract consist of: (1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of a contractual obligation or caused a party or third party to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant’s tortious conduct proximately caused damage to the plaintiff.” Culpepper v. Thompson, 254 Ga. App. 569, 571 (2002).

As evidence of good faith, IH/Nolan point to Nolan’s affidavit in which he stated that he had no ill will towards Meadow Springs and to the fact that this Court and three Court of Appeals Judges believed the lis pendens was properly filed. IH/Nolan cite Harmon v. Cunard, 190 Ga. App. 19 (1989) to support the proposition that evidence of a defendant’s good faith in

filing a claim against title shifts the burden to the plaintiff to show that the defendant acted with malice in the context of a slander of title claim. Likewise, IH/Nolan point to Renden v. Liberty Real Estate Limited Partnership, 213 Ga. App. 333 (1994) to establish that once a defendant makes an affirmative showing that his actions were motivated by valid business concerns, without personal animosity, the burden shifts to the plaintiff on summary judgment to show “specific evidence giving rise to a triable issue as to the element of malice with intent to injure.”

Meadow Springs implores the Court to apply a different standard for malice—that malice is to be presumed or inferred from the nature of the statements made. However, with regard to the slander of title claim, Meadow Springs has failed to provide authority to the Court that malice is to be inferred in a claim for slander of title, relying instead on authority addressing libel and slander, in general. Following the lead of Premier Cabinets, Inc. v. Bulat, 261 Ga. App. 578 (2003), this Court is persuaded that implied malice, which can be inferred from the totality of the circumstances, is not the appropriate standard in the context of a slander of title case. “Although [Plaintiff] cites the case of Melton v. Bow [145 Ga. App. 272 (1978)], for the proposition that malice may be inferred from the totality of the circumstances, the Melton case did not involve the filing of a materialman's lien. It involved verbal misrepresentations which slandered an individual's reputation.” Id., 261 Ga. App. at 583.

With respect to the claims for tortious interference with business and contractual relations, Meadow Springs directs the Court to the following standard as support for the application of implied malice: “[M]alice, as herein used, is a term to be given a liberal meaning; malicious or maliciously means any unauthorized interference or any interference without legal justification or excuse.” Renden, 213 Ga. App. at 334. While malice may be construed liberally, Meadow Springs, as the party who bears the burden of proof at trial, is nevertheless required to

come forward on summary judgment with specific evidence of IH/Nolan's actual malice, now that IH/Nolan have pierced its case by coming forth with evidence that they acted in good faith. See *Id.* at 335; see also *Johnson v. Auto/Mend, Inc.*, 183 Ga. App. 311, 312 (1987) (upholding summary judgment in favor of defendant on a claim of tortious interference with contractual relations, finding that "it is the duty of each party at the hearing on a motion for summary judgment to present his case in full. There having been clearly shown a want of actual malice, the pleadings of [plaintiff] were pierced and the lack of a right of recovery was disclosed.")

Meadow Springs has pointed to four instances of actual malice in the record. First, it contends that IH/Nolan's attorney delivered the Regions Bank Packet when it was about to fund a development loan in order to interfere with Meadow Springs's ability to receive the loan proceeds. However, this is an unsubstantiated conclusion undercut by Nolan's affidavit, in which he says that the statements made in the letter and in the *lis pendens* were made in good faith and that he was putting Regions Bank on notice that the representatives of Meadow Springs were unwilling to pay the brokerage fee. "Conclusory allegations by the plaintiff of conspiracy and malice are insufficient—in the absence of substantiating fact or circumstances—to raise a material issue at trial." *Johnson*, 183 Ga. at 312.

Next, Meadow Springs points to the letter delivered along with the Regions Bank Packet that indicated that a claim for a brokerage commission owed to Wilson & Nolan Southeast was at issue in the litigation, when in fact there was no such claim contained in the complaint. Upon review of the complaint filed in the 2003 case, the Court notes that a paragraph references the brokerage commission. While it is true that an actual claim associated with the brokerage commission was not raised in the complaint, such a claim could not have been made at the time

the complaint was filed because the commission would not be due prior to the closing of the loan. The Court does not find this indicative of actual malice.

Third, Meadow Springs claims that IH/Nolan's attorneys offered to remove the lis pendens in return for a payment of \$1 million. Meadow Springs concedes that evidence of this offer is not contained in the record. Accordingly, this does not create a triable issue of fact sufficient to avoid summary judgment.

Finally, Meadow Springs contends that the complaint included a false claim to the property based on an exhibit of an option to purchase the property that was not, in fact, a proper exhibit to the Operating Agreement. Upon review of the record of the 2003 case, it is apparent that the exhibit was not attached to the original complaint which was delivered to Regions Bank. Instead, it was attached to an amended complaint filed on August 28, 2003, three weeks after the lis pendens was filed and after the Regions Bank Packet was delivered. Because the basis for the slander of title and tortious interference claims (the filing of the lis pendens and delivery of the Regions Bank Packet) had already occurred prior to the date the allegedly improper exhibit was provided to the Court, any malice associated with this conduct is not probative of whether IH/Nolan committed the acts in question with malice. According, summary judgment is **GRANTED** in favor of IH/Nolan on Meadow Springs's claims of tortious interference with business and contractual relations and slander of title.

SO ORDERED this 1 day of ^{Feb.} ~~January~~, 2012.

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

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