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# MSouth Equity Partners, LP, Order Denying Defendant's Partial Motion to Dismiss

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*Fulton County Superior Court*

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IN THE SUPERIOR COURT OF FULTON COUNTY  
BUSINESS CASE DIVISION  
STATE OF GEORGIA

MSOUTH EQUITY PARTNERS, LP,            )  
  )  
    Plaintiff,                                    )  
  )  
v.    )    Civil Action File No. 2017cv287263  
  )  
ALSTON & BIRD, LLP,                        )  
  )  
    Defendant.                                 )

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**ORDER DENYING DEFENDANT’S PARTIAL MOTION TO DISMISS**

Before this Court is Defendant Alston & Bird, LLP’s (“A&B”) Partial Motion to Dismiss certain claims brought by Plaintiff MSouth Equity Partners, LP (“MSouth”). Having considered the briefs and the oral arguments of the parties, the Court finds as follows:

**ALLEGATIONS**

MSouth is a private equity investment firm and was the majority shareholder, owning approximately 66% of the interest, in LMS Intellibound Group, Inc. (“LMS”).<sup>1</sup> In February 2009, LMS retained A&B as its regular legal counsel. For many years, A&B has served as MSouth’s regular legal counsel and represented MSouth in connection with its portfolio investments. A&B represented MSouth in connection with MSouth’s investments in LMS until LMS’s sale.

In 2011, A&B advised LMS in connection with the contributions of the assets of LMS and PLS Acquisition Holdings, Inc. (“PLS”) into a new entity, Capstone Logistics, LLC (“Capstone”) (“the 2011 Transaction”). LMS and PLS each contributed all of the assets and liabilities of their respective subsidiary corporations in exchange for a 50% share interest in the

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<sup>1</sup> LMS is not a party to this suit.

newly-formed Capstone. LMS also received a \$60 million cash distribution. The Complaint alleges that A&B advised both LMS and MSouth that the 2011 Transaction would not be construed as a “disguised sale” by the IRS. In April 2014, however, the IRS commenced an audit of LMS’s 2011 fiscal year. A&B continued to represent both MSouth and LMS following the audit and tax liability determination.

In 2014, A&B represented MSouth and LMS in negotiations pursuant to the Merger and Unit Purchase Agreement (“2014 Transaction”) whereby another company (“2014 Purchaser”) purchased LMS. During these negotiations, the 2014 Purchaser learned of the potential tax liability against LMS and requested that it be indemnified for any potential tax liability. The Complaint alleges that A&B encouraged MSouth to indemnify the 2014 Purchaser for LMS’s potential tax liability arising from the 2011 Transaction. MSouth indemnified the 2014 Purchaser and thus became individually liable for LMS’s 2011 tax liability. The IRS ultimately determined the state and federal tax liabilities along with interest totaled \$7.6 million.

#### **MOTION TO DISMISS STANDARD OF REVIEW**

[A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought . . . .

*Radio Perry, Inc. v. Cox Communications, Inc.*, 323 Ga. App. 604, 605 (2013); *see also*

O.C.G.A. § 9-11-12(b)(6). In ruling on a motion to dismiss, the Court must accept as true all of plaintiff’s well-pleaded factual allegations, and draw all reasonable inferences in plaintiff’s favor. *Radio Perry, Inc.*, 323 Ga. App. at 605. A&B challenges MSouth’s Complaint on several grounds.

## STANDING

First, A&B argues that MSouth cannot seek relief on behalf of LMS and its other shareholders who are not parties to this lawsuit. A&B argues that many of the paragraphs of the Complaint are claims that belong to LMS or its shareholders, not MSouth. The general rule in Georgia is that the proper parties to bring an action on a contract are the parties who, in regard to the subject matter of the contract, have given consideration or exchanged mutual promises of performance. *See* O.C.G.A. § 9-2-20(a) (“... an action on a contract ... shall be brought in the name of the party in whom the legal interest in the contract is vested ...”). MSouth asserts that all of the claims in the Complaint are its own. In fact, at the hearing, Counsel for MSouth stated on the record that he does not represent any entity other than MSouth and therefore is not asserting claims on behalf of LMS or its minority shareholders. MSouth has alleged that A&B represented MSouth in connection with various investments, including its investments in LMS. Thus, MSouth may bring any claims arising out of alleged breach of duties arising under its contractual relationship with A&B or otherwise imposed by law. A&B’s Motion to Dismiss on for lack of standing is **DENIED**.

## COUNT FOUR AND FIVE

The Complaint alleges breach of legal duty pursuant to O.C.G.A § 51-1-6 (Count Four). MSouth alleges that A&B by its acts and omissions breached its legal duties to perform for the benefit of MSouth and to refrain from doing an act that would injure MSouth. The Complaint further alleges breach of a private duty pursuant to O.C.G.A. § 51-1-8 (Count Five). MSouth alleges that A&B by its acts and omissions breached a private duty, created by an express or implied contract, to perform for the benefit of MSouth. The Court of Appeals has recently noted that these two statutes “do not create causes of action, but simply set forth general principles of

tort law, ‘authoriz[ing] the recovery of damages for the breach of a legal duty otherwise arising, though not expressly stated, under a statute or common law.’” *Gobran Auto Sales, Inc. v. Bell*, 335 Ga. App. 873, 877 (2016) (quoting *Bridges v. Wooten*, 305 Ga. App. 682, 684(1) (2010)). For example, the Court of Appeals in *Tante v. Herring*, 211 Ga. App. 322, 327 (1993) cited O.C.G.A. § 51-1-6 when affirming a trial court’s determination that a client was entitled to recover damages from his attorney upon finding the attorney breached the fiduciary attorney-client relationship. In this case, the claims brought under these two statutes may ultimately prove duplicative of other claims and be subject to dismissal. See, e.g., *Griffin v. Fowler*, 260 Ga. App. 443, 446 (2003) (affirming summary judgment on breach of fiduciary duty claim that was duplicative of legal malpractice claim). However, A&B has not established that MSouth could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought under the statutes. Therefore, A&B’s Motion to Dismiss Counts Four and Five is **DENIED**.

### **COUNT THREE, SEVEN, EIGHT, AND TEN**

MSouth alleges Constructive Fraud (Count Three), Unjust Enrichment for Transfer of Liability (Count Seven), Unjust Enrichment for Legal Fees (Count Eight), and Equitable Indemnity (Count Ten). A&B argues for dismissal of these four counts noting that “[e]quity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law[.]” O.C.G.A. § 23-1-4. Relying on this Code section, A&B concludes that because there is availability of monetary damages under MSouth’s other claims (malpractice, breach of fiduciary duty, and breach of contract), MSouth is precluded from recovering under alternative theories of equitable relief. However, “a party may state as many separate claims as he has, ‘regardless of consistency and whether based on legal or on equitable grounds or on both.’” *Hudson v.*

*Hudson*, 309 Ga. App. 449, 449 (2011) (quoting *Miller v. Turner*, 228 Ga. 701, 701(1)(a) (1972)); O.C.G.A. § 9-11-8(e)(2); *see also* O.C.G.A. § 9-11-18(a) (“A party asserting a claim to relief . . . may join . . . as many claims, legal or equitable, as he has against an opposing party.”) MSouth properly included both legal and equitable claims in its Complaint. A&B’s Motion to Dismiss Counts Three, Seven, Eight, and Ten is **DENIED**.

**COUNT NINE**

MSouth alleges a Negligent Misrepresentation claim (County Nine), noting that A&B “failed to meet the standard of care” by negligently misrepresenting LMS’s potential tax liability and A&B’s purported conflict of interest. A&B argues for the dismissal of this count because it is duplicative of MSouth’s Legal Malpractice claim (Count One). A complaint may contain as many separate claims against a defendant as the plaintiff may have, and such claims may be inconsistent, hypothetical, and in the alternative. O.C.G.A. § 9-11-8(e); *see Campbell v. Ailion*, 338 Ga. App. 382, 388 (2016)(citing *Wingate Land & Dev. v. Robert C. Walker, Inc.*, 252 Ga. App. 818, 821 (2001)). Thus, MSouth is allowed to bring claims in the alternative against A&B and A&B’s Motion to Dismiss Count Nine is **DENIED**.

SO ORDERED this 5 day of July, 2017.

  
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JUDGE ELIZABETH E. LONG  
Superior Court of Fulton County  
Business Case Division  
Atlanta Judicial Circuit

**SERVED THROUGH EFILEGA.**

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