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Elizabeth E. Long
Fulton County Superior Court Judge

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

TARA SCOTT; BAILEY M. CARTER; and WILSON CARTER, Individually, as Trustee of THE WILSON M. CARTER 1988 TRUST, and as Next Friend of MARY WILSON CARTER,	)	Civil Action File No. 2017CV297083
Plaintiffs,	)	Bus. Case Div. 2
v.	)	
JOHN J. CARR and JOHN MATTHEW DWYER, III,	)	
Defendants.	)	

ORDER REGARDING TIMELINESS OF PLAINTIFFS BAILEY M. CARTER AND MARY WILSON CARTER'S CLAIMS

Following a June 28, 2018 hearing in the above styled matter, the Court permitted additional briefing on the statute of limitations defense raised in Defendant Carr's Motions to Dismiss and Defendant Dwyer's Motion for Judgment on the Pleadings with respect to the claims asserted by Bailey M. Carter ("Bailey) and Mary Wilson Carter ("Mary").[1] Having considered the motions and the supplemental briefing, the Court finds as follows:

SUMMARY OF PLEADINGS

In this action Plaintiffs allege Defendants Carr and Dwyer violated state and federal securities laws and committed other torts when they solicited and sold to Plaintiffs shares in Vantage Corporation ("Vantage"). Plaintiffs assert that at the time they were sold the Vantage shares: the stock was not a federal covered security, was not subject to an effective registration

[1] Although the argument raised in Defendant Carr's Amended Motion to Dismiss (which Defendant Dwyer incorporates by reference in his Motion for Judgment on the Pleadings) on this issue is directed at Bailey M. Carter, insofar as the same argument and rationale may apply to the claims asserted by Mary Wilson Carter as the other substituted party, the Court addresses the claims of Bailey and Mary collectively herein.

statement and was not exempt from registration; Defendants received direct or indirect compensation for their role in soliciting investments from them in Vantage but were not registered as securities salespeople or as investment advisors; and Defendants made misleading statements of material fact and omissions when soliciting Plaintiffs, inducing them to purchase shares and to hold their investments in Vantage, causing them to suffer damages.

Plaintiffs initiated this action on Oct. 25, 2017. The original Complaint names as Plaintiffs Wilson Carter as Trustee of the Bailey Middleton Carter 2009 Trust and the Mary Wilson Carter 2009 Trust (collectively the "Trusts"), among others, based on a Schedule K-1 provided by Vantage naming the Trusts as shareholders. However, the shares purportedly purchased by the Trusts were actually purchased by Bailey and Mary, individually and on their own behalf, as shown by their respective Stock Subscription Agreements and the corresponding Stock Certificates. Upon Defendants raising an objection as to the Trusts' standing to pursue claims related to Bailey and Mary's stock, Plaintiffs moved to substitute Bailey and Mary, individually, in the place of the Trusts. This Court granted the Motion to Substitute on June 29, 2018.

ANALYSIS

The issue currently before the Court is whether certain claims brought by Bailey and Mary, individually, are time barred.

A. Statute of Limitations and Relation Back

Claims for the sale of unregistered securities in violation of O.C.G.A. §10-5-20 (count I)[2] and for the sale of securities by an individual not properly registered as an agent in violation of O.C.G.A. §10-5-31 (count II)[3] must be "instituted within two years after the violation occurred."

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[2] *See* Plaintiffs' First Amended Complaint, ¶¶ 72-78; Plaintiffs' Second Amended Complaint, ¶¶ 91-97.

[3] *See* Plaintiffs' First Amended Complaint, ¶¶ 79-82; Plaintiffs' Second Amended Complaint,¶¶ 98-101.

O.C.G.A. §10-5-58(j). Claims alleging the violation of 15 U.S.C. §77l(a)(2), Section 12(a)(2) of the Securities Act of 1933 ("1933 Act") (count III)[4] must be brought "within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C.A. § 77m.

Further, insofar as Bailey and Mary were not named parties in the original complaint and first sought to assert claims in this action in Plaintiffs' First Amended Complaint, filed on Mar. 26, 2018, a key issue with respect to Defendants' statute of limitations defense is whether Bailey and Mary's claims relate back to the filing of the original Complaint. The Civil Practice Act allows claims to relate back to the date of the original pleading whenever the claim or defense asserted in an amended pleading arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. O.C.G.A. § 9-11-15(c). O.C.G.A. § 9-11-15(c) further provides:

> An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Georgia law has established that relation back under O.C.G.A. § 9-11-15(c) is applicable to both plaintiffs and defendants. *See* Dover Place Apartments v. A & M Plumbing & Heating Co., 167 Ga. App. 732, 734, 307 S.E.2d 530, 533 (1983) (quoting Gordon v. Gillespie, 135 Ga. App. 369, 375, 217 S.E.2d 628, 633 (1975)) ("It is now well settled…that relation back occurs both as to the plaintiff and the defendant when the new and old parties have such an identity of interest that it can be assumed, or proved, that relation back is not prejudicial; and that the new

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[4] *See* Plaintiffs' First Amended Complaint, ¶¶ 83-87; Plaintiffs' Second Amended Complaint, ¶¶ 102-106.

'cause of action' 'arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings...' provided other requirements are also met").[5] As noted by the Court of Appeals of Georgia in Dover Place Apartments,

> [s]tatutes of limitations are designed to ensure that parties are given formal and reasonable notice that a claim is being asserted against them. [O.C.G.A. § 9-11-15(c)] . . . is . . . based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the right sought to be enforced.

Id. 167 Ga. App. at 733-34 (citations omitted).

B. Findings and Conclusions of Law

Here, in their Second Amended Complaint, Plaintiffs contend: Defendant Dwyer first began soliciting Plaintiffs in violation of O.C.G.A. §§ 10-5-20 and 10-5-31 and Section 12(a)(2) of the 1933 Act in December 2015[6]; Defendant Carr began such solicitations in January 2016[7]; and Defendants continued the allegedly illegal solicitations through December 2016.[8] Given this action was initiated on Oct. 25, 2017, Plaintiffs' causes of action predicated on alleged violations of O.C.G.A. §§ 10-5-20 and 10-5-31 as first asserted in the original Complaint, were filed within the two-year statute of limitations set forth in O.C.G.A. §10-5-58(j). Although the Section 12(a)(2) claim, 15 U.S.C. §771(a)(2), is generally subject to a one year limitations period "from

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5 Although Defendants invite the Court to reconsider these holdings under a "plain and ordinary" reading of O.C.G.A. §9-11-15(c), these decisions are binding on this Court. Further, in holding that §9-11-15(c) is applicable to both plaintiffs and defendants, the appellate courts in Dover Place Apartments and Gordon expressly recognized that federal courts have reached the same conclusion in construing the federal rule upon which §9-11-15(c) is based, Federal Rule of Civil Procedure 15(c). *See, e.g.,* Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1132 (11th Cir. 2004) ("This extension of Rule 15(c)(3) to amendments involving plaintiffs rests on solid ground. When Rule 15(c) was amended in 1966, the advisory committee wrote: 'The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs'") (citing Fed.R.Civ.P. 15 Advisory Committee's note to the 1966 Amendment).

6 *See* Plaintiffs' Second Amended Complaint, ¶¶ 40-41.

7 Id. at ¶ 42.

8 Id. at ¶ 73.

the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence" (15 U.S.C. §77m), the Court finds the timeliness of the 12(a)(2) claim is a factual issue turning on questions of discovery and reasonable diligence, matters which cannot be resolved as a matter of law based on the pleadings.

Turning to the claims asserted by Bailey and Mary, the Court finds their claims for violations of §§ 10-5-20 and 10-5-31 and Section 12(a)(2) relate back to the filing of the original Complaint. Baily and Mary's claims arise out of the same conduct, transaction or occurrence attempted to be set forth in the original pleading—the alleged misrepresentations and omissions of Defendants that Plaintiffs allege induced them to purchase and hold their Vantage stock. Further, Defendants received notice of this action shortly after it was initiated and have participated fully in this litigation such that Defendants "will not be prejudiced in maintaining [their] defense on the merits". O.C.G.A. §9-11-15(c). Indeed, there is a clear identity of interest between the new parties, Bailey and Mary, and the old parties, Bailey and Mary's respective Trusts, such that it can be presumed that relation back is not prejudicial. *See* Dover Place Apartments, *supra*; Gordon, *supra*. Moreover, Defendants knew or should have known that, as the actual owners of the Vantage stock, Bailey and Mary were the proper parties to this action and but for a Schedule K-1 issued by Vantage (Defendants' alleged principal/employer) erroneously naming the Trusts as shareholders, the proper parties likely would have been named in the original Complaint.

Given all of the above, the Court hereby DENIES Defendants' motions to the extent they seek dismissal of Bailey and Mary's claims asserted pursuant to O.C.G.A. §§ 10-5-20, 10-5-31 and Section 12(a)(2) of the 1933 Act on statute of limitations grounds.

SO ORDERED this 25 day of July, 2018.

ELIZABETH E. LONG, SENIOR JUDGE
Metro Atlanta Business Case Division
Fulton County Superior Court
Atlanta Judicial Circuit

Served upon registered service contact through eFileGA:

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