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ROBERT D. SCARBOROUGH, JR. et al., Order on Baker Donelson Defendants' Motion for Judgment on the Pleadings

Elizabeth E. Long
Fulton County Superior Court

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

ROBERT D. SCARBOROUGH, JR. and JOHN R. HAMPARIAN, **Plaintiffs,** **v.** **ANTHONY LAIR, AARON INGRAM, BAKER, DONELSON, BEARMAN, CALDWELL, & BERKOWITZ, P.C., and JOSEPH DELGADO,** **Defendants.**	**CIVIL ACTION NO. 2017CV290622** **Business Case Div. 2**

ORDER ON BAKER DONELSON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

The above styled action is before the Court on Defendant Baker, Donelson, Bearman, Caldwell and Berkowitz, P.C. and Defendant Joseph Delgado's (collectively the "Baker Donelson Defendants") Motion for Judgment on the Pleadings and Motion for Attorney's Fees and Costs ("Motion"). Having considered the pleadings and the Motion, the Court finds as follows:

SUMMARY OF PLEADINGS

Plaintiffs Robert D. Scarborough, Jr. and John R. Hamparian are minority shareholders in NeoMed, Inc. ("NeoMed"), a company that provides neonatal focused devices. Defendant Anthony Lair is a director, majority shareholder, and the Chief Executive Officer of NeoMed and Defendant Aaron Ingram is its President. Defendant Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. ("Baker Donelson") has served as NeoMed's legal counsel since its formation in

2007. Joseph Delgado ("Delgado"), an attorney at Baker Donelson who has advised the company on corporate and transactional issues, in his capacity as counsel was involved in the transaction central to this litigation.

Specifically, Plaintiffs assert claims of fraud and misrepresentation by Defendants' alleged actions and omissions with respect to NeoMed's acquisition of NM Fulfillment, a company co-owned by Defendant Lair ("NM Fulfillment Acquisition"). Plaintiffs assert Defendants misrepresented, omitted, and/or suppressed materials facts regarding the NM Fulfillment Acquisition, including NM Fulfillment's valuation, the dilutive effect of the proposed acquisition on Plaintiffs' shares, and the nature of the association of NM Fulfillment with Defendant Lair's company, Specialty Medical Products ("SMP"). Additionally, Plaintiffs allege Defendants Lair and Ingram have breached fiduciary duties owed to Plaintiffs by engaging in self-dealing and corporate waste, co-mingling NeoMed's funds, and refusing to provide Plaintiffs with NeoMed's financial information.

Plaintiffs filed this action on May 27, 2017 and initially only named Lair and Ingram as Defendants. They subsequently moved to add the Baker Donelson Defendants. The Court granted the motion on May 17, 2018, after which Plaintiffs filed their Second Amended Complaint ("SAC"). The Baker Donelson Defendants answered the SAC and on Jul. 16, 2018 filed the instant Motion, seeking a judgment in their favor with respect to all claims asserted against them and an award of their attorney's fees and costs under O.C.G.A. §9-15-14. On Aug. 6, 2018, Plaintiffs filed their Third Amended Complaint ("TAC"), which they assert addresses the issues raised by the Baker Donelson Defendants and, thus, moots their Motion.

ANALYSIS

A. Timeliness of Plaintiffs' Response

The Baker Donelson Defendants urge that Plaintiffs' response to their Motion, which was submitted more than thirty days after the Motion was filed, was untimely such that Plaintiffs have waived their right to present any evidence in opposition. *See generally* Ga. Unif. Super. Ct. R. 6.2. However, given the short, five-day delay and that no prejudice to Defendants has been shown from the late filing, the Court will consider Plaintiffs' response.

B. Standard on a Motion for Judgment on the Pleadings

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." O.C.G.A. § 9-11-12(c). "[W]hen deciding a motion for judgment on the pleadings, the issue is whether the undisputed facts appearing from the pleadings entitle the movant to judgment as a matter of law." Southwest Health & Wellness, L.L.C. v. Work, 282 Ga. App. 619, 623, 639 S.E.2d 570, 575 (2006) (citing Holsapple v. Smith, 267 Ga. App. 17, 20(1), 599 S.E.2d 28 (2004)). Thus, "[t]he grant of [such a motion] under O.C.G.A. § 9-11-12(c) is proper only where there is a complete failure to state a cause of action or defense." Schumacher v. City of Roswell, 344 Ga. App. 135, 138, 809 S.E.2d 262, 265 (2017) (quoting Caldwell v. Church, 341 Ga. App. 852, 855-856 (2), 857 (2) (a), 802 S.E.2d 835 (2017).

> A complaint fails to state a claim upon which relief can be granted and warrants… judgment on the pleadings "only if ... its allegations 'disclose with certainty' that no set of facts consistent with the allegations could be proved that would entitle the plaintiff to the relief he seeks." Benedict v. State Farm Bank, FSB, 309 Ga. App. 133, 134(1), 709 S.E.2d 314 (2011) (citation omitted). "Put another way, 'if, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.'" Id.

Bush v. Bank of New York Mellon, 313 Ga. App. 84, 89, 720 S.E.2d 370, 374 (2011).

For purposes of the motion, "all well-pleaded material allegations by the nonmovant are taken as true, and all denials by the movant are taken as false. But the trial court need not adopt a party's legal conclusions based on these facts." Southwest Health & Wellness, L.L.C., 282 Ga. App. at 623 (citation omitted). "Further, in considering a motion for judgment on the pleadings, a trial court may consider exhibits attached to and incorporated into the pleadings, including exhibits attached to the complaint or the answer." Id.

C. Analysis and Conclusions of Law

In this action Plaintiffs assert claims of fraud (count V) and negligent misrepresentation (count VI) against the Baker Donelson Defendants, and seek compensatory damages as well as punitive damages and attorneys' fees (counts VII and IV, respectively).The Baker Donelson Defendants urge all of the claims fail as a matter of law insofar as they are insufficiently pled and no facts exist to support necessary elements of the claims. Plaintiffs argue that the Baker Donelson Defendants' Motion, which is based on the SAC, has been mooted by the TAC. The Court agrees that Plaintiffs' latest, operative pleading moots the arguments raised in the Motion and that the TAC at least states a claim for relief against the Baker Donelson Defendants in part.

"A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order." O.C.G.A. §9-11-15. *See* Deering v. Keever, 282 Ga. 161, 163, 646 S.E.2d 262, 264 (2007) ("O.C.G.A. § 9-11-15 is liberally construed in favor of allowing amendments") (citing Cheeley v. Henderson, 261 Ga. 498(3), 405 S.E.2d 865 (1991)). "An amendment relates back to the original pleading even if the original pleading failed to assert facts sufficient to bring the case within the trial court's jurisdiction, or is otherwise insufficient." Deering v. Keever, 282 Ga. at 163. Given these authorities, it is clear that, although allegations contained in the TAC may arguably conflict with or call into question allegations contained in

Plaintiffs' prior pleadings, the TAC nevertheless is Plaintiffs' operative pleading and Defendants' Motion must be considered in light of that pleading. *See* GeorgiaCarry.Org, Inc. v. Code Revision Comm'n, 299 Ga. 896, 899, 793 S.E.2d 35, 37 (2016) (whether motion to dismiss has been mooted by amended pleading depends on whether the grounds for dismissal asserted in the motion were affected by the amendment).

Turning to the substantive claims at issue, "[i]n order to prove fraud, the plaintiff must establish five elements: (1) a false representation by a defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to plaintiff." Engelman v. Kessler, 340 Ga. App. 239, 246, 797 S.E.2d 160, 166 (2017), cert. denied (Aug. 14, 2017). *See also* O.C.G.A. §9-11-9(b) ("In all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally").

"The elements of a claim for negligent misrepresentation are: '(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance.'" Liberty Capital, LLC v. First Chatham Bank, 338 Ga. App. 48, 54, 789 S.E.2d 303, 308–09 (2016) (citing Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc., 267 Ga. 424, 426, 479 S.E.2d 727 (1997)).

"The same principles apply to both fraud and negligent misrepresentation, and therefore justifiable reliance is an essential element of [either] claim." Anderson v. Atlanta Comm. for Olympic Games, Inc., 261 Ga. App. 895, 900, 584 S.E.2d 16, 21 (2003), aff'd sub nom. Atlanta Comm. for Olympic Games, Inc. v. Hawthrone, 278 Ga. 116, 598 S.E.2d 471 (2004) (citing Artzner v. A & A Exterminators, 242 Ga. App. 766, 771-772(2), 531 S.E.2d 200 (2000)).

"Whether a plaintiff could have protected itself by the exercise of due diligence is generally a question for the jury; however, 'an exception occurs when a plaintiff cannot offer evidence that he exercised his duty of due diligence to ascertain the truth and to avoid damage.'" Liberty Capital, LLC, 338 Ga. App. at 54 (citing Walden v. Smith, 249 Ga. App. 32, 35, 546 S.E.2d 808 (2001)).

Here, in the TAC Plaintiffs allege that in October 2016, prior to the full shareholder vote on the NM Fulfillment Acquisition, Defendants made material misrepresentations of fact and omitted material facts "with the intent to induce Plaintiffs to act or refrain from acting" with respect to that transaction.[1] Specifically, Plaintiffs allege the Baker Donelson Defendants misrepresented that NeoMed Fulfillment was a "pass through" company when in reality it was formerly a "doing business as" entity for Lair's separate company, SMP and failed to disclose material information regarding NM Fulfillment including that it owed NeoMed approximately $3,000,000.[2] They also assert the Baker Donelson Defendants misrepresented that time was of the essence in approving the NM Fulfillment Acquisition and that board action was required immediately.[3] Further, Plaintiffs contend Delgado was present when Lair misrepresented that the NM Fulfillment Acquisition would result in a 5% dilution of Scarborough's shares when in fact it diluted his shares 56% and, upon information and belief, Delgado knew that representation was false but failed to correct or amend it.

Plaintiffs allege that "[b]ased on the Defendants' material representations and omissions regarding the value, dilutive effect, 'pass through' status, and time sensitive nature of the NM Fulfillment Acquisition, Scarborough voted to approve the [transaction]."[4] According to

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1 TAC, ¶117.
2 TAC, ¶¶ 64, 114.
3 TAC, ¶115.
4 TAC, ¶117.

Plaintiffs they have suffered damages due to the Baker Donelson Defendants' conduct because, as a result of the NM Fulfillment Acquisition, Scarborough's ownership interest in NeoMed was reduced from 27% to 11.8%, Hamparian's interest was reduced from 2.73% to 1.5% ownership, and NM Fulfillment was ultimately acquired at a significantly inflated price to the benefit of Lair and Ingram and to the detriment of Plaintiffs. However, since Plaintiff Hamparian abstained from voting, the Court cannot say that he relied on Defendant Delgado's representations or omissions.

Given the allegations summarized above, the Court finds that as to Plaintiff Scarborough the deficiencies raised in the Baker Donelson Defendants' Motion have been addressed in the TAC. The Court has previously held that Plaintiffs could not have reasonably believed that the Baker Donelson Defendants represented them, thus, precluding relief under a privity theory. However the allegations above are sufficient to at least state claims of fraud or negligent misrepresentation insofar as Plaintiffs affirmatively allege Defendants' acted intentionally and willfully to induce Plaintiffs to act to approve the NM Fulfillment Acquisition.[5] *See* O.C.G.A. §51-6-2 ("Willful misrepresentation of a material fact, made to induce another to act, upon which such person acts to his injury, will give him a right of action...A fraudulent or reckless representation of facts as true when they are not, if intended to deceive, is equivalent to a knowledge of their falsehood even if the party making the representation does not know that such facts are false"); O.C.G.A. §23-2-53 ("Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case"). *See also* Robert & Co. Assocs. v. Rhodes-Haverty P'ship, 250 Ga. 680, 680-81, 300 S.E.2d 503, 504 (1983).

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[5] TAC, ¶¶ 89, 115, 117, 119, 123, 135-136.

The Baker Donelson Defendants urge that "no set of facts exist demonstrating that Delgado acted willfully" because Plaintiffs do not allege that Delgado knew any of the information he provided to them was false. However, in the TAC Plaintiffs repeatedly allege that "upon information and belief" Delgado knew the representations at issue were false but made them anyway or failed to correct them.[6] *See* Truelove v. Wilson, 159 Ga. App. 906, 908, 285 S.E.2d 556, 559 (1981) ("Wilful and wanton conduct...is conduct 'such as to evidence a wilful intention to inflict the injury, or else was so reckless or so charged with indifference to the consequences...as to justify the jury in finding a wantonness equivalent in spirit to actual intent'") (citing Hawes v. Cent. of Georgia R. Co., 117 Ga. App. 771, 771, 162 S.E.2d 14, 15 (1968)). Taking Plaintiffs' allegations in the TAC as true, the Court cannot find as a matter of law that they "'disclose with certainty' that no set of facts consistent with the allegations could be proved that would entitle [Plaintiffs] to the relief [they] seek[]." Bush, 313 Ga. App. at 89.

Further, the fact that Scarborough consulted with his own counsel prior to the October votes is not dispositive with respect to the sufficiency of Plaintiffs' claims of fraud and negligent misrepresentation. If, as alleged by Plaintiffs, the Baker Donelson Defendants intentionally or negligently made material representations or omissions related to the NM Fulfillment Acquisition and failed to timely provide requested financial information regarding NeoMed, NM Fulfillment and the proposed transaction, those acts are separate from Scarborough's prior conferral with his counsel. Indeed, the alleged misrepresentations/omissions at issue are not necessarily related to legal advice but rather appear to be based on facts and information uniquely within Defendants' possession (and that of NeoMed's accountants) which Plaintiffs allege was misrepresented or not provided to them. Ultimately Plaintiff Scarborough's diligence to ascertain the truth and to avoid damage (*e.g.*, by seeking outside counsel, requesting financial

[6] TAC, ¶¶ 53, 55, 65, 70, 113, 115, 128.

and other information regarding the companies and the proposed transaction, the timing of such requests, etc.) and his reliance on the information provided by Defendants are questions which cannot be assessed and determined as a matter of law based solely on the pleadings.

Given all of the above, the Court is compelled to and does hereby DENY the Baker Donelson Defendants' Motion for Judgment on the Pleadings with respect to Plaintiff Scarborough but GRANTS the Motion with respect to Plaintiff Hamparian. The Court declines to award any attorney's fees at this time.

SO ORDERED this 17th day of September, 2018.

Elizabeth E. Long

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

Served upon registered service contacts through eFileGA

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