3-20-2019

ROBERT 0 . SCARBOROUGH, JR et al., ORDER ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNTS IV, VI, VII OF THE FOURTH AMENDED COMPLAINT

Elizabeth E. Long
Fulton County Superior Court, Judge

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

ROBERT D. SCARBOROUGH, JR. and JOHN R. HAMPARIAN,	)	
Plaintiffs,	)	Civil Action File No. 2017CV290622
v.	)	
ANTHONY LAIR and AARON INGRAM,	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNTS IV, VI, VII OF THE FOURTH AMENDED COMPLAINT

The above-styled case is before this Court on Defendants Joseph Delgado and Baker, Donelson, Bearman, Caldwell, and Berkowitz, P.C.'s (collectively the "Baker Donelson Defendants") Amended Motion for Judgment on the Pleadings as to Counts IV, VI, and VII of Plaintiffs' Fourth Amended Complaint.[1]

Having considered the pleadings, the Court finds as follows:

STATEMENT OF THE CASE

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. 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

[1] The Baker Donelson Defendants filed a Motion to Strike Plaintiffs' Surreply to Their Amended Motion for Judgment on the Pleadings. Since the Court has not relied on Plaintiffs' surreply and Plaintiffs do not object to the Motion to Strike, the Baker Donelson Defendants' Motion to Strike is GRANTED.

2007. Defendant Joseph Delgado is an attorney at Baker Donelson who has advised NeoMed on corporate and transactional issues. He was involved in the transaction central to this litigation.

In the Fourth Amended Complaint, Plaintiffs assert a claim for fraud against the Baker Donelson Defendants arising out of Defendant Delgado's 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").[2] Additionally, Plaintiffs allege the Baker Donelson Defendants acted in concert with the other Defendants to defraud Plaintiffs of a portion of their interest in NeoMed[3] and aided and abetted the other Defendants in breaching their fiduciary duty towards Plaintiffs.[4]

The Baker Donelson Defendants here seek judgment based on the pleadings on Count IV (fraud), Count VI (conspiracy) and Count VII (aiding and abetting the other Defendants' illegal action).

I. Applicable Standard

"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-l l-12(c). The Georgia Court of Appeals has noted that:

> [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. . . . Thus, the question before us is

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2 Fourth Amended Complaint, ¶¶118, 120, 121.
3 Fourth Amended Complaint, ¶¶149, 152.
4 Fourth Amended Complaint, ¶¶124, 156.

> whether the undisputed facts appearing from the pleadings indicate that [defendants are] entitled to judgment as a matter of law. Where the part[ies] moving for judgment on the pleadings [do] not introduce affidavits, depositions, or interrogatories in support of [their] motion, such motion is the equivalent of a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The motion to dismiss should not be granted unless the averments in the complaint disclose with certainty that the plaintiff[s] would not be entitled to relief under any state of facts which could be proved in support of [their] claim.

Sw. Health & Wellness, L.L.C. v. Work, 282 Ga. App. 619, 623, 639 S.E.2d 570, 575 (2006) (internal citations omitted). For purposes of the Motion, "[a]ll 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." Id. (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.

II. Analysis and Findings of Law

a. Count IV – Fraud

In the Fourth Amended Complaint, Plaintiffs contend Defendant Delgado was present at the October shareholders' meeting when Defendant Lair represented that the NM Fulfillment Acquisition would result in a 5% dilution of Plaintiff Scarborough's shares when in fact it diluted his shares by approximately 50%. Specifically, Plaintiffs allege the Baker Donelson Defendants were "aware of [Defendant] Lair's motivation to dilute [Plaintiff] Scarborough's NeoMed shares"[5] but Defendant Delgado "knowingly made no attempt to correct or amend this material representation at any time during the October [m]eeting or since."[6] The Fourth Amended Complaint also alleges that Defendants made material misrepresentations of fact and

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5 Fourth Amended Complaint, ¶115.

6 Fourth Amended Complaint, ¶119.

omitted material facts "with the intent to induce Plaintiffs to approve the NM Fulfillment transaction."[7] Plaintiffs allege that the Baker Donelson Defendants represented that the "[NM] Fulfillment was a 'pass through' company" when in reality it was formerly a "doing business as" entity for Defendant Lair's separate company, SMP.[8] Finally, Plaintiffs allege the Baker Donelson Defendants misrepresented that time was of the essence in approving the NM Fulfillment Acquisition and that shareholder action was required immediately.

In their Motion for Judgment on the Pleadings, the Baker Donelson Defendants assert that Plaintiff Scarborough knew that his ownership interest would be diminished and thus he cannot show justifiable reliance on any misrepresentations or omissions by Defendant Delgado. Specifically, the Baker Donelson Defendants argue that Scarborough has failed to demonstrate that he exercised due diligence to verify the dilutive effect the NM Fulfilment transaction would have on his shares.

"[T]o 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"). "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

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7 Fourth Amended Complaint, ¶124, 152.

8 Fourth Amended Complaint, ¶120.

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)).

This Court considered the Baker Donelson Defendants' argument of lack of justifiable reliance in its Order on a previous Motion for Judgment on the Pleadings. Earlier, the Baker Donelson Defendants asserted that Plaintiff Scarborough cannot show justifiable reliance on Defendant Delgado's representations because Plaintiff Scarborough hired his own counsel before voting on the acquisition and that Defendant Delgado knew that he was represented by counsel. In the present Motion, the Baker Donelson Defendants now add that Plaintiff Scarborough cannot show justifiable reliance because he himself knew or should have known that his shares would be diluted and that his ownership interest would be diminished.

The Court still finds, as in the earlier Order, that "[u]ltimately Plaintiff Scarborough's diligence to ascertain the truth and to avoid damage (*e.g.*, by seeking outside counsel, requesting financial 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. Taking Plaintiffs' allegations in the [Fourth Amended Complaint] 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[]."[9]

The Baker Donelson Defendants' Motion for Judgment on the Pleadings on Plaintiff Scarborough's Fraud claim is hereby **DENIED**.

b. Count VI – Conspiracy

In Count VI of the Fourth Amended Complaint, Plaintiffs allege that Defendants acted in concert to defraud Plaintiffs with the goal of fraudulently "diluting [Plaintiff] Scarborough's

[9] Order, pp. 7-9.

shares through NeoMed's acquisition of NM Fulfillment."[10] Plaintiffs further allege that Defendants conspired to get Plaintiff Scarborough's approval of the transaction.[11]

> Georgia law provides that a conspiracy upon which a civil action for damages may be founded is a combination between two or more persons either to do some act which is a tort, or else to do some lawful act by methods which constitute a tort. Where it is sought to impose civil liability for a conspiracy, the conspiracy of itself furnishes no cause of action. The gist of the action, if a cause of action exists, is not the conspiracy alleged, but the tort committed against the plaintiff and the resulting damage. Where the act of conspiring is itself legal, the means or method of its accomplishment must be illegal.

Rogers v. Dupree, 340 Ga. App. 811, 817, 799 S.E.2d 1, 6 (2017). Moreover, "[t]he essential element of the alleged conspiracy is proof of a common design." Rogers, 340 Ga. App. at 837. "And anyone, after a conspiracy is formed, who knows of its existence and purposes and joins therein, becomes as much a party thereto as if he had been an original member." Savannah College of Art & Design v. School of Visual Arts of Savannah, 219 Ga. App. 296, 297, 464 S.E.2d 895 (1995).

In the earlier Order, this Court held that "since Plaintiff Hamparian abstained from voting, the Court cannot say that he relied on Defendant Delgado's representations or omissions."[12] Because the underlying tort is based on the allegations that Plaintiffs relied on Defendant Delgado's misrepresentations in voting in favor of the acquisition, the conspiracy claim fails as to Plaintiff Hamparian.

As to Plaintiff Scarborough, since the underlying fraud claim survives and taking his allegations as true, the Court cannot find as a matter of law that the allegations "'disclose with certainty' that no set of facts consistent with the allegations could be proven that would entitle

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10 Fourth Amended Complaint, ¶¶146, 149.
11 Fourth Amended Complaint, ¶¶149, 152.
12 Order, p.7.

[Plaintiff Scarborough] to the relief [he] seeks." Bush v. Bank of New York Mellon, 313 Ga. App. 84, 89, 720 S.E.2d 370, 374 (2011).

The Baker Donelson Defendants' Motion for Judgment on the Pleadings on Plaintiffs' Conspiracy claim is **GRANTED** as to Plaintiff Hamparian and **DENIED** as to Plaintiff Scarborough.

c. Count VII – Aiding and Abetting

In the Fourth Amended Complaint, Plaintiffs allege that Defendant Delgado assisted Defendant Lair and Defendant Ingram in breaching their fiduciary duties to Plaintiffs. Plaintiffs allege that Defendant Delgado, with knowledge of the fraudulent purpose of the transaction, furthered breaches of fiduciary duties by "failing to truthfully convey the nature of the NM Fulfilment transaction and the effect the transaction would have on Plaintiffs' shares, and by falsely stating that time was of the essence to complete the transaction . . . ."[13]

The tort of aiding and abetting a breach of fiduciary duty requires proof of the following elements:

> (1) through improper action or wrongful conduct and *without privilege*, the defendant acted to procure a breach of the primary wrongdoer's fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure; (3) the defendant's wrongful conduct procured a breach of the primary wrongdoer's fiduciary duty; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Kahn v. Britt, 330 Ga. App. 377, 389, 765 S.E.2d 446, 458 (2014) (emphasis in original). The Khan case continues to state:

> [t]he tort of aiding and abetting requires proof of virtually the same elements as the tort of tortious interference with business relations. [I]n order to be liable for tortious interference, one must be a stranger to both the contract at issue and the business relationship giving rise to and

[13] Fourth Amended Complaint, ¶158.

> underpinning the contract. In other words, all parties to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships.

Khan, 330 Ga. App. at 389.

Most of the cases cited by the parties concern tortious interference rather than aiding and abetting. But the application of the stranger doctrine appears to apply equally to both. Am. Mgmt. Servs. E., LLC v. Forth Benning Family Communities, LLC, 333 Ga. App. 664, 774 S.E.2d 233 (2015); Hyre v. Denise, 214 Ga. App. 552, 555, 449 S.E.2d 120, 125 (1994). To establish that a defendant acted without privilege, the plaintiff must show that the defendant was a stranger to the contract or business relationship at issue. Brathwaite v. Fulton-DeKalb Hosp. Auth., 317 Ga. App. 111, 113, 729 S.E.2d 625, 628 (2012) (citing to ASC Constr. Equip. USA, Inc. v. City Commercial Real Estate, Inc., 303 Ga. App. 309, 313, 693 S.E.2d 559 (2010)). "[O]nly a stranger to both the contract at issue and the business relationship giving rise to and underpinning the contract may be liable for tortious interference." Brathwaite, 317 Ga. App. at 113 (citing to Perry Golf Course Dev., LLC v. Housing Auth. of the City of Atlanta, 294 Ga. App. 387, 390, 670 S.E.2d 171 (2008)). Those who have a direct economic interest in or would benefit from a contract with which they are alleged to have interfered are not strangers to the contract and cannot have tortiously interfered with that contract. Mabra v. SF, Inc., 316 Ga. App. 62, 65, 728 S.E.2d 737 (2012).

Here, the Fourth Amended Complaint does not contain allegations that Defendant Delgado had a direct economic interest in or would benefit from the acquisition transaction. Defendant Delgado, on behalf of his client NeoMed, was involved in the planning and execution of the NM Acquisition transaction. Namely, in August 2016, Defendant Delgado "provided

NeoMed with potential restructuring options,"[14] attended the October 3, 2016 telephone conference between the defendants regarding the acquisition transaction,[15] attended the October 19, 2016 shareholders' meetings[16] and on December 28, 2016, "over the minority shareholders' objections,"[17] he "executed and filed a series of documents finalizing the acquisition."[18] Therefore, Defendant Delgado was not a stranger to the acquisition transaction. The Baker Donelson Defendants' Motion for Judgment on the Pleadings is GRANTED as to the aiding and abetting claim.

CONCLUSION

Given all of the above, the Court hereby: DENIES IN PART AND GRANTS IN PART the Baker Donelson Defendants' Motion for Judgment on the Pleadings as set forth above.

SO ORDERED this 20th day of March, 2019.

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

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[14] Fourth Amended Complaint, ¶43; see also Fourth Amended Complaint, Exhibit A, 8/24/2016 email from Delgado to Sherman.
[15] Fourth Amended Complaint, ¶151.
[16] Fourth Amended Complaint, ¶116.
[17] Fourth Amended Complaint, ¶128.
[18] Fourth Amended Complaint, ¶73.

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