2-10-2020

Brown Order on Motion to Dismiss

Wesley B. Tailor
State Court of Fulton County, Judge

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

ROD BROWN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION FILE
v.	)	NO. 2020CV331854
	)	
DIONNE VAN ZYL and BRIDGET VAN ZYL,	)	
	)	
Defendants.	)	

ORDER ON MOTION TO DISMISS

This matter comes before the court on the motion to dismiss filed by Defendants Dionne and Bridget van Zyl. Having considered the entire record, the court finds as follows:

Plaintiffs brought this action in the State Court of Fulton County on March 7, 2019, Case No. 19EV001268. This case was transferred to the Metro Atlanta Business Case Division by Order entered on January 17, 2020. In their complaint, Plaintiffs allege that Defendants engaged in a conspiracy and a racketeering enterprise, establishing in essence a "Ponzi" scheme in which Plaintiffs unwittingly invested. Plaintiffs assert a number of claims including for violations of Georgia's Racketeer Influenced and Corrupt Organizations Act ("RICO"), O.C.G.A. § 16-14-1 *et seq.*, violations of Georgia's Uniform Securities Act of 2008 ("Securities Act"), O.C.G.A. § 10-5-1 *et seq.*, fraud, fraudulent inducement, negligence, negligent misrepresentation, breach of fiduciary duty, unjust enrichment, money had and received, and conversion. On April 12, 2019, Defendants filed their motion to dismiss, which Plaintiffs oppose.

The standard for granting a motion to dismiss is a stringent one. As our Supreme Court notes:

> It is well established that: 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.... In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

Scouten v. Amerisave Mortg. Corp., 283 Ga. 72, 73 (2008) (citations and punctuation omitted); *accord* Austin v. Clark, 294 Ga. 773, 774-75 (2014). "In making this analysis, we view all of the plaintiff's well-pleaded material allegations as true, and view all denials by the defendant as

false, noting that we are under no obligation to adopt a party's legal conclusions based on these facts." *Love v. Morehouse College, Inc.*, 287 Ga. App. 743, 743-44 (2007) (citations omitted). "In deciding a motion to dismiss,... a complaint is not required to set forth a cause of action, but need only set forth a claim for relief. 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. at* 744 (citations and punctuation omitted).

A. "Shotgun" pleading.

Defendants characterize Plaintiffs' complaint as a "shotgun pleading." As the Georgia Court of Appeals has noted,

> [t]he Eleventh Circuit has addressed shotgun pleadings on many occasions, *see Davis v. Coca-Cola Bottling Co. Consolidated*, 516 F3d 955, 979 n.54 (VI)(A) (11th Cir. 2008), and we find some guidance in the decisions of that court. Although the concept of a shotgun pleading is not one susceptible of a terse definition, the Eleventh Circuit has identified several characteristics that typically mark such pleadings. A shotgun complaint, for instance, often "contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts . . . contain irrelevant factual allegations and legal conclusions," *Strategic Income Fund v. Spear, Leeds & Kellogg Corp.*, 305 F3d 1293, 1295 (II) (11th Cir. 2002), combines "multiple claims together in one count," *Ledford v. Peeples*, 568 F3d 1258, 1278 (II)(B)(1) (11th Cir. 2009), and buries material allegations "beneath innumerable pages of rambling irrelevancies." *Magluta v. Samples*, 256 F3d 1282, 1284 (IV) (11th Cir. 2001).

Bush v. Bank of N.Y. Mellon, 313 Ga. App. 84, 90-91 (2011); *accord B.L.E. ex rel. Jefferson*, 335 F. App'x 962, 963 (11th Cir. 2009); *Pelletier v. Zweifel*, 921 F.2d 1465, 1518-19 (11th Cir. 1991) ("quintessential shotgun pleadings" contain "rambling recitations"). Such pleadings are "framed in complete disregard of the principle that separate, discrete causes of action should be plead[ed] in separate counts." *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902, 905 (11th Cir. 1996); *see also Beckwith v. Bellsouth Telecomms., Inc.*, 146 Fed. Appx. 368, 371 (11th Cir. 2005) ("The failure to identify claims with sufficient clarity to enable the defendant to frame a responsive pleading constitutes a 'shotgun pleading.'").

Georgia has "abolished 'issue pleading,' [and] substituted in lieu thereof 'notice pleading,' and directs that 'all pleadings shall be construed as to do substantial justice.'" *Sheppard v. Yara Eng'g Corp.*, 248 Ga. 147, 149 (1981); *see* O.C.G.A. § 9-11-8(f). Pursuant to these principles,

> [a] complaint must contain "a short and plain statement of the claims showing that the pleader is entitled to relief," O.C.G.A. § 9-11-8(a)(2)(A), and as we have explained before, this short and plain statement must include enough detail to afford the defendant fair notice of the nature of

> the claim and a fair opportunity to frame a responsive pleading.... Each averment of a pleading shall be simple, concise, and direct," O.C.G.A. § 9-11-8(e)(1), and although alternative theories of a single claim can be pled in a single count, O.C.G.A. § 9-11-8(e)(2), distinct claims must be pled in distinct counts, at least to the extent that "a separation facilitates the clear presentation of the matters set forth." O.C.G.A. § 9-11-10(b).... Most elements of most claims can be pled in general terms, so long as they give fair notice of the nature of the claims to the defendant.

Bush, 313 Ga. App. at 89-90 (citations and punctuation omitted).

The court finds that Plaintiffs' complaint, which includes a detailed recitation of facts pertinent to this case, specific allegations of wrongdoing, and causes of action separately and clearly enumerated, cannot reasonably be construed as a shotgun pleading. Although at times redundant, the complaint is neither prolix nor rambling. The factual allegations coherently relate to, and provide the prima facie elements for, the causes of action pled by Plaintiffs. Taken as a whole and in its specifics, the complaint gives fair notice to Defendants of the nature of Plaintiffs' claims comprising this suit.

Even if the court were to find Plaintiffs' complaint to be a shotgun pleading, the court would be compelled to deny Defendants' motion to dismiss because, "as our Supreme Court has instructed, when a plaintiff fails to conform to these [pleading] requirements, the proper remedy is a more definite statement, not a dismissal of the complaint." *Bush*, 313 Ga. App. at 90 (citing *Hall v. Churchwell's, Inc.*, 243 Ga. 852, 853 (1979)). The court is disinclined to convert Defendants' motion to dismiss into a motion for more definite statement. *See* O.C.G.A. § 9-11-12(e); *see also Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 652 (1979) ("[M]otions for more definite statement are not favored inasmuch as discovery procedures should be used extensively to obtain such information. Unless the pleadings are so vague and ambiguous that the defendant could not frame the proper responsive pleadings thereto the motion should not be granted." (citations omitted)); *Padgett v. Bryant*, 121 Ga. App. 807, 812 (1970) ("Motions for more definite statement ...are not to be used merely as a substitute for discovery.").

Therefore, the court hereby **DENIES** Defendants' motion to dismiss on this ground.

B. Fraud based claims.

Defendants argue that Plaintiffs have failed to allege their fraud claims and fraud-based RICO claims with the requisite particularity.

> The tort of fraud has five elements: a false representation by the defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by the plaintiff, and damage to the plaintiff. O.C.G.A. § 9-11-9(b) requires that all allegations of fraud must be made with particularity and not averred generally. Notice pleading is the rule in Georgia, and under O.C.G.A. § 9-11-9(b), allegations of fraud must be

> pled with particularity. It is well settled that a general allegation of fraud amounts to nothing — it is necessary that the complainant show, by specifications, wherein the fraud consists. Issuable facts must be charged.

Dockens v. Runkle Consulting, Inc., 285 Ga. App. 896, 900 (2007) (citations and punctuation omitted); *accord Fairfax v. Wells Fargo Bank, N.A.*, 312 Ga. App. 171, 172 (2011). "In all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity." O.C.G.A. § 9-11-9(b).

Plaintiffs allege that they invested and/or lent money to a number of entities owned and controlled by Defendants, known as the "Doron Group." Plaintiffs were induced into these transactions by relying on material misrepresentations from Defendants about the "profitability, source of funds and/or revenue, financial stability, investment objectives, actual investments, assets and liabilities, investment risk, market share, investment protections and guarantees" of the Doron Group of companies. Specifically, the entities making up the Doran Group were not legitimate business enterprises. Instead, they served as a mechanism by which Defendants created and maintained a "Ponzi scheme," whereby payments to earlier investors and lenders were funded from later investors and lenders.

Plaintiffs further allege that Defendants wrongfully paid themselves and other family members unearned fees and excessive salaries. Additionally, Defendants fraudulently transferred funds to off-shore accounts in the Grand Caymans and Australia to make the money inaccessible to investors for purposes of absconding with such monies.

"Although fraud may not generally be predicated on statements which are promissory in nature as to future acts or events, it can be predicated on such representations where there is a present intention not to perform or a present knowledge that the future event will not occur." *Seligman v. Savannah Wholesale Co.*, 185 Ga. App. 250, 252 (1987) (citations omitted). In addition, fraudulent inducements made to convince a party to enter into a contract may supply a basis for a fraud claim. *See, e.g., Golden Atlanta Site Dev., Inc. v. R. Nahai & Sons, Inc.*, 299 Ga. App. 654, 657 (2009) ("Willful misrepresentation of a material fact, made to induce another to act, upon which such a person acts to his injury, will give him a right of action.").

The court finds that Plaintiffs have alleged their fraud, fraudulent inducement, and fraud-based RICO claims with the particularity required by O.C.G.A. § 9-11-9(b). Plaintiffs' pleading sets out "[t]he circumstances constituting the alleged fraud … with sufficient definiteness to advise [Defendants] of the claim which [they] must meet." *Gwinnett Prop. v. G+h Montage Gmbh*, 215 Ga. App. 889, 890 (1994). This is particularly so given the multiple entities and the numerous investors alleged by Plaintiffs to have been implicated in Defendants' purported course of conduct and given Plaintiffs' allegations that Defendants actively concealed the purported bad conduct giving rise to these claims.

Therefore, the court hereby **DENIES** Defendants' motion to dismiss on this ground.

C. RICO.

Defendants contend that Plaintiffs have failed to adequately plead their RICO claims. That Act provides that "[i]t shall be unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money" and "for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity." O.C.G.A. § 16-14-4(a), (b).

Plaintiffs have sufficiently identified the various Doran Group entities as an enterprise for purposes of the RICO statute. An "enterprise" "means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities." O.C.G.A. § 16-14-3(3).

A "pattern of racketeering activity" means:

> Engaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such acts occurred after July 1, 1980, and that the last of such acts occurred within four years, excluding any periods of imprisonment, after the commission of a prior act of racketeering activity.

O.C.G.A. § 16-14-3(4)(A). At minimum, Plaintiffs have sufficiently alleged that Defendants engaged in a Ponzi scheme over the course of several years involving multiple investors.

"'Racketeering activity' means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment under the laws of this state" and which are enumerated in O.C.G.A. § 16-14-3(5)(A).

> A "racketeering activity," also known as a "predicate act," is the commission of, the attempt to commit, or the solicitation or coercing of another to commit, a "crime which is chargeable by indictment" under one of forty-one categories of offenses. And a "pattern of racketeering activity" means that there have been at least two acts of racketeering activity that are interrelated and that were done "in furtherance of one or more incidents, schemes, or transactions." Additionally, it is unlawful to conspire to violate the substantive provisions of Georgia's RICO Act. Under Georgia law, a person may be found liable for RICO conspiracy "if they knowingly and willfully join a conspiracy which itself contains a common plan or purpose to commit two or more predicate acts."

Wylie v. Denton, 323 Ga. App. 161, 164-65 (2013) (citations omitted). As predicate acts, Plaintiffs have alleged specific acts purportedly committed by Defendants that would, if proven, constitute violations of Georgia's Securities Act, O.C.G.A. § 16-8-2 (theft by taking), O.C.G.A. § 16-8-3 (theft by deception), and mail and wire fraud . Each is a recognized predicate act upon which a RICO claim may be prosecuted. *See* O.C.G.A. § 16-14-3(5)(A), (C).

The court finds that Plaintiffs have adequately pled their RICO claims, including the nature of the purported enterprise, pattern of racketeering activity, predicate acts, proximate cause, and injuries suffered by Plaintiffs. Therefore, the court hereby **DENIES** Defendants' motion to dismiss on this ground.

D. Securities Act claims.

Plaintiffs plead claims under the Securities Act. Plaintiffs assert that the membership interests offered and sold by Defendants constitute securities subject to the Act. Plaintiffs further allege that Defendants committed fraud in connection with the offer and sale of those securities. *See* O.C.G.A. § 10-5-50. The Securities Act provides a private right of action. *See* O.C.G.A. § 10-5-58.

In moving to dismiss those claims, Defendants raise issues similar to those they raise with respect to Plaintiffs' fraud and RICO claims, principally that Plaintiffs have failed to allege their claims with the requisite specificity. The court disagrees. In their complaint, Plaintiffs identify "the membership interests offered and sold by Defendants, through the Doron Group entities" as the securities underpinning their claims and specify the acts of fraud and deceit in which they contend Defendants engaged.

Therefore, the court hereby **DENIES** Defendants' motion to dismiss on this ground.

E. Unjust enrichment and money had and received.

Defendants seek dismissal of Plaintiffs' claims for unjust enrichment and money had and received based on the purported existence of contractual relations amongst the parties.

> A claim of unjust enrichment will lie if there is no legal contract and the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefited party equitably ought to return or compensate for. The concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received.

Jones v. White, 311 Ga. App. 822, 827-28 (2011) (citations and punctuation omitted); *accord Engram v. Engram*, 265 Ga. 804, 807 (1995).

> Under the common law doctrine of money had and received, recovery is authorized against one who holds unspecified sums of money of another

> which he ought in equity and good conscience to refund. Such action is a legal action based upon equitable principles for implied assumpsit as a substitute for suit in equity.... An action for money had and received sounds in assumpsit and grows out of privity of contract, express or implied; but absent an actual contractual relationship, the law will imply a quasi contractual relationship to support the action. The elements of such action are: a person has received money of the other that in equity and good conscious he should not be permitted to keep; demand for repayment has been made; and the demand was refused.

Taylor v. Powertel, Inc., 250 Ga. App. 356, 359 (2001) (citations omitted); *accord City of Atlanta v. Hotels.com*, 289 Ga. 323, 328 (2011). "Such a claim exists only where there is no actual legal contract governing the issue." *Fernandez v. WebSingularity, Inc.*, 299 Ga. App. 11, 13-14 (2009) (citations and punctuation omitted).

While Plaintiffs have not purported to plead a claim for breach of contract, they do sue upon loan and investment transactions which may have their genesis in contract. That is a matter to be developed factually in the due course of this litigation. Nevertheless, "Georgia law ... permits a plaintiff to proceed to trial on alternative theories of recovery." *Campbell v. Ailion*, 338 Ga. App. 382, 388 (2016) ("If a factfinder concludes that [Defendants are] liable on [Plaintiffs'] breach of contract theory, the issue of [Defendants'] liability under the alternative theories of unjust enrichment and implied contract would become moot. Conversely, if the [factfinder] concludes that [Defendants] did not breach any express contract, questions of fact would exist as to whether [Defendants] are liable under these [alternative] theories." (citations and punctuation omitted)).

Therefore, the court hereby **DENIES** Defendants' motion to dismiss on this ground.

F. Conversion.

Defendants move to dismiss Plaintiffs' conversion claim, arguing that the money Plaintiffs purportedly paid to Defendants in the form of loan or investment transactions cannot form the basis of a cognizable conversion claim.

> Conversion constitutes an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation. To establish a prima facie case for conversion, the complaining party must show (1) title to the property or the right of possession, (2) actual possession in the other party, (3) demand for return of the property, and (4) refusal by the other party to return the property.

Bo Phillips Co., Inc. v. R. L. King Props., LLC, 336 Ga. App. 705, 707 (2016) (citations and punctuation omitted). "Demand and refusal is necessary only when the defendant comes into possession of the property lawfully. What is meant by defendant coming *lawfully* into

possession of the property is, where he finds it, and retains it for the true owner, or where he obtains the possession of the property, by the *permission or consent of* the plaintiff." *Williams v. Nat'l Auto Sales, Inc.*, 287 Ga. App. 283, 285 (2007) (citations and punctuation omitted). "Since an action for conversion is a suit for money damages for the personal property converted, then such suit constitutes the election of money damages rather than recovery of the personal property in a trover action." *Taylor*, 250 Ga. App. at 358.

> Tangible personalty or specific intangible property may be the subject for an action for conversion, but as fungible intangible personal property, money, generally, is not subject to a civil action for trover with an election for damages for its conversion. While money constitutes personal property, money is intangible personalty that is fungible, because it belongs to a class of property which cannot be differentiated by specific identification unless there has been created a specific fund that has been set aside from other money. Thus, there can be no conversion action for money damages for money, because generally, money is not subject to a civil action for conversion.

Taylor, 250 Ga. App. at 358-59 (citations omitted); *accord City of Atlanta v. Hotels.com, L.P.*, 332 Ga. App. 888, 891 (2015). Moreover, a "tort claim for conversion cannot be based on the breach of a contractual duty alone." *ULQ, LLC v. Meder*, 293 Ga. App. 176, 181 (2008).

However, "[t]here exists an exception for the conversion of money; such money must comprise a specific, separate, identifiable fund to support an action for conversion… such as insurance premiums earmarked for remittance to the insured." *Taylor*, 250 Ga. App. at 359.

> In *Decatur Auto Center v. Wachovia Bank*, our Supreme Court held that checks and other negotiable instruments can be the subject of a conversion claim. In its holding, the Supreme Court reasoned that "[c]onversion of checks is actionable because checks designate specific amounts of money for use for specific purposes." [276 Ga. 817, 820 (2001).] The Supreme Court further noted that "[c]onversion is also available for specific amounts of money placed on deposit with a bank and for overdrafts charged by a bank on existing accounts."… *Id.* at 821.… The Supreme Court of Georgia recognized in 1896 that a plaintiff in a conversion action was no longer required to identify specific bills and coins because in these busy days of commerce, few persons keep their money in bags…. In 2003, that same court recognized "that a plaintiff in a conversion action does not need to identify the specific dollars and coins represented by the face value of checks and other negotiable instruments."… In this day and age when funds are commonly transferred via wire and other electronic means, we see no logical reason for treating specific and identifiable funds that are transferred electronically … differently from checks.

Trey Inman & Assocs., P.C. v. Bank of Am., N.A., 306 Ga. App. 451, 458-59 (2010).

In their complaint, Plaintiffs generically allege that "Defendants have wrongly converted and exercised dominion over Plaintiffs' property in denial of their rights." While Plaintiffs' conversion claim is vague and lacking in allegations of demand and refusal, the court cannot find at this juncture that Plaintiffs could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

Therefore, the court hereby **DENIES** Defendants' motion to dismiss on this ground.

G. Non-Resident Plaintiffs.

Defendants assert that the claims of those Plaintiffs who reside in states other than Georgia are due to be dismissed, citing the doctrine of *lex loci delicti*. The court finds Defendants' argument to be specious.

Defendants have cited no authority that would support the dismissal of claims based on *lex loci delicti* or any other choice of law principle. That doctrine only concerns choice of law – *i.e.*, which state's substantive law might apply to a particular claim. *See, e.g.*, *Bullard v. MRA Holding, LLC*, 292 Ga. 748, 750 (2013) ("[F]or over 100 years, the state of Georgia has followed the doctrine of *lex loci delicti* in tort cases, pursuant to which a tort action is governed by the substantive law of the state where the tort was committed."). The doctrine does not purport to preclude access to the courts of Georgia by non-resident claimants or to preclude claims governed by the substantive laws of other states.

Defendants confuse choice of law matters with venue and personal jurisdiction principles. Under Georgia's Constitution, venue generally lies in the county in which the defendant resides. *See* Ga. Const. Art. VI, § II, ¶ VI ("All other civil cases … shall be tried in the county where the defendant resides"); *see also Richardson v. Gilbert*, 319 Ga. App. 72, 74 (2012) ("A defendant has the right to be tried in her county of residence."). Plaintiffs allege that Defendants reside in Fulton County, that many of the entities controlled by Defendants are Georgia entities, and that Defendants' purported course of conduct underlying Plaintiffs' claims took place in Georgia. Defendants admit in their answer that venue and jurisdiction in this court are proper.

Further, Defendants fail to cite any authority that a motion to dismiss is the appropriate vehicle for addressing choice of law issues.

Therefore, the court hereby **DENIES** Defendants' motion to dismiss.

SO ORDERED, this 10th day of February, 2020.

/s/ Wesley B. Tailor
Wesley B. Tailor, Judge
State Court of Fulton County