3-2-2022

Galaxy Next Gen. v. Ehlert, ORDER ON MOTIONS FOR ABATEMENT, SANCTIONS, REALIGNMENT OF PARTIES

Kelly L. Ellerbe
Judge, Superior Court of Fulton County, Metro Atlanta Business Case Division

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GALAXY NEXT GENERATION, INC.,	)	
	)	Civil Action
Plaintiff,	)	File No. 2021CV352606
v.	)	
BRADLEY EHLERT,	)	
Defendant/Counterclaim Plaintiff	)	
v.	)	
GALAXY NEXT GENERATION, INC., EHLERT SOLUTIONS GROUP, INC., INTERLOCK CONCEPTS, INC., GARY LEROY, MAGEN MCGAHEE, WADE WALKER, BECKY QUINTANA AND SOMERSET CPAS, P.C.,	)	
Counterclaim Defendants.	)	

ORDER ON MOTION FOR ABATEMENT, DISMISSAL, RESTRUCTURING AND SANCTIONS AND ORDER ON MOTION TO REALIGN PARTIES

This matter comes before the Court on Galaxy Next Generation, Inc.'s ("Galaxy's"), Gary LeCroy's ("LeCroy's"), Magen McGahee's ("McGahee's"), Ehlert Solutions Group, Inc's ("ESG's"), and Interlock Concepts, Inc.'s ("Interlock's") (collectively the "Galaxy Parties") Motion for Abatement and

Dismissal of Ehlert's Complaint, Restructuring of Pending Claims and for Sanctions for Evasion of Service, filed November 15, 2021 ("Abatement Motion") and Defendant Bradley Ehlert ("Ehlert's") Motion to Realign the Parties, filed December 15, 2021 ("Realignment Motion"). After reviewing the Abatement Motion, Ehlert's Response which included his Realignment Motion, filed December 15, 2021 ("Response"), the Galaxy Parties' Reply in support of their Abatement Motion and response in opposition to Ehlert's Realignment Motion, filed January 14, 2022 ("Reply"), and hearing argument on February 28, 2022, the Court enters the following order.

1. BACKGROUND AND PROCEDURAL POSTURE

1.1 The Utah Action

Ehlert owned two companies, ESG and Interlock, that he helped found. (Galaxy Compl. ¶ 8; Ehlert Ans. ¶ 8.) He agreed to sell both companies to Galaxy pursuant to a Stock Purchase Agreement ("SPA") and other related agreements. (Id.) Ehlert is a Utah resident, both ESG and Interlock were Utah corporations, and Galaxy is a Nevada corporation with its principal place of business in Georgia. (Ehlert Compl. ¶¶ 3-6; Galaxy Parties Ans. ¶¶ 3-6.) The SPA contained a forum selection clause which stated legal disputes arising from the agreement would be heard in the state or federal courts located in Fulton County, Georgia. (Galaxy Compl. ¶¶ 6, 37; Ehlert Ans. ¶¶ 6, 37.)

Disputes arose under the SPA. Among other contentions, both Galaxy and Ehlert assert the other party misrepresented or omitted key financial information in their business dealings before and after the sale. (See generally, Galaxy Compl. ¶¶ 10-81; Ehlert Compl. ¶¶ 41-200.)

In February of 2020, Ehlert filed suit against the Galaxy Parties in the Third Judicial District Court of Salt Lake County, Utah (the "Utah Action"). (Abatement Mot. 3; Resp. 2-3.) The parties litigated the propriety of the Utah Action based on the SPA's forum selection clause. (Id.) Ultimately, these parties filed a joint motion whereby they agreed to dismiss without prejudice all claims pending in the Utah Action while expressly reserving their rights "to file their claims, however styled, only in the courts of Fulton County, Georgia . . . no later than 30 days after the date of the [Utah Court's] dismissal . . . ." (Abatement Mot. 3-4, Ex. A; Resp. 3.)[1] The joint motion was filed in the Utah Action on July 30, 2021, and, on August 3, 2021, the Utah court entered the parties' proposed order of dismissal. (Id.)

1.2 The Two Fulton County Actions

On August 2, 2021, after the joint motion in the Utah Action was filed but before the dismissal order was entered, Galaxy filed a complaint against Ehlert in the Superior Court of Fulton County under the instant civil action number (the "Galaxy Action"). (Abatement Mot. 5; Resp. 3; Galaxy Compl.) The Galaxy

[1] Exhibit A to the Abatement/Sanction Motion is a cumulative exhibit including communications between counsel to the Utah Action, the joint motion seeking its dismissal, and the corresponding dismissal order entered by the Utah court.

Action was assigned to the Honorable Judge Rachelle Carnesale. Galaxy asserts that immediately after filing its complaint, Galaxy commenced what would be a diligent but prolonged efforts to serve Ehlert culminating in his personal service on September 30, 2021. (Abatement Mot. 6-9.) Those service efforts are detailed in Section 1.4, below.

On August 30, 2021, while Galaxy was attempting to serve Ehlert, Ehlert filed Civil Action No. 2021CV353898 in the Fulton County Superior Court (the "Ehlert Action"). (Abatement Mot. 5; Resp. 3-4; Ehlert Compl.) In addition to the Galaxy Parties, Ehlert named Wade Walker ("Walker"), Becky Quintana ("Quintana"), and Somerset CPAs, P.C. ("Somerset") as defendants. (Ehlert Compl.) Ehlert alleges Quintana and Somerset were accountants who assisted Galaxy in its due diligence investigation of ESG and Interlock, and Walker was a Galaxy business advisor who acted on behalf of Galaxy in communicating with Ehlert. (Ehlert Compl. ¶¶ 13, 25, 61, 137-143.) Among other claims, Walker alleges these three parties played a role in Galaxy's fraudulent scheme to procure ESG and Interlock. (Id. ¶¶ 236-240.)

Both the Galaxy Action and the Ehlert Action stem from the same underlying set of facts. When filing the complaint in the Ehlert Action, Ehlert filed no notice of related action pursuant to USCR 4.8, and the Ehlert Action was assigned to the Honorable Chief Judge Christopher Brasher.

1.3 Consolidation of the Two Fulton County Actions

On October 27, 2021, Ehlert and the Galaxy Parties filed the same joint motion in each action to consolidate the two cases under the Galaxy Action case number (the "Consolidation Motion"). The Consolidation Motion contained an agreed-upon case style where Galaxy was named Plaintiff, Ehlert was named Defendant/Counterclaim Plaintiff, and the Galaxy Parties, Walker, Quintana and Somerset were named as Counterclaim Defendants. (Consolidation Mot. 5.) However, in their Consolidation Motion, Ehlert and the Galaxy Parties reserved arguments regarding how the parties should be properly designated. (Id. n. 1.) At the time the Consolidation Motion was filed, Walker and Quintana had yet to file their responsive pleadings. The Consolidation Motion reflects that counsel for Somerset had "neither agreed nor disagreed" with its filing. (Consolidation Mot. n. 3.)

On October 29, 2021, Chief Judge Brasher transferred the Ehlert Action to Judge Carnesale. (Resp. 4.)

On November 15, 2021, the Galaxy Parties filed the Abatement Motion. The following day, on November 16, 2021, Judge Carnesale granted the Consolidation Motion, entering an Order Consolidating Cases and adopting the case style proposed by the movants ("Consolidation Order").[2] Pursuant to the Consolidation Order, the

[2] At the time the Consolidation Order was entered, Walker and Quintana had been served but had yet to file their responsive pleadings. (Consolidation Mot. 3.) Although Somerset had filed its responsive pleadings, it did not agree or disagree with the relief sought. (Consolidation Mot. n. 3.) During the February 28, 2022 hearing, the Court expressly inquired and no party raised any objection to the consolidation of the Galaxy Action and the Ehlert Action.

Ehlert Action was administratively closed and the parties were directed to confer and present a proposed scheduling order containing "deadlines for recasting pleadings (if necessary) [and] filing motions to dispose of matters in abatement." (Consolidation Ord. ¶ 4.) It is not clear whether the Court was aware of the Abatement Motion the Galaxy Parties had filed the day before.

On December 15, 2021, Ehlert filed his Response to the Abatement Motion which included his Realignment Motion.

This matter was transferred to the Metro Atlanta Business Case Division on January 11, 2022.

1.4 Galaxy's Efforts to Serve Ehlert

As referenced above, Galaxy pursued extensive efforts to serve Ehlert with the Galaxy Action. On August 3, 2021, the day after the Georgia case was filed, Galaxy transmitted an email to Ehlert's Utah counsel attaching a copy of the complaint and generally inquiring if Ehlert would be willing to waive service. (Abatement Mot. Ex. B.)[3] The request stated in part,

> [w]ould your client be willing to waive service of a summons pursuant to O.C.G.A. § 9-11-4(d), and allow you to accept the Complaint as proper service of process on his behalf? If so, I will follow up with a formal request

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See O.C.G.A. § 9-11-42(a)("When actions involving a common question of law or fact are pending before the court, if the parties consent, the court may . . . order all the actions consolidated . . ."); see also Smith v. City of Roswell, __ Ga. App. __ (1) (A21A0789, Oct. 18, 2021)(consent of all parties is generally required to consolidate separate actions).

[3] Exhibit B is a cumulative exhibit of approximately 190 pages that includes numerous emails (some with attachments) that were exchanged over a two-month period in August and September of 2021. Some of the emails found in Exhibit B were exchanged between counsel for the Galaxy Parties and Ehlert's counsel in the Utah Action while later emails were exchanged between counsel for the Galaxy Parties and Ehlert's Georgia counsel in the Ehlert Action.

> for waiver of service/return for same. Your client will then have 60 days from the date said formal request is sent to answer the complaint.
>
> Otherwise, we will proceed with personal service of a summons and the complaint on your client, and he will have 30 days from said service to answer the Complaint.

(Id.) On August 10, 2021, Ehlert's Utah counsel acknowledged receiving the email and indicated he would contact Ehlert and provide a response within two days. (Id.) However, no response was forthcoming. (Abatement Mot. 6.) On August 17, 2021, Galaxy's counsel sent Ehlert's Utah counsel a second email, again stating it would like to send a formal waiver if Ehlert was agreeable. (Id. Ex. B.) This second email further warned that Galaxy would seek to recover its service costs pursuant to O.C.G.A. § 9-11-4(d)(4) if Ehlert failed to accept the offer. (Id.) Again, Galaxy received no response, and, on August 25, 2021, it sent a third email to Ehlert's Utah counsel, indicating that it would commence personal service efforts while reserving its right to collect associated costs in accordance with O.C.G.A. § 9-11-4(d). (Id.)

The Ehlert Action was filed on August 30, 2021, just as Galaxy was commencing what would become extensive efforts to personally serve Ehlert at his Utah residence. Galaxy has offered evidence that Ehlert was evading those service attempts.[4] (Id. Ex. C.)

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[4] Exhibit C is another cumulative exhibit addressing Galaxy's attempt to serve Ehlert at his Utah residence. It includes:

1. A certification of a Wasatch County Utah Sheriff's representative reflecting six unsuccessful attempts to serve Ehlert at 1277 N. Windmill Lane in Midway, Utah, beginning on August 27, 2021 and ending on September 7, 2021. This document contains a signature block for notarization which is blank.

Galaxy also offered an email sent by its counsel on September 20, 2021 to Ehlert's Georgia counsel referencing a telephone conversation between the two occurring on Friday, September 17, 2021. (Id. 8-9, Ex. B.) The email purports to contain a summary of that conversation. (Id.) As described by Galaxy's counsel, Ehlert's Georgia counsel acknowledged he was aware of the Utah action, the agreement that led to its disposition, the filing of the Galaxy Action, the efforts to obtain a waiver of service from Ehlert's Utah counsel, and Galaxy's efforts to serve Ehlert. (Id.) This summary does not specify when Ehlert's Georgia counsel became aware of any of these developments other than it was "well prior to [the September 17, 2021] call." (Id.) That email also requests Ehlert's Georgia counsel accept service of the Galaxy Action on Ehlert's behalf. (Id.)

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2. A notarized statement from a private process server indicating nine attempts to serve Ehlert at the Windmill Lane address between September 9, 2021 and September 20, 2021. However, the process server's statement indicates some confusion which led him to conclude that Windmill Lane was "no longer a good address" because it had been changed to 1284 E. Dutch Highland Drive. Galaxy's counsel attempts to supplement this sworn evidence with comments in its Abatement Motion asserting these two addresses are for the same residence which is located at the corner of Windmill Lane and East Dutch Highland Drive. (Abatement Mot. n. 6.) This sworn statement also contains hearsay statements from someone inside the home during one of the service attempts who claimed to be its current owner and offered the surname of Sterling. Again, Galaxy's counsel attempts to supplement this evidence by including supposition in its briefing about the identity of this individual. (Id. 7.)
3. Two sworn but unnotarized statements from individuals identified in the statements as Constables of Wasatch County and Salt Lake County. (Id. 8.)
    a. The first document is a return stating the process server: (a) received no answer to his knock on September 16, 2021 although he observed children in the yard and the television on inside the home and (b) he personally served Ehlert on September 30, 2021. This return also includes hearsay comments obtained by the server during his service efforts.
    b. The second document from a different process server who was apparently present on September 16, 2021 at the very same time as the process server referenced in item (a) immediately above. Again, this statement includes a significant amount of hearsay gathered during the service investigation.

Ehlert's Georgia counsel responded in a September 22, 2021 email, refuting allegations that Ehlert was evading service and agreeing to accept service for Ehlert under certain conditions which included a reciprocal agreement for Galaxy's counsel to accept service on behalf of all the Galaxy Parties named in the Ehlert Action. (Id.) On September 29, 2021, Galaxy's counsel rejected this offer in a responding email. (Id.) The following day, on September 30, 2021, Galaxy personally served Ehlert. (Id. Ex. C.)

2. ANALYSIS

2.1 Galaxy Parties' Motion for Abatement and Dismissal of Ehlert's Complaint and Restructuring of Pending Claims

The Galaxy Parties seek to apply the doctrine of abatement that provides,

> when there are two lawsuits involving the same cause of action and the same parties that were filed at different times but that both remain pending in Georgia courts, the later-filed suit must be dismissed. In fact, whenever a pending suit for the same cause of action has been pled, abatement is required as a matter of law (citations and punctuation omitted).

McLeod v. Clements, 310 Ga. App. 235, 238 (2011).[5] Additionally, the Galaxy Parties move the Court to take several actions to clarify every party's status in the litigation as a result of the abatement. (Id. 2.)

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[5] The doctrine of abatement is codified by O.C.G.A. §§ 9-2-5(a) and 9-2-44(a). O.C.G.A. § 9-2-5(a) generally prohibits a plaintiff from prosecuting two actions simultaneously. It provides,

> [n]o plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. If two such actions are commenced simultaneously, the defendant may require the plaintiff to elect which he will prosecute. If two such actions are commenced at different times, the pendency of the former shall be a good defense to the latter.

O.C.G.A. § 9-2-44(a) generally disallows two pending actions that concern the same subject, stating,

Specifically, the Galaxy Parties request the following relief:

> (a) dismiss the Ehlert Complaint in its entirety
> (b) order that the first-filed Galaxy Complaint is the governing complaint in these proceedings;
> (c) order that Galaxy is the designated Plaintiff and Ehlert is the designated Defendant in this action;
> (d) order that Ehlert may assert any claims he maintains he possesses against Galaxy as counterclaims within his Answer to the Galaxy Complaint;
> (e) order that LeCroy, McGahee, ESG, Interlock, Walker, Quintana, and Somerset – all improperly added by Ehlert in the Ehlert Action and now proceeding as Counterclaim Defendants – are allowed to assert any claims they maintain they have against Ehlert in response to the Ehlert counterclaims within thirty (30) days of the Court's order [and];
> (f) order that the *counterclaims* asserted by Galaxy in an abundance of caution in the Galaxy Parties' Answer to the Ehlert Complaint and Galaxy's Counterclaims, filed in both actions on November 1, 2021, are no longer necessary as same will be adjudicated only as *claims* (i.e. not counterclaims) asserted by Galaxy in the Galaxy Complaint and in the Galaxy Action.

(Abatement Mot. 2.)

Ehlert makes no effort to contest the applicability of the prior pending action doctrine; however, he asserts that the Court cannot dismiss a case that has been consolidated into another case by agreement and the relief sought by the Galaxy Parties has already been achieved through the Consolidation Order. (Resp. 4.) Specifically, he contends that under the Consolidation Order, "[a]ll parties are properly before the Court, the caption has been agreed upon, and the role of the

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> … the pendency of a former action for the same cause of action between the same parties in the same or any other court having jurisdiction shall be a good cause of abatement …

As explained in Brixmor/IA Ne. Plaza, LLC v. Sublet Atlanta Realty, LLC, 347 Ga. App. 223, 224 (2018), "[t]he doctrines embodied in the two statutes are closely related in effect and are to be considered and applied together. The purpose of these statutes is to ensure judicial economy, to avoid inconsistent judgments, and to prevent harassment of the parties through multiple proceedings (citations and punctuation omitted.)"

parties and their respective claims has been provisionally set by the Court. Galaxy's request for dismissal is moot." (Id. 4-5.)

Ehlert is correct in noting the relief now sought by the Galaxy Parties is generally consistent with that outlined in the Consolidation Order. However, the Court agrees with the Galaxy Parties that the issues they now raise were not mooted by the Consolidation Order. Indeed, the Consolidation Order expressly provides that the Court would consider issues of abatement and the "recasting" of the case at a later time. (Consolidation Ord. ¶ 4; see also Joint Mot. to Consolidate n. 1.) Moreover, at the time of the Consolidation Order, certain parties originally named as Defendants in the Ehlert Action had been transformed into Counterclaim Defendants in the consolidated case proceeding under the Galaxy Action case number, creating some confusion as to their status and obligations in their new roles. For example, O.C.G.A. § 9-11-12(a) mandated the Defendants in the Ehlert Action timely file an answer after service of a summons and complaint or face a possible default whereas in their new status as Counterclaim Defendants, absent a court order, they had no obligation to file an answer. Accordingly, and in order to confirm the current status of all the parties and their obligations, the Court will consider the relief sought by the Galaxy Parties.

First, the Galaxy Parties seek dismissal of the Ehlert Action. (Abatement Mot. 2.) While the Consolidation Order administratively closed the Ehlert action, under Georgia's law of abatement, "the later-filed suit must be dismissed." McLeod; see

also Sadi Holdings, LLC v. Lib Props., Ltd., 293 Ga. App. 23, 26 (2008) ("dismissal based on a prior pending action is required as a matter of law.") However, the Galaxy Parties offer inconsistent arguments as to the extent of the required dismissal. In one part of their brief, the Galaxy Parties contend the Ehlert Action should be dismissed "in its entirety." (Abatement Mot. 2.) In another part brief, they suggest the Ehlert Action should be dismissed solely as to Galaxy because it was a party to the first-filed action whereas the other Defendants in the Ehlert Action were not. (Id. 13.)

In McClain Bldg. Materials, Inc. v. Hicks, 205 Ga. App. 767 (1992), much like the present situation, the later-filed suit named an additional defendant. Based upon the abatement doctrine, the trial court dismissed the entire later-filed action; however, the appellate court deemed the dismissal erroneous as to the additional defendant who was not a party to the first-filed suit but dismissal as to the original defendant was proper. Id. at 768-69; see also Sadi Holdings, 293 Ga. App. at 25-26. Accordingly, here, the Court finds the complaint filed in the Ehlert Action and subsequently consolidated into this case shall be dismissed solely as to Galaxy.

Additionally, the Galaxy Parties seek relief regarding the captioning of the consolidated case, the status of the remaining parties and their pleading obligations. (Id. 2.) Specifically, they seek to have Galaxy remain as the Plaintiff, Ehlert remain as the Defendant, and the other parties remain as Counterclaim Defendants.

However, the Court finds those issues are best addressed after the Court has considered Ehlert's Realignment Motion.

2.2 Ehlert's Motion to Realign the Parties

Incorporated into his response to the Abatement Motion, Ehlert has moved the Court to re-align the parties so that he is designated as the Plaintiff. As established in Cawthon v. Waco Fire and Cas. Ins. Co., 259 Ga. 632, 633 (1989), pursuant to O.C.G.A. § 9-11-21, "a trial court does have the discretion at any stage of the action and on such terms as are just . . . to realign the parties (citation and punctuation omitted.)"

As grounds for exercising that discretion, Ehlert cites Moore v. Moore, 281 Ga. 81 (2006) in which a husband and wife both sued for divorce and equitable division of marital assets; however, the defendant wife brought additional claims for alimony, adultery, attorney's fees and fraudulent transfers. Id. at 82. She also added two third party defendants, pursuing claims for fraudulent conveyance and conversion. Id. at 81. The husband appealed the trial court's order realigning the wife from her position as the divorce action's defendant to its plaintiff.

The Supreme Court found that, as a result of her claims, the wife carried "a significantly heavier burden of proof" than her husband. Id. at 82. It then reasoned,

> [t]he procedural rights which a plaintiff typically exercises at trial, including the important right to opening and concluding arguments, actually belong to whichever party bears the burden of proof. These rights are neither allocated on the basis of the denomination of the parties, nor logically conferred upon a defendant only when he bears the entire burden of proof.

Id. Accordingly, the Supreme Court upheld the trial court's decision, concluding the discretion to realign parties extends to those situations where the defendant has lodged "legitimate claims [with] a more extensive burden of proof" than the originally-designated plaintiff. Id.

Ehlert argues he is like the wife in Moore, bearing a far more extensive burden of proof. He notes that the only claim Galaxy has lodged in this matter concerns him whereas Ehlert has claims against every other party concerning the role each is alleged to have played in a scheme to defraud him in the sale of ESG and Interlock. (Resp. 6.)

The Galaxy Parties counter that Ehlert has strategically expanded the litigation with a number of frivolous claims and unnecessary parties and should not be allowed to leverage those additional claims and parties to justify his requested realignment. (Reply 8.) They argue, "once the full facts and issues are presented to the Court it will become obvious that the only dispute and the only valid claims here are those between Galaxy and Ehlert." (Id.)

As recognized in Moore, when evaluating who will carry the more extensive burden of proof, a court should consider the "legitimate" claims of the parties. Moore, 281 Ga. at 82. This dispute is in its early stages, and, much has yet to be learned about the claims Ehlert has lodged. As the case presently stands, the Court

is not persuaded that a realignment would serve the interests of justice.[6] However, even "Ehlert acknowledges the alignment of the parties is largely irrelevant prior to the presentation to a jury." (Resp. 5.) Accordingly, this ruling shall not prohibit Ehlert from re-newing his request for realignment at a later stage of the case once the claims have been more fully developed and the Court has a better grasp of what claims and parties may proceed to trial. See generally William Goldberg, 219 Ga. App. at 642 (1995) (realignment decisions may be reconsidered as claims and parties change).

Accordingly, the Court finds the complaint Galaxy filed in the Galaxy Action shall be the operative complaint in this matter and the case caption and party designations established in the Consolidation Order shall not be changed. Accordingly, any claims Ehlert has against Galaxy will proceed as counterclaims. In order to avoid the confusion that arose from consolidating the two previously separate matters and so that this litigation may proceed with a uniform starting point under the consolidated style, the Court will order that certain pleadings be recast as set forth below.[7]

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[6] The Court rejects Ehlert's other grounds for realignment. He notes he was the plaintiff in the Utah Action in which he initially brought these claims before a court, and he agreed to the disposition of the Utah Action which led to the two Fulton County actions being filed. (Resp. 5-6.) Caselaw construing the Court's discretion to realign parties focuses on ameliorating prejudice suffered by a party if its designation is not changed which leaves these particular arguments for realignment without much persuasive power. See William Goldberg & Co., Inc. v. Cohen, 219 Ga. App. 628, 642 (in considering realignment, harm or prejudice to the party seeking realignment was key consideration). Ehlert also argues that the Galaxy Action could have been subject to abatement because it was filed one day before the agreed-upon dismissal order was entered in the Utah Action such that the Utah Action was still pending. (Id. 6.) This argument is contrary to Georgia law which expressly states, "the pendency of a prior action in another state shall not abate an action between the same parties for the same cause in this state." O.C.G.A. § 9-2-45.

[7] As was acknowledged by the parties during the February 28, 2022 hearing, it is not the Court's intent that its order requiring the Defendant and Counterclaim Defendants to file recast pleadings be used as an opportunity for any party

2.3 Galaxy Parties' Motion for Sanctions for Evasion of Service

Galaxy argues that Ehlert, with the aid of his counsel, avoided service of the Galaxy Action to craft and file the Ehlert Action in a misguided effort to gain a strategic advantage over Galaxy. (Abatement Mot. 9, 14, 16.) Thus, Galaxy moves the Court "to sanction Ehlert and his counsel" for their conduct both "to reimburse Galaxy for its substantial costs related to service of the Galaxy Complaint" and "to deter similar future improper conduct." (Id. 16; Reply 11.)

Galaxy seeks these sanctions pursuant to O.C.G.A. § 9-11-4(d) which establishes a method of service through a defendant's formal waiver. (Abatement Mot. 14.) Moreover, it contends that, "[s]eparate from sanctions, O.C.G.A. § 9-11-4(d) requires an award of a plaintiff's costs of service where (as here) a defendant refuses to accept/waive service." (Abatement Mot. n. 8.)

2.3.1 *Sanctions*

Galaxy contends O.C.G.A. § 9-11-4(d)(2) lays the groundwork for a sanction by generally imposing upon defendants "a duty to avoid unnecessary costs of serving the summons." (Id. 14.) However, considering O.C.G.A. § 9-11-4(d)(2) in its entirety, this "duty to avoid unnecessary" service costs arises only "*[u]pon receipt of notice of an action in the manner provided in this subsection* (emphasis

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to expand their claims or add new parties. Additionally, all parties acknowledged that the Court's requirement for recast pleadings will not require Walker to recast his Motion to Dismiss for Lack of Personal Jurisdiction and Venue, filed December 20, 2021. Ehlert's response to said motion will be remain due April 15, 2022, consistent with the Court's prior order. (Ord. on Mot.to Enlarge Time 8.) Further, the parties acknowledged the Court's directive that the filing of these recast pleadings may not be used to create an automatic stay of discovery as provided in O.C.G.A. § 9-11-12(j)(1). This statute mandates that discovery be stayed when a party files a motion to dismiss pursuant to O.C.G.A. § 9-11-12 if said motion is filed "before or at the time of filing an answer. . . ."

supplied)." Accordingly, the Court rejects Galaxy's assertion that this subsection imposes upon a defendant some wide-ranging duty to cooperate in a plaintiff's service efforts.

Moreover, interpreting O.C.G.A. § 9-11-4(d)(2) in context with the remainder of O.C.G.A. § 9-11-4(d), it is apparent that the subsection does not contemplate any "sanction" other than an award of unnecessary service costs (and certain corresponding collection expenses) incurred by the plaintiff. Compare O.C.G.A. § 9-11-4(d)(3) (outlines the requirements that must be met by a plaintiff seeking "to avoid costs"); O.C.G.A. § 9-11-4(d)(4) (when a defendant fails to comply with a request for waiver of service, "the court shall impose the costs subsequently incurred in effecting service upon the defendant unless good cause for the failure is shown"); O.C.G.A. § 9-11-4(d)(7) (the costs contemplated by subsection (d)(4) "shall include the costs subsequently incurred in effecting service, together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.")

Accordingly, the Court rejects Galaxy's assertion that O.C.G.A. § 9-11-4(d)(2) supports a sanction that is somehow "separate" from an award of costs. (Abatement Mot. 14.)

In its Reply, Galaxy argued for the first time that Ehlert and his counsel could be sanctioned under O.C.G.A. § 9-15-14 (allows sanctions for litigation conduct that is found to be frivolous or abusive) or O.C.G.A. § 15-1-4 (outlines contempt power

of court). (Reply 10-11.) However, Galaxy simply cited these two statutes and offered no legal analysis of either statute. Ehlert is even left to guess what subsection of each statute Galaxy claims is applicable to the conduct at issue. Based upon the serious nature of the relief sought, the Court will not consider authority raised in such a belated and cursory fashion. Should Galaxy find a basis to request the Court to use its powers under either of these statutes, it should file a proper motion with specific argument and supporting precedents upon which its request may be properly defended by Ehlert and evaluated by the Court.

2.3.2 *Award of Costs*

As discussed above, O.C.G.A. § 9-11-4(d)(2) provides a defendant's "duty to avoid unnecessary service costs" is triggered by the "receipt of notice of an action in the manner provided by this subsection," and the subsection provides directives. Pursuant to O.C.G.A. § 9-11-4(d)(3), a plaintiff seeking "to avoid [service] costs," should send the defendant a notice and request for a waiver of service that "shall" fulfill the requirements listed in O.C.G.A. § 9-11-4(d)(3)(A) through (G). Galaxy's attempt to seek a waiver of service from Ehlert did not comply with several of these requirements.

For example, O.C.G.A. § 9-11-4(d)(3)(A) provides the request for waiver "shall be addressed directly to the defendant, if an individual." Here, the request for a waiver of service was sent to Ehlert's counsel in the Utah Action, not Ehlert. Moreover, O.C.G.A. § 9-11-4(d)(3)(D) mandates that a waiver request "shall inform

the defendant, by means of the text prescribed" in the statutory form notice found at O.C.G.A. § 9-11-4(l). That statutory form notice contains detailed instructions and warnings for a defendant considering whether to waive service. The notice sent by Galaxy to Ehlert's Utah counsel lacked much of the information found in the statutory form. O.C.G.A. § 9-11-4(d)(3)(G) also requires that defendant be given an extra copy of the notice and waiver request "as well as a prepaid means of compliance in writing." Again, Galaxy did not fulfill this requirement.

Reviewing the evidence closely, it is apparent that Galaxy never attempted to comply with the strict requirements of O.C.G.A § 9-11-4(d)(3). On its face, the first email sent to Ehlert's Utah counsel was nothing more than a preliminary entreaty, inquiring if Ehlert would be amenable to service in this manner. Galaxy's counsel stated, "[i]f so, I will follow up with a formal request for waiver of service/return for same." (Abatement Mot. Ex. B.) Similarly, the second email Galaxy forwarded to Ehlert's Utah counsel indicates a "formal request to waive service" would be sent should Ehlert agree to accept service in this manner. (Id.) Clearly, these emails were never intended to comply with the strict and numerous mandates of O.C.G.A. § 9-11-4(d)(3). Accordingly, the Court finds Galaxy is not entitled to an award of costs under O.C.G.A. § 9-11-4(d).

3. CONCLUSION[8]

In light of the foregoing, it is hereby ordered that:

1. The Galaxy Parties' Motion for Abatement and Dismissal of Ehlert's Complaint and Restructuring of Pending Claims is **GRANTED, IN PART** as follows:

    a. The Ehlert Action is **DISMISSED** as to Galaxy.

    b. In the present action, the parties are formally designated as follows: Galaxy is the Plaintiff and a Counterclaim Defendant, Ehlert is the Defendant and Counterclaim Plaintiff, and the remaining parties -- ESG, Interlock, LeCroy, McGhee, Walker, Quintana and Somerset – are Counterclaim Defendants.

    c. **No later than March 14, 2022**, Ehlert shall file a recast pleading responsive to the Galaxy Complaint, containing all his defenses and counterclaims.

    d. **No later than March 28, 2022**, ESG, Interlock, LeCroy, McGhee, Walker, Quintana and Somerset shall file pleadings responsive to Ehlert's counterclaim.

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[8] During the February 28, 2022 hearing, several issues that the pleadings presented to the Court for resolution were not seriously disputed during oral argument and could have easily been narrowed or resolved by conversation between counsel. The Court has some concern that something more than zealous advocacy is at play and that the enmity existing between the parties has been adopted by their attorneys. The Court is further concerned any such animosity may hamper the ability of counsel to efficiently move this litigation forward. These concerns implicate not only questions of professionalism but also place an undue burden on the Court's limited judicial resources. Accordingly, the Court requests that counsel consider these general concerns and engage in serious, meaningful efforts to discuss disputes that may arise in the future before seeking the Court's intervention.

2. Ehlert's Motion to Realign the Parties is **DENIED**.

3. Galaxy's Motion for Sanctions for Evasion of Service is **DENIED**.

SO ORDERED this 2nd day of March, 2022.

KELLY ELLERBE, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Galaxy Next Generation, Inc. v. Ehlert,
Fulton County Superior Court, Civil Action No. 2021CV352606
Order on Motion for Abatement, Dismissal, Restructuring and Sanctions and Order on Motion to Realign Parties

Filed and Served Upon Registered Contacts via Odyssey eFileGA

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