3-18-2021

The Meadows Commerce Center, LLC, Order on Pending Motions

Wesley B. Taylor
Judge State Court of Fulton County

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

THE MEADOWS COMMERCE CENTER, LLC, Plaintiff, v. MICHAEL S. BROWN; TODD A. BROWN; KEYSTONE CONSTRUCTION COMPANY, LLC; BROGDON PLACE II, LLC; and NATIONAL COPACK, LLC; Defendants.	)	CIVIL ACTION FILE NO. 2020CV333682
MICHAEL S. BROWN, Third-Party Plaintiff, v. SCOTT BROWN, Third-Party Defendant.	)	

ORDER ON PENDING MOTIONS

Before the court are (1) the motion for partial summary judgment filed by Plaintiff The Meadows Commerce Center, LLC ("Meadows") and (2) the motion for summary judgment filed by Third-Party Defendant Scott Brown. The court held a hearing on these matters on October 13, 2020. Having considered the entire record and oral argument of the parties, the court finds as follows:

Meadows, which was formed in 1996, owns an industrial office and warehouse development in Alpharetta, Georgia. Solomon Brown created three trusts – the TAB Trust, the MSB Trust, and the SSB Trust (the "Meadows Trusts") – which each owns a one-third interest in Meadows. The Meadows trusts were established for the benefit of Solomon Brown's three sons, Todd Brown, Michael Brown, and Scott Brown, and their respective descendants.[1]

[1] Until 2013, the attorney who provided estate planning advice to Solomon Brown in establishing the trusts served as the trustee of the Meadows Trusts. In 2013, Solomon's brother, William Brown, became the trustee for the Meadows Trusts. In September 2018, Solomon Brown died.

The operating agreement for Meadows states that, except as limited under that agreement and Georgia law, "the entire management and control of the property, business, and affairs of [Meadows] shall be vested in the Manager." The manager is required to, *inter alia*, "manage, or cause to be managed, the affairs of [Meadows] in a prudent and businesslike manner," maintain "trust books of account" of its operations, and is authorized to execute documents on behalf of and in the name of Meadows. For certain actions, the operating agreement requires the "unanimous affirmative vote of the Members," including entering into "any transaction not in the ordinary course of business." "Unless authorized by a vote of the Members," the manager may not receive any salary, fee, profit, or distribution except that to which he may otherwise be entitled under the operating agreement. Scott Brown was originally named as Meadows' manager.

Meadows filed this action in the State Court of Fulton County on June 1, 2017 (Case No. 17EV002637). In dispute is whether Scott Brown or Michael Brown served as Meadows' manager from 2004 to 2013. Meadows alleges that Scott Brown ceased being the manager of Meadows in April 2004 and that Michael Brown was substituted as the manager by the members of Meadow. Michael Brown served as manager of Meadows until he was removed by the members in September 2013, whereupon Scott Brown again became the manager.

Meadows alleges that, during Michael Brown's tenure as manager, he violated the operating agreement and approved a number of improper transactions and payments using Meadows' assets and without approval by the members, including payments for personal expenses. For example, Meadows alleges that Michael Brown used Meadows' funds to pay his and Todd Brown's health insurance premiums, paid himself a "management fee," made unauthorized withdrawals from Meadows' accounts, used Meadows' funds to pay his personal credit cards, unauthorized loans to his other company (Defendant Brogdon Place II, LLC), and allowed his and Todd Brown's other companies (Defendants Keystone Construction and National Copack, LLC) to lease or otherwise use space in Meadows' property without paying rent. Meadows pleads claims for breach of fiduciary duties and violation of Georgia's RICO statute, among others.

Michael Brown filed a third-party complaint against Scott Brown, alleging that Scott Brown served as manager of Meadows at all times since it was established. Michael Brown alleges that Scott Brown engaged Michael Brown in 2002 to assist in the management of the company such that a principal/agent relationship between them was formed. Michael Brown asserts that, to the extent he is found liable to Meadows, Scott Brown should be derivatively liable to Michael Brown under theories of indemnification, vicarious liability, and respondeat superior.

Meadows filed its motion for partial summary judgment on February 14, 2019. Scott Brown filed his motion for summary judgment on March 8, 2019. Both motions are opposed.

At that time, the three sons became co-trustees of the Meadows Trusts along with William Brown.

This case was transferred to the Superior Court of Fulton County Business Case Division by Order entered on February 28, 2020.

"Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Ridley v. Sovereign Solutions, LLC*, 315 Ga. App. 237, 237 (2012) (quoting O.C.G.A. § 9-11-56(c)); *accord Lau's Corp., Inc. v. Haskins*, 261 Ga. 491 (1991). "The burden of proof is shifted when the moving party makes a *prima facie* showing that it is entitled to judgment as a matter of law. At that time the opposing party must come forward with rebuttal evidence or suffer judgment against him." *Trust Co. Bank v. Stubbs*, 203 Ga. App. 557, 560 (1992) (citations and punctuation omitted)**.** "To do so, the [non-movant] must set forth specific facts showing the existence of a genuine issue of disputed fact." *Angel Bus. Catalysts, LLC v. Bank of the Ozarks*, 316 Ga. App. 253, 257 (2012). In considering a motion for summary judgment, the court must "view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant." *Season All Flower Shop, Inc. v. Rorie*, 323 Ga. App. 529, 529 (2013) (citation omitted). "The cardinal rule of summary judgment procedure is that the court can neither resolve facts nor reconcile the issues, but can only determine if there is an issue." *Fowler v. Smith*, 237 Ga. App. 841, 844 (1999) (citations omitted).

I. Meadows' Motion.

Meadows moves for partial summary judgment against Michael Brown on one of its breach of fiduciary duty claims. Meadows seeks a ruling as a matter of law that Michael Brown owed a fiduciary duty to Meadows, which he breached when he used Meadows' funds to pay for health insurance for himself and Todd Brown between 2007 and 2013. Meadows contends that, in 2004, after Scott Brown resigned as Meadows' manager, Solomon Brown appointed Michael Brown as manager. As the manager from 2004 to 2013, Michael Brown had control over Meadows' bank account and was responsible for generally running Meadows.

Michael Brown does not dispute that he used Meadows' funds to pay for health insurance for himself and Todd Brown. Michael Brown instead contends that the money he used to purchase the health insurance was compensation to which he was due for his work for Meadows. In addition, Michael Brown contends that there are factual disputes as to his role with Meadows during 2004 through 2013, asserting that he was acting merely as a property manager and not the manager of Meadows itself. Michael Brown variously contends that Scott Brown never relinquished his role as Meadows' manager or that Solomon Brown acted as the manager of Meadows, particularly during the time Scott Brown was pursuing his own business interests.

The court finds that there are genuine issues of material fact regarding the role Michael Brown played at Meadows and whether his use of funds for health insurance was a breach of any duty Michael Brown owed to Meadows or its members.

Under the operating agreement:

> "Manager" means Scott B. Brown, or any party or parties substituted for such Manager pursuant to the terms of this Agreement; provided, however, that in the event Scott B. Brown is unwilling or unable to act as manager, then Sol Brown (a/k/a Solomon Brown) shall be the Manager. In the event Sol Brown is the Manager, he shall have the sole power to designate his successor.

In their deposition testimony, Solomon Brown and Scott Brown agree that Scott Brown left Meadows around 2004 to run his own business. According to Solomon Brown, Michael Brown assumed a management role with Meadows. Solomon Brown testified that he did not tell Michael Brown how to manage Meadows and did not involve himself in the management of Meadows.

Solomon Brown further testified in his deposition as follows:

> A. I transferred [to Michael Brown] the management of rental and taking care of the property physically, and collecting the rents, and readjusting the building to be more productive.
>
> Q. That's property management, basically?
>
> A. Yes, ma'am; that is property management.

As for 2013, when Scott Brown took back over, Solomon Brown testified:

> Q. It's property management what you were trying to transition when you told Scott to take over at Meadows?...
>
> A. I wanted to transfer property management, and Michael knew what I wanted.
>
> Q. And ultimately, you did accomplish a transfer of the property management power from Michael to Scott?
>
> A. Yes, ma'am.

When asked: "Did you know that part of the claims in this suit allege that Scott made Michael the manager of the Meadows LLC? Solomon Brown answered "No such thing happened." In addition, Solomon Brown testified that he considered himself to be the "boss."

> Q. You previously testified that you did make management decisions, management change. You made decisions as to the changes in

> management at Meadows. What authority did you have to make those decisions?
>
> A. It's been the way we have managed the family property, and is the way I'm handling it from the inception of the property way back. … Michael, Scott, and Todd know I'm the boss. I built the property and I run it with keeping my mouth shut learning from them.

Such testimony may indicate that Solomon Brown did not designate Michael Brown to be his successor as manager of Meadows.

Michael Brown testified that he regarded Solomon Brown as the boss.

> Q. Are you aware that Sol is not a member of Meadows Commerce Center, LLC?
>
> A. Back then we had literally no idea…. We had no idea if he was a general partner, manage- -- we didn't know. We just didn't understand what he was doing, but we thought he was in charge…. At the time we had – we were under the assumption he [Solomon Brown] was like the general partner or something. You know, we didn't know specifically. We always thought he was in charge.

Michael Brown also testified that Scott Brown remained the manager of Meadows and was actively involved in running the business.

Solomon Brown testified that he did not recall discussing with Michael Brown his using company funds for personal expenses. Solomon Brown did state that none of the sons had the "privilege" of paying personal expenses out of company funds. When asked if Michael Brown had asked him "if he could pay himself from Meadows?" Solomon responded "No, sir; he just did it." "I never knew what payments he [Michael] was making. He had the checkbook." "I trusted my sons. If it backfired, I'm guilty." Solomon also indicated that he did not know about the health insurance payments at the time Michael Brown was making those payments.

On the other hand, Solomon Brown testified that he had no issue with Michael Brown receiving a management fee during the time he was acting as manager at Meadows.

> Q. [W]hen Michael was managing Meadows he got a management fee?... Did you object to him receiving that fee?
>
> A. No. I had no objection. Anybody who worked and earned it….

Michael Brown testified that he did speak with Solomon Brown regarding the insurance payments:

A. …the Blue Cross, I don't know what year it started. … So we would have had that discussion back when it started, and when it started I don't recollect.

Q. You don't recall when it started, and you don't recall a specific discussion authorizing you and Todd to take money out of the Meadows Commerce Center to pay your health insurance?

A. I believe we had the kind of discussion with Sol that was like, you know, well, what do we do about – you know, about health insurance. And he was, you know, just do it this way, you know. Again, not formal. It wasn't like we had some sort of meeting about that subject. It was probably of an in-passing thing like at lunch….

A. The idea was, it just cut out writing a check. Instead of writing management fees to ourselves and then writing a check to BCBS, it was just easier to do it in one transaction than do it in two.

Todd Brown testified in deposition as follows:

Q. Do you have a specific recollection of any conversation with Scott or [Sol] telling you or Michael to pay your health insurance from Meadows?

A. Yes.

Q. You have a -- when did that specific conversation occur?

A. Many years ago when we were all trying to figure out the best way to pay our healthcare and we realized that as beneficiaries of these trusts it made more sense to pay from the corporations than to pay after taxes, after we had, you know, collected the money personally and it was sort of the purpose of these trusts and things to take care of the beneficiaries so it made perfect sense for some of these entities to pay our healthcare. I never did any bookkeeping. I didn't pick which one so I just didn't know exactly which one. I just knew that the family business took care of everybody's healthcare. Mine was obviously less because, you know, I'm single and didn't have a family, and Michael and Scott did, so theirs was more. But again, family business, don't care.

Q. Tell me about when that specific conversation occurred and who was present.

A. They happened consistently repeatedly over many years. From, I couldn't even tell you, 1991 when we all had Fortis benefits before Blue Cross and everything. I just don't know when it all began. We all had a

> verbal agreement many years ago on how everybody would take their insurance, pay for their family's health insurance.
>
> Q. So when Meadows stopped paying your health insurance you have an email to Scott, Saul and Michael objecting and claiming, wait, this is how we always did it and we agreed to do it that way?
>
> A. No, I was not asked anything. I was told. I received an e-mail and was told that all personal expenses would stop in 2013 and that we would all be responsible for all of our own personal expenses and that the businesses would all be run on a professional basis and no longer the way we were doing it.

Given the genuine factual issues surrounding the exact roles Michael Brown, Scott Brown, and Solomon Brown played at any given time at Meadows, as well as the factual disputes concerning the health insurance payments, the court finds that summary judgment is not appropriate on this claim.

Therefore, Meadows' motion for partial summary judgment is hereby **DENIED**.

II. Scott Brown's Motion.

In his third-party complaint, Michael Brown alleges that Scott Brown served as manager of Meadows at all times and that Scott Brown engaged Michael Brown from 2002 to 2013 to help manage Meadows, giving rise to a principal/agent relationship between Scott Brown and Michael Brown. Michael Brown alleges that Scott Brown authorized Michael Brown to bind Meadows and to enter into transactions on behalf of Meadows and to handle such matters as leases, build outs, and management issues at the Meadows property. Michael Brown further alleges that he provided Scott Brown with periodic reports of Michael Brown's actions on behalf of Meadows, notice as to the expenditures of Meadows' funds, and access to Meadows financial, tax, and bank documents. Michael Brown asserts that he acted within the authority granted to him by Scott Brown at all times. Consequently, Michael Brown contends that, should he be held liable to Meadows, Scott Brown should be liable to Michael Brown under theories of common law indemnification, vicarious liability, and respondeat superior. Scott Brown moves for summary judgment on all of Michael Brown's third-party claims.

"In Georgia, third-party practice is governed by O.C.G.A. § 9-11-14." *Hines v. Holland*, 334 Ga. App. 292, 294 (2015). "At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." O.C.G.A. § 9-11-14(a).

"This section does not authorize defendant to seek affirmative relief solely on his own behalf. Instead, the complaint must be predicated on secondary or derivative liability, such as indemnity, subrogation or contribution." *McCray v. Fannie Mae*, 292 Ga. App. 156, 160 (2008) (citations omitted).

> O.C.G.A. § 9-11-14 does not allow the tender of another defendant who is or may be liable to the plaintiff…. Our impleader provision does not allow a defendant to bring in a third-party for the purpose of enforcing a liability against the latter different from that on which the plaintiff is proceeding in an action at law. Impleader is not a device for bringing into an action any controversy which may happen to have some relationship with it. A defendant cannot assert an entirely separate claim against the third-party even though it arises out of the same general set of facts as the main claim. There must be an attempt to pass on to the third-party all or part of the liability asserted against the defendant but not to tender the third party as a substitute defendant. Only one who is secondarily liable to the original defendant may be brought in as a third-party defendant, as in cases of indemnity, subrogation, contribution, warranty and the like.

Lamb v. K.M. Ins. Co., 208 Ga. App. 746, 746-47 (1993) (citations and punctuation omitted); *accord Satilla Cmty. Serv. Bd. v. Satilla Health Servs.*, 275 Ga. 805, 809 (2002); *Hines*, 334 Ga. App. at 294 ("A third-party action may be maintained only against one who is secondarily liable to the original defendant for part or all of the original plaintiff's claim. When a recovery by the plaintiff against the defendant would necessarily be followed by recovery for the defendant against the third-party defendant, then a third-party action is proper.").

With these principles in mind, the court reviews each of the third-party claims asserted by Michael Brown. In his brief, Michael Brown states that he "seeks to hold Scott liable under theories of vicarious liability and respondeat superior. These claims are consistent with the well-settled principle that a principal is subject to liability to a third party harmed by an agent's conduct when the agent's conduct is within the scope of the agent's actual authority or ratified by the principal." The court finds that Michael Brown's claims for vicarious liability and respondeat superior do not state viable third-party claims.

Respondeat superior and vicarious liability are essentially the same. "Respondeat superior" means "[l]et the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." *Black's Law Dictionary* 1179 (5th ed. 1979). Similarly, "vicarious liability" has been defined as "[i]ndirect legal responsibility; for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent." *Id.* at 1404.

"For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation or privity to the negligent person as to create the relation of principal and agent." O.C.G.A. § 51-2-1(a). "The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." O.C.G.A. § 10-6-1; *see also Handy v. DeKalb Med. Ctr., Inc.*, 298 Ga. App. 82, 83 (2009). "Every person shall be liable for torts committed by his … servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily." O.C.G.A. § 51-2-2; *see also* O.C.G.A. § 10-6-60 ("The principal shall be bound for the care, diligence, and fidelity of his

agent in his business, and hence he shall be bound for the neglect and fraud of his agent in the transaction of such business."). "Two elements must be present to render a master liable under respondeat superior: first, the servant must be in furtherance of the master's business; and, second, he must be acting within the scope of his master's business." *Piedmont Hosp., Inc. v. Palladino*, 276 Ga. 612, 613-14 (2003) (citations and punctuation omitted).

Although Michael Brown asserts that he was acting as an agent of Scott Brown during the time he acted as a manager at Meadows, the doctrines of respondeat superior and vicarious liability cannot provide him with a third-party claim against Scott Brown. Michael Brown has not cited, and the court is not aware, of any legal authority permitting a claim by an agent against his principal for the agent's wrongdoing based on respondeat superior or vicarious liability. Instead, these doctrines create a right of action in the victim, not in the alleged wrongdoer/agent. Michael Brown concedes as much in his brief by noting that these doctrines provide that a "principal is subject to liability ***to a third party*** harmed by an agent's conduct."

Moreover, to permit such claims in this case would run afoul of the maxim that a defendant may not use O.C.G.A. § 9-11-14 to "tender … another defendant who is or may be liable to the plaintiff." *Lamb*, 208 Ga. App. at 747. In other words, if Michael Brown was Scott Brown's agent, and if, in that capacity, Michael Brown committed a tort against Meadows, Scott Brown could be held accountable to Meadows – but not to Michael Brown – for respondeat superior or vicarious liability. O.C.G.A. § 9-11-14 does not provide a basis for a claim brought by an agent against his principal for torts that the principal might have committed against others, as the agent would lack standing to pursue any such claim.

In addition, Michael Brown does not allege that Scott Brown committed any tort against him; and, even if he had, such a claim would not be cognizable under O.C.G.A. § 9-11-14. *See, e.g., Lamb*, 208 Ga. App. at 747 ("A defendant cannot assert an entirely separate claim against the third-party even though it arises out of the same general set of facts as the main claim.").

In sum, under his claims for respondeat superior and vicarious liability, Michael Brown cannot show that Scott Brown has any liability to Michael Brown – either primarily, secondarily, or derivatively.

Michael Brown also asserts a claim for common law indemnification, which is a type of claim facially cognizable under O.C.G.A. § 9-11-14.

> [U]nder Georgia law indemnity is defined "as the obligation or duty resting on one person to make good any loss or damage another has incurred by acting at his request or for his benefit." And despite the enactment of O.C.G.A. § 51-12-33, it is well settled that "Georgia law continues to recognize two broad categories of indemnity: as created by contract, as between a surety and a debtor; and under the common law of vicarious liability, as between principals and agents." Specifically with regard to the latter category, "[i]f a person is compelled to pay damages because of negligence *imputed to him* as the result of a tort committed by

> another, he may maintain an action for indemnity against the person whose wrong has thus been imputed to him."

Dist. Owners Ass'n v. AMEC Envtl. & Infrastructure, Inc., 322 Ga. App. 713, 715-16 (2013) (citations omitted); *accord Havenbrook Homes, LLC v. Infinity Real Estate Invest., Inc.*, 356 Ga. App. 477, 483 (2020) ("A person may be obligated to indemnify another … such as where negligence has been imputed to him based on another's tort."); *Auto-Owners Ins. Co. v. Anderson*, 252 Ga. App. 361, 363 (2001).

It is only "if a person is compelled to pay damages because of negligence *imputed to him* as the result of a tort committed by another, [that] he may maintain an action for indemnity against the person whose wrong has thus been imputed to him." *Hines*, 334 Ga. App. at 296. Common law indemnification does not create a right of action in the purported wrongdoer – only in the person who is required to pay for the wrongdoer's conduct. Here, however, Michael Brown does not assert that Meadows seeks to impute Scott Brown's conduct to Michael Brown. To the contrary, Meadows sues Michael Brown for conduct Michael Brown purportedly committed. The liability asserted against Michael Brown is actual and direct. *See* O.C.G.A. § 10-6-85 ("All agents, by an express undertaking to that effect, may render themselves individually liable. Every agent exceeding the scope of his authority shall be individually liable to the person with whom he deals; so, also, for his own tortious act, whether acting by command of his principal or not, he shall be responsible."). It bears repeating that Michael Brown asserts he was the "agent," not the principal, of Scott Brown.

Where there is no imputed liability, a claim for common law indemnity fails as a matter of law. *See, e.g.*, *Havenbrook Homes*, 2020 Ga. App. LEXIS 469, at *13; *Dist. Owners Ass'n*, 322 Ga. App. at 716 ("because no allegations of imputed negligence or vicarious liability have been made in this case, common law indemnity principles do not apply").[2]

For the foregoing reasons, the court finds that Michael Brown has failed as a matter of law to state a viable third-party claim against Scott Brown. Therefore, the court hereby **GRANTS** Scott Brown's motion for summary judgment against Michael Brown's third-party complaint.

SO ORDERED, this 18th day of March, 2021.

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

[2] If Michael Brown can demonstrate to a jury that Scott Brown at all times remained the manager of Meadows, and that Scott Brown, as Meadows' manager, knew or, directed, or ratified Michael Brown's purported conduct, such a showing might provide Michael Brown a viable defense against the claims asserted by Meadows. But Michael Brown would not be entitled to indemnification from Scott Brown for the conduct Michael Brown is alleged to have committed.