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Order on Defendants' Motions for Summary
Judgment (AMANA I SA)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AMANA I SA and
SHEIK MOHAMMED AL-AMOUDI

Plaintiff,

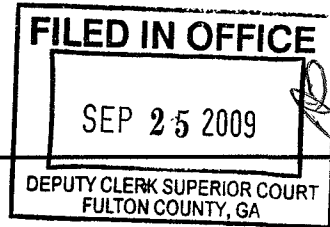
v.

CAIRNWOOD GROUP, LLC,
CAIRNWOOD CAPITAL
MANAGEMENT, LLC, LANE P.
PENDLETON, LAIRD P. PENDLETON,
KIRK P. PENDLETON, and THAYER B.
PENDLETON.

Defendants,

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Civil Action File No. 2006-CV-114931



ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

On August 26, 2009, Counsel appeared before the Court to present argument on Defendants' Motions for Summary Judgment. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motions and the record in the case, the Court finds as follows:

I. Facts

This case arises out of Plaintiffs' investment in the Cairnwood Global Technology Fund ("CGTF" or "Fund"). In 1999 the individual Defendants agreed to form CGTF which would be sponsored by Cairnwood Group, LLC and managed by Cairnwood Capital Management, LLC. In February 2000 Defendant Lane Pendleton telephoned Mr. Karim Karaman ("Karaman") who serves as Plaintiff Sheik Mohammed Al-Amoudi's ("Al-Amoudi") investment manager and as a director of Plaintiff Amana I SA ("Amana"). Karaman acted as a liaison between the parties regarding Plaintiffs investment in

CGTF. During the call with Karaman, Lane Pendleton described an investment opportunity in CGTF. Shortly after the telephone conversation, Lane Pendleton met with Karaman in London and further discussed the proposed investment. During that meeting, Lane Pendleton solicited a \$10 million dollar investment by Al-Amoudi in CGTF. On March 21, 2000, Karaman received a fund executive summary and a PowerPoint presentation providing details about the proposed investment. In April 2000 Al-Amoudi, the majority shareholder of Amana, committed to invest \$10 million in CGTF through Amana. Amana made four payments to CGTF: \$5M in April 2000; \$2.5M in March 2001; \$1M in August 2001; and \$1.5M in January 2003. The first two payments, however, were made prior to Amana's incorporation on July 6, 2001, and were wired from one of Al-Amoudi's personal bank accounts. In January, 2006, Al-Amoudi assigned all rights of action related to the first two payments to Amana.

Plaintiffs allege that they were fraudulently induced to invest in CGTF by the following misrepresentations:

1. the Fund would have total funding of at least \$50 million;
2. Pendleton family members personally, as well as select members of the CCC Alliance, had already committed to investing \$30 million in the Fund;
3. Fahd bin Abdullah, an acquaintance known to both Al-Amoudi and Karaman, had agreed to invest \$10 million in the Fund;
4. The Funds initial closing amount would be \$25 million;
5. The minimum investment amount for each Fund investor was \$5 million;

6. The Fund would use all funds contributed by investors to seek out and identify businesses in which to make equity or debt investments that were expected to yield very high returns.
7. Fund Shareholders would receive annual audited financial statements prepared by the Fund's independent accountants, Pratt-Thomas, Gumb & Company.

Amana filed a Complaint on April 8, 2006. On April 13, 2009, Plaintiffs' filed a Third Amended Complaint asserting counts for fraud, civil conspiracy to defraud, negligent misrepresentation and violation of the Georgia RICO Act.

II. Standard

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991). The moving party need only eliminate one essential element of a party's claim to prevail on summary judgment. Real Estate Int'l Inc. v. Buggah, 220 Ga. App. 449, 451 (1996).

III. Motions for Summary Judgment

On May 1, 2009, all of the Defendants except Lane Pendleton filed a Motion for Summary Judgment. On the same day, Defendant Lane Pendleton filed his own Motion for Summary Judgment adopting his co-Defendants' arguments in support of his

motion. Defendants' Motions assert that they are entitled to summary judgment for four reasons. First, Defendants argue that "[a]ll of Plaintiffs' claims fail because Defendants' alleged misrepresentations did not proximately cause the injury alleged." Second, Defendants argue that "Plaintiffs RICO claim fails because Plaintiffs have no evidence to show a pattern of racketeering activity." Third, Defendants argue that Plaintiffs' fraud, negligent misrepresentation, and conspiracy claims fail because they are barred by the statute of limitations. Fourth, Defendants argue that Plaintiffs' claims of fraud, negligent misrepresentation and conspiracy to commit fraud fail because Plaintiffs did not rely on the representations in the PowerPoint presentation or the executive summary when making the decision to invest in CGTF.

a. Proximate Cause

To succeed on a fraud claim under Georgia law, a plaintiff must prove "five essential elements: (1) false representation made by the defendant; (2) scienter, the intent to deceive; (3) intent to induce the plaintiff to act or refrain from acting in reliance upon the representation; (4) justifiable reliance by the plaintiff upon the representation; and (5) damages directly and proximately caused by reliance." Middleton v. Troy Young Realty, Inc., 257 Ga. App. 771, 772 (Ga. App. 2002). The Georgia Court of Appeals has stated unequivocally that "an essential element of a fraud claim is proximate cause." Duke Galish, LLC v. Manton, 291 Ga. App. 827, 833 (2008).

Defendants contend that Plaintiffs can only establish proximate cause by showing that Defendants' alleged misrepresentations were the reason their investment in CGTF performed poorly. During oral argument, Defendants referred to this

requirement as “loss causation.” Loss causation is a concept used in federal securities fraud cases and is an essential element of securities fraud claims under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10(b)(5).

Defendants’ argument fails to show that loss causation is an essential element under a Georgia state law claim for fraud. To support their argument, Defendants rely extensively on Duke Galish, LLC v. Manton LLC, 291 Ga. App. 827, 833 (2008) for the proposition that proximate causation requires that a Plaintiff specifically prove loss causation or as Defendants described in their brief, “that the misrepresentations were the reason that the investment turned out to be a losing one.” In Duke, Plaintiffs asserted a fraud claim arguing that a purchase agreement would not have been consummated if appellees had not artificially inflated their secured claims. The Duke Court explained that “any damage claimed to have been suffered by a plaintiff does not proximately result from the defendants’ alleged misconduct, if the damage would have occurred notwithstanding their misconduct.” Thus, Duke is instructive as to what does not constitute proximate cause, and does not limit the ways in which a plaintiff may establish proximate cause. The Duke Court reasoned that proximate cause was lacking because the plaintiffs would have been damaged despite defendants alleged fraud because the purchase agreement did not close for an entirely separate reason—a failed contingency that required plaintiffs to obtain a building permit. Here, there is no evidence to show that Plaintiffs would not have been damaged despite Defendants’ alleged fraud because Plaintiffs have provided evidence that they would not have invested in CGTF absent the alleged misrepresentations by Defendants. Moreover, Plaintiffs have provided testimony that they were not generally looking to invest in

technology funds and only agreed to invest in CGTF based on Defendants' alleged misrepresentations. While Duke clearly stands for the rule that proximate cause is an essential element of a fraud claim under Georgia law, it does not require that proximate cause be established only by showing loss causation.

Defendants also rely on Pidcock v. Sunnyland America, Inc., 682 F. Supp. 1563 (S.D. Ga. 1987), a decision from the U.S. District Court for the Southern District of Georgia entirely devoted to analyzing a SEC Rule 10(b)(5) claim except for a single paragraph which provides “[t]he elements required to prove a cause of action for fraud under Georgia law are essentially the same as those required under Rule 10(b)(5)... [h]aving failed to prove causation under 10(b)(5), it follows that plaintiff has failed to prove causation under his state law claim.” Pidcock is neither controlling nor persuasive enough for this Court to find that proximate cause needs to be established by showing loss causation in Georgia fraud cases.

None of the rest of the cases cited by Defendants, including Chudasama v. Mazda Motor Corp., 123 F.3d 1353 (11th Cir. 1997), requires the showing of loss causation. Rather, these cases merely reinforce that proximate cause is an essential element of fraud under Georgia law which neither the Court nor Plaintiffs dispute. Interestingly, in Chudasama, the Eleventh Circuit declined to extend a different federal securities fraud concept—a fraud-on-the market argument to stand in the place of reliance—noting that “[w]e find it very doubtful that Georgia courts would change their historic requirement of proof of reliance by grafting a rule of federal securities law onto their body of tort law.” Chudasama v Mazda Motor Corp., *supra*, 123 F.3d at 1369. In

the same way, there is no need to import the concept of loss causation into Georgia's requirement that plaintiffs establish proximate cause in fraud cases.

Defendants argue that Plaintiffs must show proximate cause under their Georgia RICO claim in the same way as their fraud claim, pointing out that an essential element of a Georgia RICO claim is proximate cause. Maddox v. Southern Engineering Co., 231 Ga. App. 802 (1998). However, the Court finds that proximate cause need not be established only in the narrow way suggested by Defendants.

Proximate cause is generally a jury question. "Where the proof 'does not plainly, palpably and indisputably show a lack of proximate cause,' the issue is for the jury." Malak v. First Nat. Bank of Atlanta, 195 Ga. App. 105 (1990) (citing DeKalb County Hosp. Auth. v. Theofanidis, 157 Ga. App. 811, 812(2) (1981)). Plaintiffs have provided evidence sufficient for a jury to conclude that Defendants alleged misrepresentations were a proximate cause of Plaintiffs' injury. Moreover, Plaintiffs have provided some evidence to show proximate causation in the narrow fashion urged by Defendants by submitting deposition testimony that the size of the fund was one reason it performed poorly, and evidence that Defendants' representations that the fund's target size would be \$50 million, if true, would have allowed the fund to perform better. There is also evidence to show that Defendants represented that the Fund would have an initial closing amount of \$25 million. Because the Fund's size never reached that amount, Plaintiffs would have suffered no losses as the Fund would never have gotten past the planning stage.

The Court rejects Defendants' argument that to survive summary judgment proximate cause must be established by expert testimony. The cases cited by Defendants, Johnson v. Dep't of Transp., 245 Ga. App. 839 (2000) and Lamb v. R.L. Mathsi Certified Dairy Co., 183 Ga. App. 455 (1987) do not support this argument. In Johnson, a case arising out of a car accident, the Court held that Plaintiffs failed to present any evidence of causation including "any recollection by the driver or passenger, the testimony of an eyewitness to the incident, or testimony from a police officer or other person with expertise in accident reconstruction." Johnson, 245 Ga. App. at 840. And the Lamb court held that Plaintiff was not qualified to opine as to the cause of internal engine damage, but could testify as to physical damage to the car. Neither of these cases support the argument that to survive summary judgment Plaintiffs must provide expert testimony.

b. RICO

In pertinent part, the Georgia RICO Act makes it unlawful 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" through a "pattern of racketeering activity." O.C.G.A. § 16-14-4. A pattern of racketeering activity is defined by the Act in pertinent part as "[e]ngaging in at least two acts of racketeering activity." O.C.G.A. 16-14-3(8).

Defendants argue that summary judgment as to Plaintiffs' Georgia RICO claim should be granted because there is no evidence sufficient to create an issue of fact as to whether Defendants committed two or more predicate acts. However, Plaintiffs have

provided evidence that both Amana's August 2001 and January 2003 payments to CGTF were induced by new and different misrepresentations beyond those that induced Amana's April 2000 and March 2001 payments to CGTF. For instance, Plaintiffs provide Karaman's deposition testimony as evidence that Amana's final payment to CGTF was induced by threats of dilution and by a representation from Lane Pendleton that CGTF needed the additional payment to allow the Fund to recover. Plaintiffs also provide evidence that Amana's August 2001 payment was induced by a misrepresentation made by Lane Pendleton in a June 2001 letter. All of the forgoing evidence provides a basis upon which a jury could find a pattern of racketeering activity. Accordingly, questions of fact preclude the grant of summary judgment on Plaintiffs' RICO claim.

c. Statute of Limitations

Defendants argue that summary judgment should be entered in their favor on counts one through three of Plaintiff's Third Amended Complaint because those claims are time-barred by the applicable statute of limitations. The statute of limitations for fraud, negligent misrepresentation, and conspiracy to commit fraud is four years. O.C.G.A. § 9-3-31. The statute of limitations in such actions may be tolled until the cause of action "is discovered or by reasonable diligence should have been discovered." Hamburger v. PFM Capital Management, Inc., 286 Ga .App. 382, 388 (2007). "[W]here there are facts involving fraud and excuses for delay in discovering the same, the question is one of mixed law and fact and is one for determination by the jury under proper instructions from the court." Sandy Springs Toyota v. Classic Cadillac Atlanta Corp., 269 Ga. App. 470, 472 (2004). A plaintiff bears the burden of proving the

facts necessary to establish tolling of the applicable statute of limitations. Nash v. Ohio Nat'l Life Ins. Co., 266 Ga. App. 416, 418 (2002).

Defendants raised a statute of limitations argument which this Court rejected on March 30, 2007. Defendants argue that recent deposition testimony by Karaman warrants a different result on Defendants' statute of limitations argument at this time. The Court finds that there continues to be an extensive dispute as to whether Plaintiffs exercised reasonable diligence to uncover the alleged fraud and negligent misrepresentation, and such question is appropriate for a jury to answer.

d. Reliance

Defendants contend that Plaintiffs' claims of fraud, negligent misrepresentation and conspiracy to commit fraud fail because Plaintiffs did not rely on the representations in the PowerPoint presentation or the executive summary when making the decision to invest in CGTF. An essential element of a fraud or negligent misrepresentation claim is justifiable reliance by the plaintiff on the misrepresentation. Middleton v. Troy Young Realty, Inc., 257 Ga. App. 771, 772 (Ga. App. 2002). Plaintiffs have offered extensive deposition testimony from Karaman upon which a jury could reasonably determine that Plaintiffs relied on Defendants alleged misrepresentations. Accordingly, the Court finds that the question of Plaintiffs justifiable reliance on Defendants alleged misrepresentations is a matter for a jury's determination.

IV. Conclusion

For all of the foregoing reasons, the Court finds that questions of fact preclude a grant of summary judgment in this case. Accordingly, Defendants' Motions for Summary Judgment are hereby **DENIED**.

SO ORDERED this 25th day of September, 2009.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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