8-17-2012

Order on Defendants' Motion for Summary Judgment (Etowah Environmental Group_ Walsh)

Melvin K. Westmoreland
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ETOWAH ENVIRONMENTAL GROUP, LLC, *Plaintiff,* v. MICHAEL WALSH, CHRISTOPHER BEALL, ADSTAR WASTE HOLDINGS CORP., and HIGHSTAR CAPITAL FUND II, L.P., *Defendants.*	)	CIVIL ACTION NO. 2012-CV-211149

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the Motion for Summary Judgment of Defendants AdStar Waste Holdings Corp. ("AdStar"), Highstar Capital Fund II, L.P. ("Highstar"), Michael Walsh ("Walsh"), and Christopher Beall ("Beall," together with AdStar, Highstar, and Walsh, "Defendants"). Upon consideration of the briefs and materials submitted on the motion, argument of the parties, and the record of the case, this Court finds as follows:

Plaintiff and non-party Advanced Disposal Services, Inc. ("ADS") owned Federal Road, LLC ("Federal Road"), through which they owned and operated the Eagle Point Landfill located in Forsyth County, Georgia. Plaintiff owned 25% and ADS owned 75% of Federal Road.

In 2006, ADS and Defendants began to discuss the prospect of Defendants' acquisition of ADS. The Federal Road Operating Agreement provides that Federal Road could be merged into ADS upon ADS' election, which would then trigger Plaintiff's right to an appraisal of its shares. Additionally, Plaintiff contends, and for purposes of this motion Defendants do not dispute, that Plaintiff could also elect to exercise "tag-along" rights upon a change in control, that would

permit Plaintiff to "tag along" to the deal negotiated by ADS upon the same incremental price and on the same terms and conditions.

It appears from the record Defendants made at least three offers to purchase ADS. On May 5, 2006, Walsh wrote to ADS and offered to purchase its shares for $425 million, with an independent valuation of Federal Road between $62 and $65 million. On May 10, 2006, Defendants increased the offer for ADS by $25 million, to $450 million, but decreased the value of Federal Road to between $45.5 million and $47 million. Finally, on May 19, 2006, Defendants raised the offer for ADS to $470 million, an increase of $20 million from the previous offer, with an allocation of $45.5 million to Federal Road.

On June 13, 2006, ADS officers met with Plaintiff and revealed the $45.5 million offer for Federal Road. Plaintiff was not told about the $65 million valuation placed on Federal Road in the May 5th offer letter. At that meeting, Plaintiff was given the choice to either tag along at its proportionate share of the $45.5 million offer or be subject to the appraisal process, which Plaintiff contends imposed unfavorable rules and limits as required under the Federal Road Operating Agreement on the method of apportioning value to its shares. Due to its alleged reliance on the $45.5 million price, Plaintiff elected to pursue its appraisal rights, which ultimately led to litigation and then arbitration with ADS over the parties' dispute of the appraisal process. Plaintiff ultimately received an award totaling $26.4 million against ADS and one of its principals.

Now, Plaintiff has asserted claims against Defendants based on their conduct in allegedly conspiring with ADS to purposely undervalue Federal Road so that the buy-out of Plaintiff's interest would be cheaper. Specifically, Plaintiff is pursuing claims for fraud, aiding and abetting breaches of fiduciary duties, tortious interference with a business relationship and civil

conspiracy. Plaintiff also contends it was damaged due to Defendants' failure to produce documents and alleged false testimony to the arbitration panel. Finally, Plaintiff seeks punitive damages and attorneys' fees, including fees incurred in the prior lawsuit and arbitration against ADS.

Defendants seek summary judgment on the basis that Plaintiff's action is barred by res judicata and the prohibition on double recovery, contending that Plaintiff already litigated the issues presented here in the arbitration with ADS and recovered a complete verdict. In addition, Defendants complain that Plaintiff's claim for "fraud on the arbitration" cannot be pursued outside the arbitration process. Next, Defendants argue that Plaintiff's claims for attorney' fees incurred in litigating over the appraisal process are barred by issue preclusion. Defendants also mount substantive attacks to Plaintiff's claims. However, the Court finds those arguments unavailing for now, based on the limited record before it, and Defendants' motion is **DENIED** as to those arguments.

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).

1. Plaintiff's Claims Based on 2006 Conduct

Defendants characterize this lawsuit as an effort by Plaintiff to re-litigate the same injury for which Plaintiff already recovered in arbitration. Because Defendants contend that the same matters were placed in issue in the arbitration, Defendants argue that Plaintiff's claims are barred by res judicata. Additionally, because Plaintiff was awarded a favorable verdict by the

arbitration panel, Defendants contend that Plaintiff's claims are barred by the prohibition on double recovery.

"A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside." O.C.G.A. § 9-12-40. A plaintiff is therefore prohibited from "splitting up claims arising from the same transaction and prosecuting them piecemeal or presenting only a portion of the grounds on which relief is sought and leaving the rest for a second suit if the first fails." Flagg Energy Dev. Corp. v. General Motors Corp., 235 Ga. Ap. 540, 542 (1998). For a judgment in one action to bar subsequent actions, "the two actions must share certain characteristics. First, the parties to the two actions must be identical, and second, the subject matter of the actions must also be identical." Id.

Similarly, O.C.G.A. § 9-2-4 prevents a plaintiff from recovering twice for the same injury. "[A] plaintiff may pursue any number of consistent or inconsistent remedies against the same person or different persons until he shall obtain a satisfaction from some of them." O.C.G.A. § 9-2-4. Although a plaintiff may bring multiple lawsuits against different parties to recover damages for a single injury, a plaintiff is precluded from pursuing a second claim against different parties once it has received "satisfaction" for the single injury. Green v. Thompson, 208 Ga. App. 609, 610 (1993).

At the hearing, Defendants pointed the Court to specific places in the transcript of the arbitration, Plaintiff's post-hearing arbitration brief, and the arbitration award to advance the point that the same issues are at risk of being re-litigated if Plaintiff is allowed to proceed with its

claims. Upon review of the limited record of the arbitration before it, the Court is satisfied that the issues placed in controversy here are distinct from those presented in the arbitration.

In the arbitration, the panel was asked to consider, under the rubric of the appraisal process set forth in the Federal Road Operating Agreement, the value of Plaintiff's minority interest in Federal Road as a result of a merger of Federal Road into ADS. However, because the panel found that ADS owed fiduciary duties to Plaintiff, the panel chose to apply the "entire fairness doctrine" set forth under Weinberger v. UOP, Inc., 457 A2d 701 (1983), which freed Plaintiff from some of the rules and limits placed on the appraisal process under the Operating Agreement. Applying the entire fairness doctrine, the panel declined to subject Plaintiff's shares to a minority discount, but nevertheless determined a value for Plaintiff's interest by evaluating what would be a "fair price" or "fair market value," taking into account discounted cash flow based on an EBITDA multiple, among other financial analyses.

In contrast, Plaintiff seeks to pursue what it would have gotten had it elected to exercise its tag-along rights, rather than opting for the appraisal, which it alleges it missed out on in reliance on Defendants' offer letter allocating only $45.5 million to Federal Road. The Court finds that this issue is distinct from the matters addressed by the arbitration panel. While Defendants may ultimately show that the amount Plaintiff would have recovered had it exercised tag along rights is the same as what Plaintiff recovered under the entire fairness doctrine, it is premature for the Court to make this finding now, and the Court appreciates that a valuation driven by what Defendants actually paid for ADS might be different than what experts determine to be a fair price for Plaintiff's interest. Moreover, the propriety of Defendants' conduct in formulating the values of Federal Road contained in the offer letters has not been directly placed

in issue as Defendants were not parties to the arbitration. Accordingly, the Court **DENIES** Defendants' motion.

2. Plaintiff's Claims Based on Defendants' Conduct in the Arbitration Proceeding

As part of its fraud claims, Plaintiff has accused Defendants of displaying a lack of candor during the arbitration process by providing misleading or inaccurate testimony and by withholding documents. Defendants cite Corey v. New York Stock Exchange, 691 F.2d 1205 (6th Cir. 1982), to stand for the proposition that the FAA prohibits a litigant from pursuing in a second action claims based on conduct that took place during an arbitration proceeding. Additionally, Defendants point out that Georgia does not recognize a civil cause of action for perjury. Willett v. Stookey, 256 Ga, App. 403 (2002).

Nevertheless, the Georgia Supreme Court has recognized a cause of action for fraud on a tribunal. Butler v. Turner, 274 Ga. 566 (2001). In that case a plaintiff was awarded a jury verdict in a separate action for the fraud of the defendant in falsely testifying to his income in a child support proceeding. Id. The Court held that "[w]hen a material fact is willfully misrepresented to induce another to act and upon which the other acts, a cause of action is created in the injured party." Id. at 569. The Court went on to explain that the fraud action was not an attack on the prior award, but rather a "suit in tort for damages... from the fraud and deceit perpetrated by [the defendant]." Id. at 570.

On the basis of this authority, the Court finds that Plaintiff has legal grounds in Georgia to pursue a claim against Defendants here, who were not parties to the previous arbitration or subject to the arbitration clause in the Federal Road Operating Agreement, based on alleged fraud on the arbitration panel. Defendants' motion is **DENIED** with respect to Plaintiff's fraud claims based on conduct that took place in the arbitration.

3. Attorneys' Fees Incurred in the Appraisal Litigation

Defendants take issue with Plaintiff's claim for damages based on expenses it incurred in the appraisal process and subsequent litigation because Defendants contend that the matter was already addressed by the arbitration panel and Defendants dispute a legal basis for imposing liability on them for such costs.

As reflected in Plaintiff's post-hearing brief submitted in the arbitration, the issue presented to the arbitration panel was whether to award attorneys' fees to Plaintiff based on the bad faith of ADS principal, Charlie Appleby, in hiding the May 5, 2006 letter. The arbitration panel declined to award attorneys' fees because of the Federal Road Operating Agreement, which required both parties to bear their own litigation costs, and because of the panel's concern over Plaintiff's "delay in attempting to circumvent arbitration."

Although the panel evaluated Plaintiff's conduct and found factors that militated against the recovery of litigation costs, the Court finds the issue before the arbitrators distinguishable for res judicata purposes. In the arbitration, the panel was concerned with the conduct of Mr. Appleby in hiding the first offer letter and whether such conduct would overcome the provisions of the Federal Road Operating Agreement. Here, the issue for the fact finder will be whether the independent conduct of Defendants caused Plaintiff damages, including hiring an appraiser and litigating over disputes related to the appraisal process, due to Plaintiff's election to exercise its appraisal rights without accurate information. While the fact finder may find, like the arbitration panel, that Plaintiff's own behavior may tip the scales against an award in Plaintiff's favor, the Court finds the issue distinct from that visited by the arbitration panel, and Georgia law permits Plaintiff to pursue as damages costs incurred by a party who was forced to hire an appraiser due

to an alleged fraudulent scheme. McGowan v. Progressive Inc. Co., 281 Ga. 169 (2006). Accordingly, Defendants' motion is **DENIED**.

Because the Court did not consider the second affidavit of Jeremy Berry in its evaluation of Defendants' motion, Plaintiff's Motion to Strike Second Affidavit of Jeremy Berry is moot.

SO ORDERED this 17th day of August, 2012.

MELVIN K. WESTMORELAND, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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