7-22-2012

Order on Defendants' Motion to Dismiss (Silverton Financial_Porter Keadle Moore)

Elizabeth E. Long
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SILVERTON FINANCIAL SERVICES, INC. by and through its Chapter 7 Bankruptcy Trustee, JEFFREY K. KERR,	)	
Plaintiff,	)	
v.	)	**Civil Action File No.**
	)	**2010CV194891**
PORTER KEADLE MOORE, LLP, SALVATORE A. INSERRA, and TOM A. BRYAN,	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Defendants' Motion to Dismiss Claims Against Defendants Porter Keadle Moore, LLP and Salvatore A. Inserra. Upon consideration of the briefs submitted on the motion and the record of the case, this Court finds as follows:

This case arises out of the insolvency of Silverton Financial Services, Inc. ("SFSI"), a holding company that owned, among other companies, Silverton Bank ("Silverton"), which was headquartered in Georgia. On May 1, 2009, Silverton was seized by federal regulators. It was the largest bank failure in Georgia history. On June 5, 2009, SFSI declared bankruptcy. The bankruptcy court appointed Jeffrey K. Kerr to act as its Chapter 7 trustee (the "Trustee"), and he is pursuing this action against Silverton's and SFSI's former Chairman and CEO, Defendant Tom Bryan ("Bryan"), for breach of the duties set forth in O.C.G.A. §§ 14-2-830 and 14-2-842 and against SFSI's former auditors, Defendants Porter Keadle Moore, LLP and Salvatore A. Inserra (collectively, "PKM"), for professional negligence.

Defendants PKM are accused of failing to perform auditing functions with professional standards of care and of "negligently opin[ing] that SFSI's financial statements were not materially misstated and that SFSI's financial position prior to bankruptcy was safe, sound and secure."

Bryan is accused of failing to discharge with ordinary care the duties imposed on him in his capacity as a corporate officer and as a member of the board of directors of SFSI. Plaintiff claims that Bryan misstated Silverton's true operating results and financial condition and recommended that capital be dispensed in a manner at odds with the preservation of SFSI as a going concern. Many, if not all, of Silverton's executive officers were also officers of SFSI; and many of the members of the board of directors of the two entities were the same.

The Amended Complaint also states that SFSI's and Silverton's boards authorized certain of the transactions that form the basis of the Trustee's claims against PKM. For example, paragraph 34 of the Amended Complaint refers to the authorization of Silverton's board of the purchase of an aircraft at Bryan's request, paragraph 42 of the Amended Complaint describes the authorization of the SFSI board of a private capital raise of up to $15 million of its stock to fund growth of Silverton although Silverton's total risk-based capital ratio had fallen to 10.57% (below mandated ratios of 11%), paragraph 54 of the Amended Complaint explains that Bryan informed the Silverton board that "occupancy and equipment costs" were up $1.7 million due to SFSI's move to a new multi-million dollar headquarters and because of SFSI's aviation expenses, and paragraph 57 of the Amended Complaint provides that the SFSI board authorized the distribution of dividends despite Bryan's statement to Silverton's board that Silverton "was in a holding pattern from a loan growth standpoint in order to properly manage capital ratios."

PKM seek the dismissal of the Trustee's claims against them on the basis of *in pari delicto*, contending that this doctrine bars a plaintiff from recovery when it has participated equally in the alleged wrongdoing that led to its harm. "When both parties are equally at fault, equity will not interfere but will leave them where it finds them. The rule is otherwise if the fault of one decidedly overbalances that of the other." O.C.G.A. § 23-1-15.

In reviewing a motion to dismiss pursuant to O.C.G.A. § 9-11-12(b)(6), the Court must determine whether plaintiffs have stated a claim upon which relief can be granted. Under this standard, the Court must analyze whether "(1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant established that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." Stendahl v. Cobb Cty., 284 Ga. 525, 525 (2008). The Court "must accept as true all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff." Cunningham v. Gage, 301 Ga. App. 306, 307 (2009).

Plaintiff filed its Amended Complaint on April 27, 2012, and Defendants filed the instant motion on May 14, 2012. For purposes of this motion, the Court's inquiry is directed to the Amended Complaint. See Krinsk v. SunTrust Banks, Inc., 654 F.3d 1194 (2011) ("[A]n amended complaint supersedes the initial complaint and becomes the operative pleading in the case.")

In its Amended Complaint, Plaintiff seeks recovery for damages due to the alleged negligence of PKM and Bryan. Defendants contend that the acts of SFSI's own officers and directors caused, or equally caused, the harm SFSI allegedly suffered and that such conduct is imputed to SFSI. "The law imputes to the principal, and charges him with, all notice or

knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority...." Fowler v. Latham, 201 Ga. 68, 74 (1946); Brown v. Cooper, 237 Ga. App. 348 (1999) (holding that the knowledge of an officer acting in a dual role as an officer of another entity could nevertheless be imputed to the corporation).

Plaintiff counters, citing United States v. Bestfoods, 524 U.S. 51 (1998), that overlapping executives and officers at two companies cannot render the parent liable for the acts of the subsidiary. However, the Court finds Plaintiff's application of the veil piercing analysis misplaced. The acts of an agent may be imputed to the principal, despite the fact that he may from time to time serve in a different capacity, so long as he acts in furtherance of and within the scope of his agency. Travis Pruitt & Associates, P.C. v. Hooper, 277 Ga. App. 1 (2005). Accordingly, the Court agrees that acts attributed to Bryan or to Silverton's or SFSI's boards may be imputed to SFSI consistent with the laws of agency.

The Trustee here stands in the place of SFSI. *See* Bank of Marin v. England, 385 U.S. 99, 101 (1966). And he is subject to any applicable defenses that could be raised by the Defendants against SFSI. Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145 (11th Cir. 2006).

Nevertheless, construing the allegations in favor of Plaintiff, the Amended Complaint does not show any intentional misconduct on the part of Bryan or the Silverton or SFSI boards. Upon review of the relevant case law, the Court failed to locate a case in which the doctrine of *in pari delicto* was applied to prevent a plaintiff from asserting claims when the only wrongdoing shown on the part of the plaintiff was negligence.

As discovery proceeds in this case, more facts may develop, but at this point it would be premature to make a comparative analysis of the negligence, if any, of the parties. Accordingly, Defendants' motion is **DENIED**.

SO ORDERED this 12 day of July, 2012.

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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