11-30-2012

Order on Defendants' Motion to Dismiss (Meadow Springs Recovery, LLC et al. v. Wofford, et al.)

Elizabeth E. Long
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MEADOW SPRINGS RECOVERY, LLC as assignee of MEADOW SPRINGS, LLC, NICHOLAS WALLDORFF, McCHESNEY INVESTMENT ADVISORS, LLC and HOMESTEAD CONSTRUCTION, INC.,	
Plaintiff,	
v.	**Civil Action File No. 2012CV220304**
M. RUSSELL WOFFORD, JR., ALSTON & BIRD LLP, GEOFFREY NOLAN, IH RIVERDALE, LLC, DAVID L. PARDUE, and HARTMON, SIMONS & WOOD, LLP f/k/a HARTMON, SIMONS, SPIELMAN & WOOD, LLP,	
Defendants.	

ORDER ON DEFENDANTS' MOTION TO DISMISS

On November 19, 2012, the parties appeared before the Court to present oral argument on the Motion to Dismiss of Defendants M. Russell Wofford, Jr. and Alston & Bird LLP (the "A&B Defendants"). Upon consideration of the arguments of counsel and the record in this case (the "2012 Case"), the Court finds as follows:

In this 2012 Case, Plaintiff asserts claims for abusive litigation arising out of a decade-old dispute between former partners involved in a real estate venture. In 2003, the A&B Defendants, on behalf of Geoffrey Nolan ("Nolan") and IH Riverdale, LLC ("IH"), filed suit against Plaintiff's predecessor in interest, Meadow Springs, LLC, and others, alleging that they had "exercised improper, wrongful and illegal dominion and/or control over property and property interests belonging to IH/Nolan, including... [a parcel of real property in Clayton

County, Georgia]." *IH Riverdale, LLC v. McChesney Capital Partners, LLC*, Case No. 2003CV73603 (the "2003 Case").

The next day, the A&B Defendants recorded a lis pendens in Clayton County in which they claimed that their clients had an interest in the property and that the complaint filed sought relief involving the property. On the same day, the A&B Defendants delivered a letter to Regions Bank, notifying it of the pending litigation and enclosing a copy of the complaint and lis pendens (the "Regions Bank Packet"). Sometime after receiving the Regions Bank Packet, Regions Bank refused to close on a construction loan. Thereafter, Meadow Springs, LLC lost the property through foreclosure.

On September 22, 2008, the 2003 Case was consolidated with three other related cases. This Court entered an order on September 8, 2011, granting summary judgment to Plaintiff's predecessors on all the claims in the 2003 Case and all remaining claims in the consolidated cases, with the exception of claims pending against Nolan/IH in another case. On January 17, 2012, this Court entered final judgment in the 2003 Case.[1]

In January 2011, Plaintiff filed a complaint against the A&B Defendants and Alexander Suto, asserting claims against the A&B Defendants and Suto for slander of title and tortious interference arising out of their conduct in representing Nolan/IH in the 2003 Case. *Meadow Springs Recovery, LLC v. Wofford, et al.*, Case No. 2011CV203473 (the "2011 Case"). On January 9, 2012, this Court held that the claims for slander of title and tortious interference with business and contractual relations were preempted by Georgia's abusive litigation statute. On November 7, 2012, the Georgia Court of Appeals affirmed that ruling.

[1] At oral argument on November 19, 2012, the Court was not aware of the extent to which the cases were consolidated—not just for administrative purposes but also for trial.

On April 13, 2012, Plaintiff initiated the 2012 Case in DeKalb County State Court against the A&B Defendants and others, asserting abusive litigation. A&B Defendants argue here that, because the appeal in the 2011 Case was pending at the time that Plaintiff filed the 2012 Case, the 2012 Case is barred as a matter of law pursuant to O.C.G.A. § 9-2-5.

Under O.C.G.A. § 9-2-5, "[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." Similarly, O.C.G.A. § 9-2-44 provides that "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."

A&B Defendants contend that the 2011 Case, which arises out of the same set of facts (the actions of the A&B Defendants in the 2003 Case) and seeks similar damages from the A&B Defendants, qualifies as "the same cause of action" justifying the abatement of this 2012 Case. In reliance on *Sadi Holdings, LLC v. Lib Props., Ltd.*, 293 Ga. App. 23 (2008), A&B Defendants point out that a matter is still "pending" for purposes of applying the prior pending action doctrine when an appeal is pending. Additionally, whether a prior action is pending is determined as of the time the defendants raise the defense. *See Bouldin v. Aragona-Garcia Enterprises, Inc.,* 161 Ga. App. 396 (1982). The fact that the Court of Appeals affirmed this Court's ruling on November 7, 2012, does not eliminate the basis of the A&B Defendants' motion.

Plaintiff counters by arguing that its claims for abusive litigation could not be asserted until January 17, 2012, when the Court filed the "Judgment" in the 2003 Case that made the

entry of the summary judgment of September 8, 2011, a final judgment. Because the 2003 Case was consolidated with related actions, Plaintiff argues that the "Judgment" entered on January 17, 2012, was the "final termination" of the 2003 Case for purposes of bringing a claim for abusive litigation. *See, e.g., Northwest Atlanta Bank v. Zec*, 196 Ga. 114 (1943).

OCGA § 9-11-54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.

Consolidation, unless it is specified for a specific purpose, operates to merge the cases into a single case. *See Northwest Atlanta Bank*, 196 Ga. at 117. This Court acknowledges this principle and finds that the summary judgment order in the 2003 Case was subject to O.C.G.A. § 9-11-54(b); and therefore, the 2003 Case was not finally terminated until the "Judgment" entered on January 17, 2012.

Since Plaintiff could not bring an abusive litigation claim before January 17, 2012, because the 2003 Case was not final until that date, and since it could not amend the 2011 Case to claim abusive litigation because the 2011 Case was on appeal, the Court is presented with a dilemma.

For this Court now to hold that OCGA § 9-2-5 bars Plaintiff from proceeding with the 2012 Case would be unjust. What is before us today is a motion to dismiss, not a motion on the merits. Plaintiff could not bring an abusive litigation clam against the A&B Defendants until after the final order in the 2003 Case. By then the 2011 Case had been decided and was on

appeal, and if OCGA § 9-2-5 is applied, Plaintiff is barred from bringing an abusive litigation claim. This Court believes that this litigation has gone on long enough; the substance of the issue should be reached. Therefore the Court finds that an exception to the application of OCGA § 9-2-5 should be made here. Plaintiff could not file an abusive litigation claim until the 2003 Case was finally terminated, and in the 2011 Case the Plaintiff was told that it should have filed an abusive litigation claim rather than the claims it filed. An exception to the prior pending action principle is necessary to prevent a ruling of form over substance.

The Motion to Dismiss is hereby **DENIED**.

SO ORDERED this 30 **day of November, 2012.**

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

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