Spring 5-1-2013

Order on Motion for Summary Judgment of Defendants M. Russell Wofford, Jr. and Alston & Bird LLP (Meadow Springs Recovery LLC 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,	**Civil Action File No. 2012CV220304**
v.	
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 MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS M. RUSSELL WOFFORD, JR. AND ALSTON & BIRD, LLP

On April 19, 2013, the parties appeared before the Court to present oral argument on the Motion for Summary Judgment of Defendants M. Russell Wofford, Jr. and Alston & Bird, LLP (the "A&B Defendants"). Upon consideration of the arguments of counsel, the briefs filed and the record in this case, the Court finds as follows:

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 a complaint (the "Complaint") 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]" (the "Property"). 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.

In 2005, Meadow Springs, LLC filed a complaint against Nolan and IH asserting claims for slander of title and tortious interference with business and contractual relationships premised on the filing of the lis pendens and the delivery of the Regions Bank Packet. The case was transferred to this Court in December 2007. On January 15, 2008, this Court granted summary judgment to IH/Nolan on the slander of title claim finding that the filing of the lis pendens was proper. The Court of Appeals affirmed the ruling. Meadow Springs, LLC v. IH Riverdale, LLC, 296 Ga. App. 551 (2009). The Georgia Supreme Court reversed, holding that the right to invest in a real estate development through a limited liability company did not sufficiently "involve" real estate within the meaning of the lis pendens statute, thereby rendering the lis pendens invalid. Meadow Springs, LLC v. IH Riverdale, LLC, 286 Ga. 701 (2010).

Following remand, this Court ultimately found that Plaintiff's predecessor could not point to sufficient evidence of malice to support its claims for slander of title and tortious interference

with business and contractual relations and granted IH/Nolan's motion for summary judgment on February 1, 2012. The Plaintiff filed suit in this case in 2012 against the A&B Defendants and others, alleging abusive litigation. The A&B Defendants seek summary judgment on all counts against them, contending that it was permissible to make the claims set forth in the Complaint in the 2003 Case and that they should be granted summary judgment.

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).

A claim for abusive litigation imposes liability on "[a]ny person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another…if such person acts: (1) With malice; and (2) Without substantial justification." O.C.G.A. § 51-7-81 (emphasis added). OCGA § 51-7-80(7) defines "without substantial justification" as "[f]rivolous," "[g]roundless in fact or in law," or "[v]exatious." The issue of whether or not the underlying suit had a basis in law at the time it was filed is a question of law and is therefore appropriate for the trial judge to determine. See Davis v. Butler, 240 Ga. App. 72, 75 (1999).

The A&B Defendants contend that Plaintiff cannot make the requisite showing that they acted without substantial justification in the underlying litigation, pointing to the fact that five different judges found the filing of the lis pendens proper. Specifically, the A&B Plaintiffs refer the Court to: 1) Judge Cynthia Wright's ruling on August 22, 2003, denying the Emergency Motion for Cancellation of Notice of Lis Pendens, finding that the relief sought in the 2003 Case supported the filing of the lis pendens; 2) This Court's Order on Motions for Summary Judgment

in a related case on January 15, 2008, granting summary judgment to IH/Nolan and denying Plaintiff's predecessors' motion for partial summary judgment on the basis that the lis pendens was appropriate; and 3) A unanimous panel of three Court of Appeals judges affirming this Court's summary judgment ruling.

In Bacon v. Volvo Service Center, Inc., 288 Ga. App. 399 (2007), the Court of Appeals held that "[w]hile [the plaintiff in the underlying case] was 'ultimately unsuccessful' in the litigation, it does not automatically follow that [the plaintiff in the underlying case] engaged in abusive litigation." Id. at 401. The Court of Appeals further instructed that "where a plaintiff survives motions for summary judgment and directed verdict and obtains a successful jury verdict, establishing lack of substantial justification requires more than a showing that the verdict was reversed on appeal, such as evidence of fraud." Id. at 402.

Similarly, in Davis v. Butler, the Court of Appeals held that:

> [w]here the trial court finds in the alleged abusive litigation that such action withstands the attack by motion for summary judgment and is entitled to a trial by jury, although the plaintiff may lose at trial, such denial of summary judgment constitutes a legal determination that the action has substantial justification, because it is not groundless, or frivolous and can proceed to a jury trial. Thus, it was not groundless, frivolous or vexations in fact or in law. 240 Ga. App. at 74.

Bacon and Davis are applicable here. Five different judges considered the facts of the 2003 Case and determined that the filing of the lis pendens was proper. The fact that the Georgia Supreme Court ultimately reversed them is precisely the situation that existed in Bacon. Just because a plaintiff ultimately loses does not prove that he acted with malice and without substantial justification.

Plaintiff counters that an exception to this rule exists in "[c]ases in which the judgment in the original action is obtained by fraud, perjury or subornation..." Georgia Loan & Trust Co. v.

Johnston, 116 Ga. 628 (1902). Plaintiff presents three instances which it says shows fraud, or, which at least rise to the level of requiring a jury determination of its existence. First, A&B Defendants on behalf of their clients attached a document to the Complaint in the 2003 Case which Plaintiff claims they knew or should have known was "altered," thus committing a fraud on the court. However, the defendants, Plaintiff's predecessor, in the 2003 Case attached the very same "altered" document as an exhibit to their brief filed with the Court in support of their emergency motion to set aside the lis pendens. How can this be fraud if Plaintiff's predecessor made the same mistake with the document? Additionally, none of the three rulings by the five judges relied on the "altered" portion of the document.

Next, Plaintiff points to an offer by A&B Defendants on behalf of their clients to withdraw the lis pendens in exchange for one million dollars. This offer was made early in the litigation of the 2003 Case, and the Court is unable to see how it is any more than an offer of settlement; certainly not evidence of fraud, and certainly not evidence of fraud on the Court.

Finally, Plaintiff asserts that fraud can be implied from the fact that the A&B Defendants informed Regions Bank in a "hurried form" of the claims in the Complaint before the filing of the lis pendens. The Court has found no evidence in the record to support this allegation, and even if it were true, the Court cannot see how this contact could amount to fraud. And again, no fraud on the Court.

The Court finds that the fraud exception does not exist here. Thus, as indicated above, Plaintiff has not shown that the A&B Defendants acted without substantial justification. Plaintiff also argues that these three instances are some evidence of malice and therefore, there is a jury question as to whether the A&B Defendants satisfy the malice prong of OCGA § 51-7-81. The

Court does not find there to be sufficient evidence of malice, but, more importantly, the statute requires both prongs, not just one. And the Court has already held above that the A&B Defendants did not act without substantial justification.

Lastly, Plaintiff in the complaint in this case has set forth eleven abusive litigation counts against the A&B Defendants based on claims that were made in the Complaint in the 2003 Case. These counts are Count 1—Abusive Litigation (Unjust Enrichment Claim against Meadow Springs); Count 2—Abusive Litigation (Conversion Claim against Walldorff and Homestead); Count 3—Abusive Litigation (Misappropriation of Property Claim against Meadow Springs); Count 4—Abusive Litigation (Specific Performance against Meadow Springs); Count 5—Abusive Litigation (Fraudulent Conveyance Claim against Meadow Springs); Count 6—Abusive Litigation (Conspiracy Claim against Meadow Springs); Count 7—Abusive Litigation (Wrongful Foreclosure claim against Meadow Springs); Count 8—Abusive Litigation (Claim for Injunctive Relief against Walldorff and Meadow Springs); Count 9—Abusive Litigation (Lis Pendens); Count 10—Abusive Litigation (Regions Bank Packet); and Count 11—Abusive Litigation (Imposition of a Constructive Trust).

Plaintiff claims that nine of these counts are still pending despite an adverse finding concerning the lis pendens and the Regions Bank Packet (Counts 9 and 10). The trouble with this argument is that each of the counts relies exclusively on the same facts as those asserted in Counts 9 and 10. No other facts concerning the A&B Defendants are alleged in the complaint in this case, and none have been presented to the Court in an affidavit or a deposition. "Where the movant [on summary judgment] meets its burden of negating at least one essential element of the plaintiff's claims or otherwise pierces the plaintiff's allegations, the nonmoving party must

produce rebuttal evidence sufficient to raise a triable issue." Heritage Creek Development Corp. v. Colonial Bank, 268 Ga. App. 369, 375 (2004). In this case, the Plaintiff failed to do this. The A&B Defendants' motion is **GRANTED**.

SO ORDERED this 1st day of ~~April~~ May, 2013.

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

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