3-22-2016

Frances B. Bunzl Order on Defedant's Motion to Dismiss

Melvin K. Westmoreland
Fulton County Superior Court Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FRANCES B. BUNZL, SUZANNE BUNZL WILNER PATRICIA H. BUNZL and ANNA R. WILNER,	)	
Plaintiffs,	)	**Civil Action No. 2016cv270084**
vs.	)	
SUTHERLAND ASBILL & BRENNAN, LLP, BENNETT L. KIGHT, and ROBERT B. SMITH,	)	
Defendants.	)	

ORDER ON MOTION TO DISMISS

This matter is before the Court on Defendant Bennett L. Kight's ("Kight") Motion to Dismiss Plaintiffs' Complaint. Upon consideration of the pleadings and the briefs submitted on the Motion, the Court finds as follows:

It is well established that:

> [A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (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 establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. ... In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

Scouten v. Amerisave Mortgage Corp., 283 Ga. 72, 73(2008) (quoting *Anderson v. Flake*, 267 Ga. 498, 501 (1997)); *see also* O.C.G.A. § 9-11-12(b)(6). "[A] trial court may properly consider exhibits attached to and incorporated in the pleadings in considering a motion to dismiss for failure to state a claim for relief." *Hendon Properties, LLC v. Cinema Dev., LLC*, 275 Ga. App. 434, 435 (2005). Defendant seeks dismissal of all of Plaintiffs' claims against him because (1) the doctrine of abatement requires a later filed action to be dismissed when the claims arise

out of the same transaction as claims in a previously filed suit with the same parties; (2) the claims were not filed within the applicable statute of limitation; and (3) Plaintiffs did not adequately allege Kight was acting in his capacity as Plaintiffs' attorney when authorizing the transactions that constitute malpractice.

A. Doctrine of Abatement

O.C.G.A. § 9-2-5(a) provides in relevant part: "No 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 at different times, the pendency of the former shall be a good defense to the latter." Similarly, O.C.G.A. § 9-2-44(a) provides:

> A former recovery or 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. However, if the first action is so defective that no recovery can possibly be had, the pendency of a former action shall not abate the latter.

These statutes "are closely related in effect and are to be considered and applied together." *Huff v. Valentine*, 217 Ga. App. 310, 311 (1995); see also *Sadi Holdings, LLC v. Lib Props., Ltd.,* 293 Ga. App. 23, 24 (2008). "The general rule under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) is that when there are two lawsuits involving the same cause of action and the same parties that were filed at different times but that both remain pending in Georgia courts, the later-filed suit must be dismissed." *Sadi Holdings*, 293 Ga. App. at 24; see *Jones v. Rich's, Inc.,* 81 Ga. App. 841, 845 (1950). In order for this Code section to be applicable, the parties must occupy the same status in both suits. *Bedingfield v. Bedingfield*, 248 Ga. 91, 92 (1981); *Tinsley v. Beeler,* 134 Ga. App. 514, 516 (1975). "Whenever a pending suit for the same cause of action has been pled, abatement is required as a matter of law." *Intl. Telecommunications Exchange Corp. v. MCI Telecommunications Corp.,* 214 Ga. App. 416, 417 (1994). "A plea in abatement is one which, without disputing the justice of the plaintiff's claim, objects to the place, mode, or time of

asserting it." *Hose v. Jason Prop. Mgmt. Co. of Atlanta*, 178 Ga. App. 661, 662 (1986) (citations omitted). "It is interposed to stop the plaintiff's action, leaving it open to the plaintiff, however, to renew the suit in another place or form, or at another time. It should not assume to answer the action upon its merits, or deny the existence of the particular cause of action upon which the plaintiff relies." *Id.*; see also *Sadi Holdings, LLC,* 293 Ga. App. at 26-27 (noting dismissal of renewal action was dismissal without prejudice).

On February 8, 2013, Kight and Lankford filed an action in the Superior Court of Fulton County, *Bunzl, et al. v. Kight, et al.,* CAFN 2013cv227097 ("Bunzl 2013 Action"), seeking the court's approval of their accounting of the Bunzl Trusts. In response, the defendants (Plaintiffs in this action) filed a Third Party Complaint alleging fifteen counts against Kight and Lankford, both individually and as Trustees of the Trusts, which included claims for breach of trust, breach of fiduciary duties, accounting, theft, fraud, conspiracy, professional malpractice and negligence, among others.

Lankford resigned as Trustee on May 11, 2015, and Kight was removed as Trustee by Order dated May 21, 2015. The new general trustees, Patricia, Suzanne and Anna filed a Motion to Amend Complaint to realign the parties, to add additional counts, and to add additional Defendants. The Court granted this Motion by Order dated December 16, 2015. Now, Frances Bunzl, Suzanne Bunzl Wilner, Anna Wilner, and Patricia Bunzl are Plaintiffs in the Bunzl 2013 Action and Bennett Kight, William Lankford, Judith Kight, Robert Kight, and several Playmore entities are Defendants. Plaintiffs then filed their First Amended and Recast Verified Complaint on December 28, 2015, which brought numerous claims against the named Defendants. Notably, Count VII, which was brought against Kight for breach of fiduciary duty, alleges that as the Plaintiffs' attorney, Kight violated his duty of loyalty and other fiduciary duties by engaging in

acts of bad faith, self-dealing, theft, conversion, fraud and concealment while managing the Bunzl Trusts. (First Amended Compl., ¶¶ 769, 772). The Bunzl 2013 Action is currently pending.

In the present case, Plaintiffs brought four claims against Defendants, both individually and collectively, which included claims for legal malpractice, accounting, attorneys' fees and punitive damages. Plaintiffs argue these claims are derived from Kight's status as a partner, counsel, employee and/or agent of Defendant Sutherland, Asbill & Brennan, LLP ("Sutherland"). Most notably, the claim against Kight individually for legal malpractice is prefaced on the claim that he "fail[ed] to exercise ordinary care, skill and diligence" in his capacity as an employee/agent of Defendant Sutherland responsible for managing the Bunzl Trusts. (Verified Compl, ¶ 356). Plaintiffs set forth specific acts or omissions which they allege constitute legal malpractice on behalf of Kight, which include: (1) failing to disclose Kight's conflict of interest in representing the family and various trusts; (2) failing to disclose Kight's illegal conduct through which he transferred money and assets to himself that belonged to the Bunzl Trusts; and (3) Kight's making business decisions and stealing Bunzl assets, among others. (Verified Compl. ¶354).

Plaintiffs argue the doctrine of abatement does not apply because Kight does not have the same status in both suits. Specifically, Plaintiffs claim in this suit Kight is being sued as an agent of Sutherland while in the Bunzl 2013Action Kight is being sued in his capacity as Trustee of the Bunzl Trusts. Since the Bunzl 2013 Action does not have claims against Kight in his capacity as an employee of Sutherland, Plaintiffs claim the doctrine of abatement cannot apply. However, this argument is misguided. Instead, when determining whether the doctrine of abatement applies, Georgia courts have considered whether the separate suit that was pending when the

present claim was filed involved the same parties, alleged liability on similar theories, and arose out of the same transaction at issue in the present claim. See *Odion v. Varon*, 312 Ga. App. 242, 244-45 (2011). When determining the status of each party, courts will typically look to whether the plaintiffs in the previous action are plaintiffs or defendants in the present action, and vice versa. See *Tinsley*, 134 Ga. App. at 516.

In both the Bunzl 2013 Action and this case, there are claims against Kight in his capacity as an attorney responsible for managing the Bunzl Trusts; it is clear the claims arise out of the same transaction or occurrence between the same parties. Plaintiffs in the Bunzl 2013 Action allege Kight breached his fiduciary duties by engaging in acts of self-dealing, bad faith, theft, fraud and concealment through his various acts or omissions in managing the Bunzl Trusts. In the present case, Plaintiffs allege Kight committed legal malpractice by failing to exercise ordinary care, skill and diligence in his capacity as an attorney managing the Bunzl Trusts. To establish legal malpractice, Plaintiffs point to the fact Kight engaged in self-dealing and theft by causing money and assets of the Bunzl Trusts to be transferred to him, along with the fact he failed to obtain written consent to engage in certain transactions where a conflict of interest existed. The breach of fiduciary duty claim against Kight in the Bunzl 2013 Action and the legal malpractice claim against Kight in the present case thus arise out of the same transactions or occurrences: Kight's alleged mismanagement of the Bunzl Trusts as an attorney. See *Griffin v. Fowler et al.,* 260 Ga. App. 443, 446 (2003); *McMann v. Mockler,* 233 Ga. App. 279, 281-282 (1998) (finding breach of fiduciary duty claim is mere duplication of legal malpractice claim because malpractice claim is based on establishment of a fiduciary, attorney-client relationship that is breached). Any minor differences between the two complaints do not controvert the fact they both assert claims against Kight that arise out of the same transactions and allege liability

based on Kight's role as Plaintiffs' attorney. See *Jones*, 81 Ga. App. at 846. As such, the doctrine of abatement would apply to the claims against Kight in the present case.

The argument that Kight does not have the same status in the Bunzl 2013 Action as he does in this case due to being a counter-defendant in one and a defendant in another has been rendered moot since the court realigned the parties in the prior filed case after the briefs in this Motion were filed. Further, while additional defendants were added in this suit, the addition of new defendants does not prevent the Court from dismissing the claims against Kight under the theory of abatement. See *McLain Bldg. Materials v. Hicks*, 205 Ga. App. 767, 769 (1992). Finally, Plaintiffs have presented no evidence that the Bunzl 2013 Action complaint is so defective no recovery can possibly be had pursuant to it, as required by O.C.G.A. § 9-2-44(a) to avoid abatement when the doctrine would otherwise apply. Because the claims in this action against Kight arise out of the same transaction which the claims against Kight are based on in the previously filed and still pending Bunzl 2013 Action, and because Plaintiffs failed to present evidence that the Bunzl 2013 Action complaint is so defective that recovery cannot possibly be had pursuant to it, Kight's Motion to Dismiss the claims against him is **GRANTED** and the claims against him are dismissed without prejudice.

SO ORDERED this 22nd day of March, 2016.

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

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