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Order on Defendant Wilkinson's Motion for Summary Judgment (ALLEN FREEMAN)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
APR 12 2010
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

157

ALLEN FREEMAN, BARBARA
FREEMAN, NELDA FREEMAN, and
LOIS MEISER V. VISION

Plaintiffs,

v.

Civil Action File No. 2007-CV-138599

VISION FINANCIAL, LP,
TRADESTATION SECURITIES, INC.,
MF GLOBAL INC., f/k/a MAN
FINANCIAL INC., ANTHONY
MICHAEL RAMUNNO, JR.,
individually and d/b/a RENAISSANCE
ASSET MANAGEMENT, RAM I, LLC,
RENAISSANCE ASSET
MANAGEMENT, LLC, and WILLIAM
STACY WILKINSON

Defendants,

ORDER ON DEFENDANT WILKINSON'S MOTION FOR SUMMARY JUDGMENT

On March 18, 2010, counsel appeared to present oral argument on a Motion for Summary Judgment filed by Defendant William Stacy Wilkinson ("Wilkinson"). After reviewing the briefs submitted on the Motion, hearing the arguments presented by counsel, and reviewing the file including all depositions filed, the Court finds as follows:

Plaintiffs, along with many other individuals not named in this lawsuit, invested money in the commodities market through Defendant Anthony Michael Ramunno, Jr. ("Ramunno"). Ramunno is currently incarcerated in federal prison for operating a fraudulent investment scheme. Ramunno operated his scheme through Renaissance Asset Management LLC ("Renaissance") and RAM I, LLC ("RAM"). Wilkinson, a licensed securities and commodities broker, joined Renaissance in the summer of 2005.

The depositions of Wilkinson, Ramunno, and Plaintiff Allen Freeman have been taken. The other Plaintiffs have stipulated that they never met nor communicated with Wilkinson and relied exclusively on Allen Freeman for investment advice. The parties disagree as to whether Wilkinson was a principal of Renaissance. For the sake of this Motion, the Court will view the facts in the light most favorable to Plaintiffs and assume that Wilkinson was a principal of Renaissance.

Plaintiffs filed a Second Amended Complaint in January 2010 bringing the following counts against Wilkinson: (1) fraud and conspiracy to defraud, (2) constructive fraud and negligent misrepresentation, (3) breach of fiduciary duty, (4) aiding and abetting breach of fiduciary duty, (5) negligence, (6) punitive damages under O.C.G.A. 51-12-5.1, (7) attorneys' fees and expenses under O.C.G.A. 13-6-11, and (8) a count to pierce the corporate veil.

Wilkinson argues that he is entitled to summary judgment on all of Plaintiffs' claims against him.

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). The moving party need only eliminate one essential element of a party's claim to prevail on summary judgment. Real Estate Int'l Inc. v. Buggah, 220 Ga. App. 449, 451 (1996).

Under Georgia law, "fraud has five elements: (1) false representation by a defendant; (2) scienter; (3) intention to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff." Bogle v. Bragg, 248 Ga. App. 632, 634 (2001). The record shows that the plaintiffs did not have any contact with Wilkinson whatsoever.

Specifically, Plaintiff Allen Freeman spoke with Wilkinson for the first time at one of Ramunno's criminal proceedings, and the remaining Plaintiffs have stipulated that they never

met nor communicated with Wilkinson. In their response brief, Plaintiffs argue fraud by omission under O.C.G.A. 23-2-53. To succeed on a fraud-by-omission claim, Plaintiffs must show that Wilkinson owed them a duty to disclose. In attempting to show such a duty, Plaintiffs cite Internal Medicine Alliance v. Budell, 290 Ga. App. 231 (2008). That case, however, deals with the fiduciary duties a member of an LLC owes to other members of that LLC, not with any duties owed by an LLC member to that LLC's customers or clients. In further attempting to show a fiduciary relationship between themselves and Wilkinson that would give rise to a duty to disclose, Plaintiffs cite Glisson v. Freeman, 243 Ga. App. 92 (2000) which found a fiduciary relationship between an investment firm and its client. Here, however, Wilkinson is being sued individually. In a final attempt to show that Wilkinson owed them a duty to disclose, Plaintiffs cite Lautenberg Foundation v. Madoff, Civil Action No. 09-816 (SRC), currently pending in the U.S. District Court for the District of New Jersey. That case brings suit against Peter Madoff, the brother of Bernard Madoff who is at the heart of a now-infamous Ponzi scheme. The Court finds Lautenberg Foundation unpersuasive when compared to the facts in this case. The Court also notes a general rule cited in Lautenberg Foundation that New York law does not impose a fiduciary duty on a company's controlling shareholder, officer or director to the investing public or to the company's customers. See Am. Fin. Int'l Group-Asia, L.L.C. v. Bennett, No. 05 Civ. 8988(GEL), 2007 WL1732427, at *4 (S.D.N.Y. June 14, 2007).

As there is no evidence of any false representation by Wilkinson or that Wilkinson had a fiduciary relationship with any of the Plaintiffs, Plaintiffs' fraud claim fails as a matter of law. Likewise, because Plaintiffs' claim for fraud fails, their claim for conspiracy to defraud also fails because "absent the underlying tort, there can be no liability for civil conspiracy." Mustaqeem-Graydon v. SunTrust Bank, 258 Ga. App. 200, 207 (2002).

Negligent misrepresentation has three elements: “(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance.” Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, 267 Ga. 424, 426 (1997). The record shows no misrepresentations, intentional or negligent, made by Wilkinson to any Plaintiffs. Accordingly, Plaintiffs’ claim for negligent misrepresentation fails as a matter of law.

“Constructive fraud consists of any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another.” O.C.G.A. § 23-2-51. The record is void of any evidence that Wilkinson had any relationship with Plaintiffs whatsoever, let alone one that would give rise to a legal or equitable duty to them or in which they justly reposed trust or confidence. For this reason, Plaintiffs’ claim for constructive fraud also fails as a matter of law.

To establish a claim for breach of fiduciary duty, a plaintiff must prove “(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach.” SunTrust Bank v. Merritt, 272 Ga. App. 485, 489 (2005). There is no evidence to support a fiduciary relationship between Plaintiffs and Wilkinson. Rather, the evidence shows that none of the Plaintiffs even knew Wilkinson before they had already invested in Ramunno’s scheme.

To establish a claim for aiding and abetting the breach of a fiduciary duty, a plaintiff must come forward with evidence to support the following four elements: (1) defendant acted to procure a breach of another’s fiduciary duty to the plaintiff, (2) defendant acted with knowledge that the other owed the plaintiff a fiduciary duty, and acted purposely and with malice with the intent to injure plaintiffs, (3) the defendant's wrongful conduct did in fact procure a breach of the other’s fiduciary duty, and (4) the defendant's tortious conduct proximately caused damage to the plaintiff. Insight Technology, Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 25-26 (2006).

Plaintiffs have failed to produce any evidence to show how Wilkinson aided or abetted a breach of fiduciary duty perpetrated by Ramunno or Renaissance. If anything, the evidence shows that Wilkinson was wholly unaware of Ramunno's scheme since he and his family were even more heavily invested in Renaissance than Plaintiffs and, as a result, suffered greater losses than Plaintiffs.

The essential elements of a negligence claim are: "(1) a legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty." City of Douglasville v. Queen, 270 Ga. 770, 772 (1999). Plaintiffs have failed to produce any facts to show that Wilkinson owed them a duty. Without a duty owing from Wilkinson to Plaintiffs, their claim for negligence fails as a matter of law.

It is undisputed that Renaissance and RAM are Georgia limited liability companies. Georgia courts exercise "great caution" when asked to disregard a company's structure so as to hold a member or shareholder individually liable for the acts of the company. Milk v. Total Pay and HR Solutions, Inc., 280 Ga. App. 449 (2006) (noting that the "longstanding principle that officers and shareholders are not personally liable for corporate acts" is "equally applicable in the LLC context"). Under the Georgia Limited Liability Company Act, an LLC member is not liable for an LLC's obligations or liabilities "whether arising in contract, tort or otherwise." O.C.G.A. § 14-11-303. In order to pierce the corporate veil of an LLC and hold one of its members personally liable for the acts of the LLC, there must be evidence that the member "abused the forms by which the LLC was maintained as a separate legal entity apart from the personal business of its members." Bonner v. Brunson, 262 Ga. App. 521, 522 (2003). "A court

may disregard the separate LLC entity and the protective veil it provides to an individual member of the LLC when that member, in order to defeat justice or perpetrate fraud, conducts his personal and LLC business as if they were one by commingling the two on an interchangeable or joint basis or confusing otherwise separate properties, records, or control.”

Id. Plaintiffs have presented no evidence to support piercing the corporate veil as against Wilkinson in this case.

Plaintiffs have not prevailed on any substantive claims against Wilkinson and, thus, their claims for punitive damages and attorneys’ fees cannot survive summary judgment.

Wilkinson’s Motion for Summary Judgment is hereby **GRANTED**.

SO ORDERED this 12th day of April, 2010.


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

Copies to:

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