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Order on Harrison and Katten's Motion for Reconsideration of Dismissal Orders (ALTHEIDA MAYFIELD)

Elizabeth E. Long
Superior Court of Fulton County

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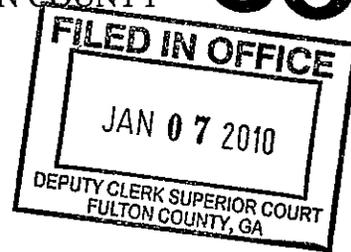
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY



ALTHEIDA MAYFIELD, as an Individual;)
and as Trustee of the TRUST; et al.,)

Plaintiffs,)

v.)

SUSSEX FINANCIAL GROUP, INC. et al.,)

Defendants,)

Civil Action File No. 2009-CV-166048

**ORDER ON HARRISON AND KATTEN'S
MOTION FOR RECONSIDERATION OF DISMISSAL ORDERS**

This case is before the Court on a Motion for Reconsideration filed by Defendants Arnold Harrison ("Harrison"), Katten Muchin Rosenman LLP, and Katten, Muchin, Zavis ("Katten"). Plaintiffs are named beneficiaries of a trust created by the musician Curtis Lee Mayfield, Jr. ("the Trust"). Harrison is an attorney who performed legal services for the Trust. Harrison was a partner with the law firm Katten from 1981 until June, 2001.

Harrison and Katten previously filed Motions to Dismiss upon which this Court ruled in Orders dated October 12, 2009. In light of those Orders, Plaintiffs only remaining claim against Harrison and Katten is for breach of fiduciary duty. Harrison and Katten now ask the Court to reconsider its ruling on their motions to dismiss and to dismiss the remaining breach of fiduciary duty claim.

In support of their motion for reconsideration, Harrison and Katten argue that Plaintiffs' remaining claim is barred by the statute of limitation because an attorney, Jackson Culbreth, was a general agent of Plaintiffs in 1999-2000 so that any knowledge he had as to Harrison and Katten's alleged wrongdoing at that time was attributable to Plaintiffs and started the running of the statute of limitations period. The Court finds otherwise. The Court acknowledges that

Plaintiffs allege in paragraph 91 of their Complaint that Culbreth was “representing Altheida Mayfield and the other heirs, in their individual capacities.” However, the Court finds that the phrase “in their individual capacities” is meant to distinguish Culbreth’s representation of the heirs in the probate of the estate from any representation they had as Trust beneficiaries. While there may be evidence to show that Culbreth represented the Trust during certain periods in the past and that he represented the executors and the heirs of the estate of Curtis Lee Mayfield, Jr., there is nothing to support a finding that Culbreth was a general agent of Plaintiffs so that his knowledge may be imputed to them for statute of limitations purposes.

Harrison and Katten further argue that the remaining breach of fiduciary duty claim asserted against them should be dismissed as “merely duplicative” of a malpractice claim that Plaintiffs are not asserting in this case under the holding in McMann v. Mockler, 233 Ga. App. 279 (1998). That case makes clear that “[a] professional malpractice action is merely a professional negligence action.” Id. at 280. Here, Plaintiffs are not asserting any professional negligence claim, rather they assert a breach of fiduciary duty based on intentional and willful (not merely negligent) misconduct. Therefore, there is no duplication of claims. The Court finds that Plaintiffs’ breach of fiduciary duty claim may proceed.

Harrison and Katten again argue that the claims against them should be dismissed because service was never proper in Plaintiffs’ 2004 action—the action upon which this renewal action is based. Under Georgia’s Long Arm Statute, service upon an out-of-state defendant must conform to the law of the state where service is had. Illinois permits service by a sheriff or, for Cook County, by a special process server appointed by the court. Here, a Fulton Superior Court judge issued an order appointing a special process server. Harrison and Katten argue that the

appointment must have been by a Cook County judge and that the number of the certificate issued to the process server must be on the order.

[T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections. Henderson v. United States, 517 U.S. 654, 671-672 (1996) (quoted in Georgia Pines Community Svc. Bd. v. Summerlin, 282 Ga. 339, 343 (2007)).

Again, this Court will not dismiss a case upon such a technical ground where Katten had notice.

A Florida appellate court made much the same decision. Takiff v. Takiff, 683 So.2d 595 (Fla.App. 3 Dist 1996).

Katten also argues that service was improper as to it because the Complaint, with which it was served, on more than one occasion was deficient as it was not identical to the Complaint filed with the Court, e.g. it was missing a few exhibits. However, Katten was clearly on notice of the claims filed against it and the Court finds that the service deficiency in the 2004 action has not prejudiced Katten at all in this case. This Court seeks to do substantive justice and it refuses to dismiss Plaintiffs' claims on a technicality that has caused no prejudice in this case.

SO ORDERED this 7th day of January, 2010.


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

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