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Order on Defendants' Motion for Summary Judgment (PJ CANNON)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PJ CANNON, HENRY G. NAGEL, JOHN COLAGRANDE, REBECCA RICHEY, JEFFERY FRANKS (individually and on behalf of the Franks Family Trust), STEPHEN M. FILREIS, EDWARD RUTH, DEBORAH KENNICOTT, TURNER LYNN HUGHES, LESLIE WILLIAMS, CHARLES KELLY, ROGER WINANS, and MARK HANISEE

Plaintiffs,

v.

H&R BLOCK INC. a Missouri Corporation; RSM MCGLADREY BUSINESS SERVICES, INC., f/k/a HRB Business Services, Inc., a Missouri Corporation, and RSM McGLADREY EMPLOYER SERVICES, INC., f/k/a MyBenefitsSource, a Georgia Corporation,

Defendants.

Civil Action File No. 2007-CV-137010

FILED IN OFFICE
FEB 24 2010
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

EDWARD L. CAIN, JR.,

Plaintiff,

v.

H&R BLOCK INC., a Missouri Corporation, RSM MCGLADREY BUSINESS SERVICES, INC., f/k/a HRB BUSINESS SERVICES, INC., a Missouri Corporation, and RSM McGLADREY EMPLOYER SERVICES, INC., f/k/a MYBENEFITSSOURCE, a Georgia Corporation,

Defendants.

Civil Action File No. 2009-CV-162592

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

These cases arise out of the acquisition by Defendant RSM McGladrey Business Services, Inc. ("Business Services") of a controlling interest in MyBenefitSource, a start-up company that provided payroll processing, employee benefits, and related services, and which is now known as RSM McGladrey Employer Services, Inc. ("Employer Services"). That transaction called for Business Services to acquire a majority of the stock in December 2001 and to acquire the remaining stock at a later date. To that end, Business Services and Employer Services' minority shareholders entered into a Shareholder's Agreement ("SA") dictating the terms of the future purchase pursuant to a put-call provision. In addition, Employer Services option holders entered into Amended Stock Option Agreements which bound them to the terms of the SA if they opted to acquire Employer Services stock by exercising their options so that they, too, could participate in the put-call agreement.

Plaintiffs are former officers and employees, and, in the case of Mr. Cain, a former director of Employer Services who either owned shares or held options in Employer Services. Business Services is an affiliate of Defendant H&R Block, Inc. ("HRB"). Plaintiffs allege that Defendants executed a scheme to depress the value of Employer Services to the benefit of HRB and HRB's other affiliates, and to the detriment of Plaintiffs. Among other things, Plaintiffs allege that Defendants diverted revenues from Employer Services to other companies under the HRB umbrella. Plaintiffs further allege that Defendants terminated Employer Services employees without cause, depressed Employer Services' stock value, and misrepresented material elements of the Shareholder Agreement to employees wishing to exercise their stock

options.

Plaintiffs' claims, found in either the Cain Complaint, the PJ Cannon Complaint, or both, fall into three broad categories: (1) claims asserted by minority shareholders including Mr. Cain who is an original founder of MyBenefitSource; (2) claims asserted by option holders, and (3) a claim asserted by Mr. Cain for breach of his employment contract.

Minority Shareholders' Claims

Defendants argue that the minority shareholders' claims for: (1) breach of contract, (2) fraud, and (3) breach of fiduciary duty are barred by the terms of the SA because those claims "boil down to a claim to recover what the fair market value of their shares is or should be in their estimation." Based on this initial premise, Defendants argue that the SA provides the exclusive procedure for determining the value of all shares "put" by all minority shareholders and provides for a "final and binding" appraisal process, not litigation. Contract construction is a question of law for the court. O.C.G.A. § 13-2-1; Castellana v. Conyers Toyota, Inc., 200 Ga. App. 161, 165 (1991). The courts finds that the independent appraisal process described in the SA is merely an alternative method for determining fair market value under the SA, and is not intended as the means by which to challenge Defendants' alleged purposeful misstatement or manipulation of the figures used to determine fair market value.

Next Defendants argue that the minority shareholders' fraud claim should be dismissed because the minority shareholders ratified Defendants' alleged fraud by the

very act of putting their shares. In contrast, Plaintiffs maintain that putting their shares was a mechanism through which Defendants fraud came to light and established Plaintiffs' injury. In support of their argument, Defendants rely on Jernigan Auto Parts, Inc. v. Commercial State Bank, 186 Ga. App. 267, 271 (1988), a case in which the Court of Appeals affirmed summary judgment in favor of a bank when defendants "waived [the bank's] fraud and ratified the notes by their silence after they learned of the [bank] officer's objected-to actions and by their subsequent payments on the notes. Here, there are genuine issues of material fact as to whether Plaintiffs waived or ratified Defendants' alleged fraud including whether Plaintiffs put their shares after they had learned fully of Defendants' alleged fraud. All such questions of material fact must be left for a jury to decide.

Next Defendants argue that certain minority shareholders released their fraud claims. Specifically, Defendants argue that Plaintiffs Kennicott, Williams, Kelly, and Winans executed releases that released claims "known or unknown" in 2002-2003. Defendants further argue that these Plaintiffs' fraud claims accrued prior to the execution of those releases. However, under Georgia law, a fraud claim does not accrue until it is discovered and the defendant has suffered injury. Hamburger v. PFM Capital Management, Inc., 286 Ga. App. 382, 388 fn. 21 (2007); Nash v. Ohio Nat. Life Ins. Co., 266 Ga. App. 416, 417(1) (2004); Green v. White, 229 Ga. App. 776, 780 (1997); McGowan v. Progressive Preferred Ins. Co., 274 Ga. App. 483, 490 (2005). Accordingly, Plaintiffs' claims accrued in December 2006 when they put their shares and were thereby allegedly injured by Defendants alleged fraud. Therefore, Plaintiffs'

fraud claim asserted in this case was not among those claims released in the release agreements signed in 2002-2003. Moreover, those releases only released claims related to Plaintiffs' employment or termination of employment. Therefore, those releases are inapplicable to Plaintiffs' present claims as shareholders which are unrelated to their former employment with Employer Services.

Option Holders' Claims

Defendants argue that the option holders' fraud and breach of contract claims should be dismissed because unexercised options are unenforceable promises of future compensation. The Court finds that stock options are not unenforceable promises of future compensation, rather stock options constitute a "continuing offer" by an employer to sell to an employee shares of the employer company at a certain price during a certain period of time. Langer v. Iowa Beef Packers, Inc., 420 F.2d 365, 368 (8th Cir. 1970); see also 18B Am. Jur. 2d Corporations § 1688. Whether the employee exercises the options and purchases shares under the terms of the options rests with the discretion of the employee, not the employer.

Next, Defendants argue that the option holders' claims are too indefinite to support a claim for fraud. Defendants note that there are 4 option holder plaintiffs in this case: Colagrande, Richey, Cannon, and Nagel, and that it is undisputed that none of them ever exercised their options. Defendants also note that while the option holders claim that they were dissuaded from exercising their options because of Defendants' alleged fraud, the Stock Option Agreement permitted Employer Services to

buy back any stock acquired through the exercise of an option if that option holder departed Employer Services within 30 days of exercising the option. Defendants further point out that the buy-back price was not set, rather it was left to the discretion of Employer Services, and that all of the option holders were in the process of departing Employers Services when the alleged fraud occurred. Defendants then conclude that Employer Services' discretion to set the buy-back price renders the buy-back provision of the Stock Option Agreement "too indefinite to support a claim for fraud."

First, the Court finds that the option holders' fraud claim is not based on the buy-back provision of the Stock Option Agreement and thus whether it is too indefinite to support a claim for fraud is irrelevant. It is true that under Georgia law, certain claims may be precluded because they are based on damages that are too remote or speculative, e.g. claims for loss profits in certain situations. However, here, the Court finds that the option holders' claim that Defendants' fraud precluded them from exercising their options is not too indefinite to support an award of damages. While requiring proof and explanation, and while subject to the rigors of cross examination and the rules of evidence, the Court finds that the damages the option holders seek could "be proved with reasonable certainty." Graham Bros. Const. Co., Inc. v. C. W. Matthews Contracting Co., Inc.,159 Ga. App. 546 (1981). Finally, the Court also finds that Defendants' argument on this point involves contingencies that did not occur. No one will ever be able to determine whether the buy-back provisions would have even come into play because the option holders never exercised their options. Therefore,

whether they would have exercised their options within thirty days of their departure is impossible to say with certainty. And even if the options holders had exercised their options within thirty days of their departure from Employer Services, it is also impossible to say with certainty that Employer Services would have decided to buy-back those shares. The Court finds that such speculation cannot foreclose the option holders' claims.

Defendants additionally argue that the option holders have no evidence of a misrepresentation made by Defendants so that their fraud claim fails for lack of an essential element. Defendants' argument assumes that the option holders' fraud claim is based on one misrepresentation. However, the option holders have identified additional misrepresentations as grounds for their fraud claim.

Next, Defendants argue that Nagel and Cannon's fraud claim is barred by the statute of limitations. Under Georgia law, the statute of limitations for fraud is four years. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382 (2007). Both Cannon and Nagel allege they were given misinformation about their stock options as they were departing from Employer Services and that in reliance on that misinformation they refrained from exercising their options. Cannon's last day of employment with Employer Services was on April 4, 2003 and Nagel's was on June 17, 2003. Nagel and Cannon's claims were filed on July 13, 2007, more than four years after their claims accrued. In response, Nagel and Cannon argue that the deadline to exercise their options was extended to July 14, 2003 so that the filing of their Complaint on July 13, 2007 was timely as it was within four years of the last date on which they could

exercise their options. The Court finds the extension of that deadline irrelevant as Nagel's and Cannon's alleged fraud claim accrued as soon as they received misinformation and relied on it in refraining from exercising options, not on the last day that they possibly could have exercised their options.

Defendants contend that Plaintiffs' damages necessary implies a claim for lost profits and are thus too remote and speculative to support any recovery. The Court disagrees. Plaintiffs' alleged damages are tied to what their expert opines the fair market value of Employer Services would have been absent Defendants alleged wrongdoing. The Court acknowledges that undoubtedly such a calculation will be complex, and will likely involve differing opinions of experts, but concludes that such calculations are not to remote or speculative to preclude an award of damages if proven.

Next, Defendants argue that summary judgment should be awarded to them on Cain's claim that he is owed at least $200,000 in severance benefits and compensation under the terms of his employment contract. Defendants argue that paragraph 4(c)(1) of Cain's employment contract unambiguously sets a condition precedent on any separation payments promised to Cain. Specifically, before entitlement to any separation payments, Cain was required to execute a Separation and Release Agreement ("Release") and it is undisputed that Cain never did this. Under Georgia law, a condition precedent must be performed before a contract becomes obligatory upon the other party. Roush v. Dan Vaden Chevrolet, Inc., 155 Ga. App. 372 (1980). However, Cain's employment contract called for him to execute a release "in a form

prepared" by Employer Services. In explaining his failure to execute the Release prepared by and presented to him by Employer Services, Cain argues that Employer Services refused to provide him with the Company's standard release and, instead, drafted a release that included all claims whether or not related to his employment, i.e. his shareholder claims. Cain acknowledges the condition precedent to severance payments provided in his employment contract and states that he is willing to sign a release regarding employment-related claims which is what the parties intended pursuant to his employment contract. In support of this argument, Cain cites examples of other releases used by Employer Services for other employees during the same time period that apply only to employment-related claims. The Court finds that there are questions of material fact on this issue including whether Defendants breached an implied duty of good faith and fair dealing in Cain's employment contract by drafting a release that included not only Cain's possible employment-related claims, but also claims he may have as a shareholder.

Finally, Defendants argue that Plaintiffs' remaining claims for (1) aiding and abetting, (2) attorneys' fees, and (3) punitive damages depend on the existence of a valid underlying claim. Because all but Nagel's and Cannon's fraud claim survives Defendants' motion for summary judgment, their remaining claims survive as well.

Accordingly, summary judgment on Nagel's and Cannon's fraud claim is hereby GRANTED, but Defendants' remaining motion for summary judgment is DENIED.

SO ORDERED this 24 day of February, 2010.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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