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Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY
FILED IN OFFICE
DEC 17 2009
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

CURTIS LEE MAYFIELD, III et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action File No. 2009CV166043**
MARVIN HEIMAN, et al.,	)	
Defendants,	)	

ORDER ON HARRISON AND KATTEN'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR RECONSIDERATION OF DISMISSAL ORDERS

This case is before the Court on a Motion for Judgment on the Pleadings and 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, Muchin, Zavis (now known as Katten, Muchin, Rosenman, LLP since May 2, 2005) 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 order, the only remaining claim against Harrison and Katten in this case is one for breach of fiduciary duty asserted by Curtis Lee Mayfield, III ("Mayfield, III").

Motion for Judgment on the Pleadings

On November 4, 2009, Harrison and Katten filed amended answers attaching, among other things, a release signed by Mayfield, III in April 2000 ("2000 Release"). Harrison and Katten argue that judgment in their favor should be entered on the remaining claim against them in this case based on the 2000 Release.

A previous ruling in this case voided the 2000 Release pursuant to O.C.G.A. §53-12-194(a) and this Court was bound by that ruling as the law of the case. However, the Court of Appeals has recently ruled that O.C.G.A. §53-12-194(a) does not void the 2000 Release.

In pertinent part, the 2000 Release provides:

> 13. Indemnification, Hold Harmless and Release. For and in consideration of the distribution of the Net Principal Amount, the Beneficiary does hereby ...
>
> (d) Release, any and all claims which the Beneficiary now has or may have had, however arising in law or in equity against the Estate of Curtis Lee Mayfield, any trust created by or for Curtis Lee Mayfield of which Beneficiary was a primary or residuary beneficiary, inclusive of any claim against the Mayfield Family Trust (formerly known as the Mayfield Revocable Trust) as the trustees, agents and attorneys for all of said trusts.

This Court finds that the 2000 Release expressly releases Harrison and Katten as "attorneys" for a "trust created by or for Curtis Lee Mayfield of which Beneficiary was a primary or residuary beneficiary."

In light of the Court of Appeals opinion, this Court finds that the 2000 Release bars Mayfield, III's remaining claim against both Harrison and Katten based on any of their conduct that occurred prior to the execution of the 2000 Release on April 21, 2000. Mayfield, III's claim against Harrison and Katten based on any of their conduct occurring after April 21, 2000 remains pending in this case.

Motion for Reconsideration

On October 12, 2009 the Court entered orders on Harrison and Katten's motions to dismiss. In those orders, the Court found that the statute of limitations did not bar Mayfield, III's breach of fiduciary duty claim against Harrison and Katten. In support of their motion for reconsideration, Harrison and Katten again argue that 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 by Mayfield, III should be dismissed as "merely duplicative" of a malpractice claim that he is 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, Mayfield, III is not asserting any professional negligence claim, rather he is asserting 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 Mayfield, III's 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' 2007 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 three occasions was deficient as it was not identical to the Complaint filed with the Court, e.g. it was missing a few exhibits. The Court finds it troubling that Katten, a law firm, did nothing to notify Plaintiffs of what must have been an inadvertence. Katten could have called any one of several co-Defendants (including Jenner & Block, a fellow law firm) to secure the missing exhibits. Katten is represented by the same attorneys as its co-Defendant and former partner, Harrison, and it could have gotten any missing exhibits from them. Katten was clearly on notice of the claims filed against it because it received the Complaint on two occasions prior to the Plaintiffs' dismissal of their 2007 action and once after that dismissal. The Court finds that the service deficiency in the 2007 action has not prejudiced Katten at all in this case. The Court notes that Katten's Motion to Dismiss has been fully addressed and resulted in the dismissal of all but one claim against it. 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 16th day of December, 2009.

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

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