



EXHIBIT A

March 16, 2016 Order

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Gabriel Barnhill and GSB Enterprises, LLC,)

Plaintiffs,)

vs.)

J. Floyd Swilley, J. Floyd Swilley Investment Advisors, Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP,)

William C. Piner, WCP Limited, LLC, 809 Holdings, LP, QC Financing, LLC, Heath Causey, and Sage Financial Group, LLC,)

Defendants.)

Gabriel Barnhill and GSB Enterprises, LLC,)

Plaintiffs,)

vs.)

J. Floyd Swilley, J. Floyd Swilley SMG Partners, LLC, SMS Services, LP, William C. Piner, WCP Limited, LLC,)

Alicia A. Piner, 809 Holdings, LP, Heath Causey, Sage Financial Group, LLC, Sage Advisory Group, L.P., Sage Private Equity Group,)

Secured Asset Factoring Exchange, Inc., SAFE, Inc., Digics, LLC, 9-1-1, Plumbing, LLC, and Sage Funding, L.P.,)

Christopher Pitcock,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

CASE NO. 2014-CP-26-08367
(formerly 2013-CP-26-02816)

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SC Court of Appeals

ORDER

HORRY COUNTY
2016 MAR 21 PM 2:25
MELANIE HARRIS, CLERK OF COURT

CASE NO. 2014-CP-26-3362

This matter came before the Court on February 16, 2016 pursuant to Plaintiffs' Motion to Compel Depositions of Defendants and Plaintiffs' Motion for Judgment on the Pleadings and/or Summary Judgment on Defendants' Counterclaims. Present at the hearing were Nate Fata,

counsel for the plaintiffs. Stefan Fiedler was present for 809 Holdings, L.P. The other defendants were proceeding pro se as John Leiter was relieved as their counsel. Although the pro se defendants were duly notified of the hearing by plaintiffs' counsel via hearing Notice filed on February 9, 2016, they were not present at the call of the case.

BACKGROUND

Gabriel Barnhill and GSB Enterprises, Inc. ("Barnhill") commenced this action by filing a Summons and Complaint on April 25, 2013, asserting causes of action, inter alia, for violation of the South Carolina Investment Act, breach of fiduciary duty, fraud, misrepresentation, and violation of the Unfair Trade Practices Act. Barnhill alleges that in 2011 Defendants engaged in a Ponzi scheme in which Barnhill, who was Floyd Swilley's accounting and financial advisory client, invested no less than \$115,000 in 809 Holdings, LP, and received approximately \$2,000 in return. The Swilley and Piner Defendants established 809 Holdings in 2010. 809 Holdings was a startup company that would loan money to companies in a "factoring" arrangement. The borrower company was QC Financing, LLC, a pawn shop entity established by Piner and Swilley. In 2014, Barnhill filed a companion case asserting derivative claims.

PROCEDURAL HISTORY

Defendants have failed to comply with multiple Court Orders on discovery and have and continue to obstruct the discovery process. Plaintiffs have filed numerous motions to compel discovery.¹

¹ Plaintiffs filed Motions to Compel on the following dates: July 3, 2013, January 8, 2014, January 10, 2014, September 5, 2014, September 5, 2014, October 15, 2014, May 15, 2015, and December 15, 2015.

A discovery Order was entered on September 20, 2013 concerning defendants' failure to respond to the April 2013 discovery requests. Thereafter, defendants failed to provide responsive information and lodged objections. Plaintiffs filed a Motion for Sanctions on November 4, 2013. The Court partially granted Plaintiffs' Motion for Sanctions and awarded attorney fees by Order filed January 16, 2014.

On September 30, 2014, the Court entered another Order for Sanctions. In that Order, Judge Hyman found, "Defendants have been sandbagging in their discovery responses... The March 2012 payment to Twigg for his 809 Holdings, LP investment and the multiple undisclosed payments to Defendants are examples of Defendants' sandbagging and obstruction in the discovery process."²

Plaintiffs' Motion for Sanctions filed May 4, 2015 and Motion for Sanctions filed June 12, 2015 were for failure to comply with Court ordered mediation and discovery, respectively. The Court entered an Order on September 10, 2015, granting Plaintiffs relief and the Court awarded attorney fees.

ANALYSIS

Plaintiffs' counsel argued that although the case has been pending for more than two years, defendants have not presented for depositions and have not cooperated for depositions. More than four discovery Orders have been entered in this case, three of which resulted in sanctions. See Orders of Judge Hyman dated October 9, 2015, Judge Culbertson dated January 13, 2014, and Judge Seals dated September 10, 2015. Defendants agreed in an Order filed May 22, 2015 to cooperate in discovery in setting the depositions. Although depositions notices were

² Twigg filed a separate action Robert L. Twigg and Twigg Enterprises, LLC vs. J. Floyd Swilley; Heath Causey, Laurel Swilley; Sage Financial Group, LLC; Secured Asset Factoring Exchange, Inc. and 809 Holdings, LP, Civil Action No. 2013-CP-26-5477. The Defendants in Twigg are represented by Mark Neill, Esq.

served for the depositions of J. Floyd Swilley, Laurel K. Swilley, Heath Causey, 809 Holdings, LP and WCP Limited, LLC, those defendants did not appear for deposition. Moreover, through no fault of 809 Holdings' counsel, defendants never proposed any deposition dates even after the instant discovery motion was filed. The instant motion follows two years of discovery abuse and multiple motions to compel defendants to disclose information and provide deposition testimony.

Discovery is a critical component of the litigation process. Defendants have for more than two years obstructed the discovery process and have prejudiced plaintiffs' ability to prepare for trial. Judge Seals previously entered a Scheduling Order that this case could be called for trial on or after May 1, 2016.

If a party fails to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, or rendering a default judgment. Rule 37(b)(c), SCRPC. Griffin Grading and Cleary, Inc. v. Tire Service Equipment Manufacturing Company, Inc., 511 S.E.2d 716, 718 (S.C. App. 1999). The decision of whether or not to award sanctions is generally entrusted to the discretion of the trial court. OZO, Inc. v. Moyer, 594 S.E. 2d 541, 546 (S.C. App. 2004). Based on their failure to respond or cooperate in the depositions and discovery process, their failure to appear or present any argument to explain their lack of cooperation, and with their well-documented pattern of discovery obstruction, I hereby strike the Answers, Counterclaims and pleadings of Defendants J. Floyd Swilley, Laurel Swilley, 809 Holdings, L.P., Heath Causey and WCP Limited, LLC.

I further direct that the Plaintiffs' Affidavit for Attorney's Fees be served upon the parties and Plaintiffs' Motion for Attorney Fees be heard by another Circuit Court Judge at the next scheduled motion hearing on this matter.

In addition, the Court grants Plaintiffs' Motion for Judgment on the Pleadings and/or Summary Judgment on Defendants' counterclaims. On June 26, 2013, defendants filed their Amended Answer with Counterclaims. Defendants asserted counterclaims for:

1. South Carolina Frivolous Proceeding Act (all Defendants);
2. Quantum Meruit (809 Holdings only);
3. Usurpation of Partnership Opportunity (809 Holdings only);
4. Negligent Misrepresentation (809 Holdings only);
5. Breach of Fiduciary Duties (809 Holdings only); and
6. Breach of Loan Agreements (Floyd Swilley only).

As set forth in the Court's Order filed May 22, 2015, Defendants have stipulated the claims were asserted only by those Defendants indicated above. Defendants' first counterclaim under the Frivolous Proceedings Act is not ripe and, therefore, it is dismissed. Defendants' remaining counterclaims fail as a matter of law for two reasons. First, no legal duties are owed by plaintiffs to any of the defendants. Second, defendants have proffered no evidence to support the elements of the remaining claims, including damages.

The determination of the existence of a duty is solely the responsibility of the court. Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996). Whether the law recognizes a particular duty is an issue of law to be decided by the Court. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997). An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstances. Id.

Barnhill owes no legal duty to any defendant. He is a limited partner in 809 Holdings, LLP. Barnhill's status as limited partner does not create any duty under any asserted cause of action. To the contrary, pursuant to statute Barnhill is expressly shielded from liability. S.C. Code Ann. § 33-42-430.

Similarly, Barnhill's status as a member of a limited liability company, QC Financing, LLC, does not create duties to any defendant. No duty is owed by Barnhill to any defendant pursuant to S.C. Code Ann. § 33-44-303. Barnhill is not obligated for any debts of QC Financing, LLC. Similarly, any claim based on Floyd Swilley's allegation that he loaned money to the pawn shop prior to Barnhill's membership status in QC Financing, LLC fails under the statutory section cited above.

The counterclaims for usurpation of corporate opportunity and quantum meruit are also barred by the above cited statutory sections. Barnhill is not liable as a member of a limited liability company or as a limited partner pursuant to S.C. Code Ann. § 33-42-430 and S.C. Code Ann. § 33-44-303.

In addition, the allegations of negligent misrepresentation fail as a matter of law. Paragraph 201 of the Counterclaim alleges Barnhill made a promise that he would comply with the terms of the partnership. A broken promise is not legally sufficient for a negligent representation claim. Allegro, Inc. v. Scully, 409 S.C. 392, 418, 762 S.E.2d 54 (Crt. App. 2014).

The claim of breach of fiduciary duty in Paragraphs 206 – 213 of the Counterclaim, to-wit, that 809 Holdings did not get paid by other entities, is legally insufficient. As a limited partner, Barnhill is not liable for 809 Holdings not getting paid.

At this late stage in the proceedings, defendants must come forward with some evidence to support each element of each cause of action. Defendants have not proffered or argued any evidence to support any counterclaim. Furthermore, defendants have offered no evidence showing plaintiffs caused any damages. Plaintiffs' Motion for Judgment on the Pleadings and for Summary Judgment is granted.

In connection with the Motion for Summary Judgment, plaintiffs' counsel moved to strike the Affidavit of William Piner. I hereby grant that Motion as the Piner Affidavit does not comply with Rule 56, SCRPC. The Affidavit contains conclusory and speculative statements and also attempts to rely on hearsay by appending to the Affidavit an email from a nonparty. Furthermore, the allegations in paragraphs five and six are made upon information and belief and are not made upon personal knowledge and, therefore, may not be used. The Affidavit is stricken in its entirety. Even if I were to consider such Affidavit, which I am not, the Affidavit does not present any material issue of fact that would allow liability on the part of any plaintiffs to defendants.

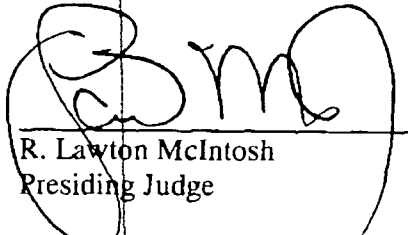
NOW, THEREFORE, IT IS HEREBY ORDERED THAT the Answer, Counterclaim and other pleadings of J. Floyd Swilley, Laurel K. Swilley, Heath Causey, 809 Holdings, LP and WCP Limited, LLC are hereby stricken;

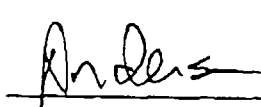
And IT IS FURTHER ORDERED that all counterclaims are dismissed with prejudice;

And IT IS FURTHER ORDERED that the Affidavit of William Piner is stricken;

And IT IS FURTHER ORDERED that the Plaintiffs shall serve their Motion for Attorney Fees and Affidavit for Attorney Fees upon the Defendants with the Motion for Attorney Fees to be heard by the presiding judge at the next term of court;

AND IT IS SO ORDERED.


R. Lawton McIntosh
Presiding Judge


_____, South Carolina
This 16 day of March, 2016