

2008 WL 1943313 (Ga.Super.) (Trial Order)

Superior Court of Georgia, DeKalb County
BOXCAR DEVELOPMENT CORP., Retail Group Partners, Inc., Retail Group Management
Partners, LLC, and Jerome D. Hoffman, Plaintiffs,

v.

NEW WORLD COMMUNICATIONS OF ATLANTA, INC. d/b/a Fox 5 News of Atlanta and
Fox News Network, LLC, Defendants.

No. 08CV2248-10.

May 1, 2008.

Order

Prepared by: Cynthia L. Counts, Esq., Georgia Bar No. 190280, Benjamin C. Bartlett, Esq.,
Georgia Bar. No. 371518.

Counts & Associates, 1384 Lanier Place, Atlanta, Georgia 30306, Telephone: (404)876-1785,
Facsimile: (404)249-9897, Email: ccounts@lawcounts.com.

Submitted for review to: Michael W. Strong, Attorney for Plaintiffs, 194 Baker Road, Newnan,
Georgia 30265.

Honorable C. David Wood, Judge.

CIVIL ACTION

This Court held an expedited hearing, pursuant to O.C.G.A. 9-1 1- 11.1(d), on the unopposed Motion of Defendants New World Communications of Atlanta, Inc., d/b/a FOX 5 News of Atlanta and Fox News Network, LLC, to Dismiss SLAPP Suit (hereinafter referred to as "Motion to Dismiss") on April 24, 2008. Counsel for Plaintiffs Boxcar Development Corp., Retail Group Partners, Inc., Retail Group Management Partners, LLC, and Jerome D. Hoffman did not appear. Proper notice having been given to all parties, this Court proceeded with the hearing. Defense counsel orally argued that the Court should dismiss Plaintiffs' claims with prejudice based on the merits of Defendants' Motion to Dismiss and pursuant to Uniform Superior Court Rule due to Plaintiffs' failure to properly respond to the call of the hearing. After oral argument, and having reviewed Defendants' Motion to Dismiss and Memorandum in Support as well as the applicable facts and law, this Court ruled from the bench that Plaintiffs' claims be dismissed with prejudice for failure to comply with the prerequisites of O.C.G.A. § 9-1 1-11.1 (d). Additionally, this Court ordered that the case be dismissed pursuant to Uniform Superior Court Rule 14.

FINDINGS OF FACT

On February 8, 2008, Plaintiffs filed a Complaint asserting claims for alleged defamation, invasion of privacy (false light and intrusion), fraudulent misrepresentation, and intentional infliction of emotional distress arising from FOX 5's "airing [of] a series of broadcasts about

Plaintiff Hoffman" and his principal business, Plaintiff Boxcar Development Corp. (hereinafter referred to as "News Reports"). Complaint, ¶ 4. Plaintiffs conceded in the Complaint that the FOX 5 News Reports commented upon an "investigation by the [Georgia] Secretary of State with regard to certain potential securities laws violations." Complaint ¶ 5; *see also* Verified Answer and March 27 News Report attached thereto in DVD format ("The Georgia Secretary of State's securities division is already investigating Hoffman based on our earlier stories"). Additionally, according to Plaintiffs' Complaint, the News Reports alleged that Plaintiffs were seeking to "defraud and deceive certain individuals and business entities" and the News Reports "imputed actions" to Plaintiffs that could be "criminal in nature." Complaint, ¶¶ 4, 6, 13. Thus, the allegations in Plaintiffs' Complaint show that the News Reports involved a matter of significant public interest and concern.

Plaintiffs' Complaint contained a verification signed by Plaintiff Hoffman stating "the allegations in the above-captioned Complaint are true and accurate to the best of my knowledge." Hoffman's verification, however, did not include requisite verification pursuant to O.C.G.A. 9-11-11.1(b). *See* Complaint and Plaintiffs' Verification attached thereto. Plaintiffs' counsel filed no verification. In its Verified Answer, Defendant FOX 5 gave notice that Plaintiffs had failed to comply with the prerequisites of O.C.G.A. § 9-11- 11.1(b). *See* FOX 5's Verified Answer, p. 2 ("Sixth Defense"). The record shows Plaintiffs did not file the proper verifications required by O.C.G.A. 9-11- 11. 1(b) within 10 days after receiving notice of their defective verification in Defendants' Answer, and did not attempt to file the required verifications at any time.

On March 31, 2008, Defendants filed and served upon Plaintiffs' counsel their Motion to Dismiss and Defendants' request for an expedited hearing pursuant to O.C.G.A. 9-11-11.1(d). This Court scheduled a hearing on April 24, 2005 at 2:30 p.m. The record reflects that this Court served Plaintiffs' counsel with a Notice of Hearing for April 24, 2008 at 2:30 PM. Despite this notice, Plaintiffs' counsel failed to appear at the hearing. After waiting several minutes for Plaintiffs' counsel to appear, this Court proceeded with the hearing.

FINDINGS OF LAW

The anti-SLAPP statute was designed to "protect Georgia citizens who participate in 'matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances' from the 'abuse of the judicial process.'" *Metzler v. Rowell*, 248 Ga. App. 596, 597 (2001) (*citing* O.C.G.A § 9-11- 11.1 (a)). The purpose of the anti-SLAPP statute passed by the General Assembly in 1996 is to reaffirm the importance of protecting First Amendment speakers from the ill effects of meritless litigation by ensuring that the exercise of free speech rights will "not be chilled through the abuse of the judicial process." Consistent with its goal, the General Assembly incorporated into the language of the statute a preamble reiterating that intent:

The General Assembly of Georgia finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition the government for redress of grievances. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of freedom of speech and the right to petition government for the redress of grievances should not be chilled through an abuse of the judicial process.

O.C.G.A. § 9-11-11.1.

In order to protect this articulated purpose, the statute provides an early disposition mechanism for First Amendment cases. *See* O.C.G.A. § 9-11-11.1 (d); *see also Browns Mill Development Co. v. Denton*, 275 Ga. 2, 6 (2002) ("intent of the statute is to encourage the exercise of free speech and afford a procedural protection to acts of communication on public issues"). Accordingly, two of the statute's most important elements are the provisions requiring detailed verifications by plaintiffs and their counsel and an accelerated hearing on a motion to dismiss. Since protracted and expensive litigation is a primary goal of SLAPP filers, the requirement that the court hold a hearing on the merits of the motion to dismiss within thirty (30) days provides a disincentive for the filing of such suits and helps prevent abuse of the judicial process. *See* O.C.G.A. 9-11-11.1(d). Moreover, as the Georgia Court of Appeals has explained, the trial court's dismissal of an anti-SLAPP complaint with prejudice where the plaintiffs and their counsel fail to file the necessary verifications after being put on notice of the requirements of O.C.G.A. § 9-11-11.1(b) is essential to promoting the entire purpose of Georgia's anti-SLAPP statute:

To hold otherwise would frustrate the purpose of the anti-SLAPP statute. As discussed above, the explicit rationale behind the anti-SLAPP statute is "to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances." O.C.G.A. § 9-11-11.1 (a). In order to achieve this purpose, the anti-SLAPP statute employs verification requirements to discourage cavalier and unfounded lawsuits filed against someone exercising his right to petition government. O.C.G.A. § 9-11-11.1 (b). By requiring the party opposing the petitioner and his attorney to verify the substance of their complaint, and thereby face sanctions if the verification proves substantively improvident, the anti-SLAPP statute insures that any challenge to the right to petition government must be based on substantive facts.

Hawks v. Hinely, 252 Ga. App. 510, 517 (2001).

The central question as to the statute's applicability is a "matter of law for the trial court's determination based upon the pleadings, rather than upon evidence presented by either party." *See Browns Mill Dev. Co. v. Denton*, 247 Ga. App. 232, 237 (2005). A defendant who comments upon and reports about potential illegal or wrongful conduct or activity that is made in connection with an issue under consideration or review by a government entity has engaged in an "act" under Georgia's anti-SLAPP statute. *See* O.C.G.A. § 9-11-11.1. Seeking to facilitate important public policy objectives, the Georgia legislature assured that the detailed verification requirements of the statute would be imposed in all lawsuits "arising from an act" by any person or entity that "could reasonably be construed as an act in furtherance of the right of free speech or the right to petition the government for redress of grievances ... in connection with an issue of public interest or concern." O.C.G.A. § 9-11-11.1(b).

Even a defendant's statement made *prior* to the initiation of a government investigation qualifies as an "act" of free speech in connection with an issue of public interest or concern entitled to protection as Georgia's anti-SLAPP statute. Thus, a defendant's statements made to a local television station that sparked an official government investigation are a protected "act" of free

speech in connection with an issue of public interest or concern. *Harkins v. Atlanta Humane Society*, 264 Ga. App. 356 (2003), *aff'd in part, reversed in part sub nom., Atlanta Humane Society v. Harkins*, 278 Ga. 451 (2004), *on remand sub nom., Harkins v. Atlanta Humane Soc.*, 273 Ga. App. 489 (2005).

The analysis of whether the Georgia anti-SLAPP statute applies to Defendants' actions does not depend on the label of Plaintiffs' claims, but on whether the claims arise from an act that "could reasonably be construed as an act in furtherance of the right of free speech or the right to petition the government for redress of grievances ... in connection with an issue of public interest or concern." O.C.G.A. § 9-11-11.1(b); *see also Hagemann v. Berkman Wynhaven*, 2008 Ga. App. LEXIS 391 (2008) (anti-SLAPP statute applied to plaintiffs claims, including claims of fraud and interference with contractual and business relationships, because "the pinnacle of the alleged 'tortious behavior' " was an act "squarely within the purview" of the anti-SLAPP statute); *Raskin v. Swann*, 216 Ga. App. 478 (1995) (holding that although the complaint "is cast in terms of fraud and breach of an alleged agreement, the gravamen of the cause of action is defamation ... even if we were to assume the allegations were truthful, plaintiffs complaint fails to state a claim for which money damages may be awarded").

The Georgia Supreme Court's decision in *Denton v. Browns Mill Dev. Co.*, 275 Ga. 2, 10 (2002), which held that the anti-SLAPP statute did not apply to the plaintiffs claim of trespass, is distinguishable and does not control here. In this case, Plaintiffs do not allege that any damages arose from Defendants' alleged interference with a property right of Plaintiffs. Instead, a review of the Complaint shows that all damages alleged by Plaintiffs arose from Defendants' "acts" of communication - the broadcasts of their News Reports. *See* Complaint ¶¶ 12, 20, 21, 28, 38, and 45. Therefore, Georgia's anti-SLAPP statute applies to Plaintiffs' claims against Defendants.

By its very nature, an investigative news report is a medium that seeks to influence the public or State government. *See Harkins*, 273 Ga. App. 489, 490 (2005) (statute held to apply to statements made during a television broadcast because government officials or the public at large hearing the broadcast could be "influence[d] or persuade[d]" themselves act to change the problems with the Atlanta Humane Society). Here, Plaintiffs' Complaint alleges that the News Reports implicated Plaintiffs as being engaged in questionable business practices in Georgia and raised the issue of a government investigation of Hoffman and his companies. As such, this Court finds that the FOX 5 News Report was an act that "could reasonably be construed to be in furtherance of the right of free speech or the right to petition the government for redress of grievances ... in connection with an issue of public interest or concern." O.C.G.A. § 9-11-11.1(b); *see also Denton*, 275 Ga. at 6.

CONCLUSIONS OF LAW

Because the FOX 5 News Reports should be reasonably construed as acts in furtherance of free speech in connection with an issue of public concern, the procedural requirements of Georgia's anti-SLAPP statute clearly apply. *Browns*, 247 Ga. App. at 235. Consequently, Plaintiffs and their counsel were obligated to file detailed verifications when they filed their Complaint or cure the defect within ten (10) days after Defendants notified Plaintiffs of their defective verifications. Plaintiffs did not do so. Accordingly, pursuant to the Georgia anti-SLAPP statute and the case law construing it, this Court must dismiss Plaintiffs' Complaint with prejudice. O.C.G.A. 9-11-

11.1(b); *See Hawks*, 252 Ga. App. 510, 516 (holding "the anti-SLAPP statute's mandate that an improperly verified complaint shall be stricken necessarily means that the claims in any such complaint must be dismissed with prejudice"); *see also Davis v. Emmis Publ'g Corp.*, 244 Ga. App. 795, 798 (2000) (finding that a "claim 'shall be stricken' if the verification is not filed timely"); *Camp v. Cowetta*, 280 Ga. 199 (2006) (construing in dictum that O.C.G.A. 9-11-11.1(b) imposes an absolute ten-day limit on plaintiff's right to cure failure to file written verification in cases implicating free speech rights and that under the statute no later amendments to cure defect are permitted).

Accordingly, it is hereby ORDERED and ADJUDGED that Defendants' Motion to Dismiss SLAPP Suit is hereby granted; Defendants' oral motion to dismiss due to Plaintiffs' failure to properly respond to the call of the hearing is granted pursuant to Uniform Superior Court Rule 14. Because of the dictates of Georgia's anti-SLAPP statute, Plaintiffs' Complaint shall be dismissed with prejudice.

DATED this 1 day of May, 2008.

<<signature>>

The Honorable C. David Wood

Judge DeKalb County Superior Court

Reprinted from Westlaw with permission of Thomson/West. If you wish to check the currency of this case, you may do so using KeyCite on Westlaw by visiting <http://www.westlaw.com/>.