IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for The Buckhead Community Bank, Plaintiff, v. R. CHARLES LOUDERMILK, SR., et al., Defendants.	CIVIL ACTION FILE NO. 1:12-CV-4156-TWT

ORDER

The Federal Deposit Insurance Corporation, acting as receiver for the Buckhead Community Bank, claims that former officers and directors of the bank were negligent and grossly negligent in their management of the bank's loan portfolio, leading to the bank's failure.

I. Background

In 2005, the Buckhead Community Bank (the "Bank") began to implement a new, aggressive growth strategy. The Defendants, R. Charles Loudermilk, Sr., Hugh C. Aldredge, David B. Allman, Marvin Cosgray, Louis J. Douglass III, Gregory W. Holden, John D. Margeson, Larry P. Martindale, and Darryl L. Overall, served on the

Bank's Loan Committee and oversaw the aggressive growth strategy. Pursuant to the strategy, the Bank opened three new branches and expanded its loan portfolio. (Am. Compl. ¶¶ 2-4, 23).

The Loan Committee actively pursued commercial real estate ("CRE") and acquisition, development, and construction ("ADC") loans in expanding the Bank's loan portfolio. According to the FDIC, the Loan Committee took unreasonable risks and violated Bank policy by approving speculative loans without adequate information. The Loan Committee also participated in loan purchases from other banks without independently reviewing the loans, again in contravention of Bank policy. (Id. ¶¶ 2-4, 25, 43-44).

The Loan Committee's new strategy was ultimately a total failure. From 2005 to 2007, the Bank's loan portfolio increased 240%, mostly from gains in its high-risk real estate and construction loans. At the same time, however, the Bank's adversely classified assets went from accounting for 12.62 percent of tier 1 capital to 236 percent of tier 1 capital. (Id. at ¶ 32). The changes in the Bank's loan portfolio brought the ire of regulators, and the Bank was repeatedly warned about its excessive concentrations in high-risk loans and about its poor underwriting and credit administration policies. (Id. at ¶ 37). On December 4, 2009, the Bank failed, the

Georgia Department of Banking and Finance ("GDBF") closed it, and the FDIC took over as receiver. (Id. at ¶ 11).[1]

The FDIC contends that the Defendants – nine former officers and directors of the Bank – were negligent and grossly negligent "in their numerous, repeated, and obvious breaches and violations of the Bank's Loan Policy, underwriting requirements, banking regulations, and prudent and sound banking practices." (Id. at ¶ 5). The FDIC's amended complaint details twelve representative loan transactions that it contends were improperly approved or renewed by the Loan Committee (the "Loss Loans"). The FDIC contends these Loss Loans caused damage to the Bank in excess of $21.8 million. The Defendants contend they were not negligent and suggest that the FDIC is simply seeking to recover for losses caused by the recent and unanticipated financial crisis. Further, they argue that Bank directors and officers cannot be held liable for ordinary negligence under Georgia's business judgment rule.

The case is set for a jury trial on October 11, 2016. The Plaintiff has filed a pre-trial Motion to Strike Defendant's Proposed Verdict Form and Objection to Defendants' Request for Apportionment under O.C.G.A. § 51-12-33 [Doc. 136]. The Plaintiffs' proposed verdict form does not provide for apportionment of liability

[1] As receiver, the FDIC succeeded to all rights and privileges of the Bank, including claims against former directors and officers for negligence and gross negligence. See 12 U.S.C. § 1821(d)(2)(A)(i).

among the Defendants. The Defendants' proposed verdict form is over 25 pages long. It would require the jury to assign a percentage of fault against each defendant as to each of the ten loans that are to be the subject of the trial.

II. Discussion

The Plaintiff's Motion to Strike [Doc. 136] is DENIED. A motion to strike under Rule 12 (f) of the Federal Rules of Civil Procedure is limited to striking a pleading. A proposed verdict form attached to the Pre-Trial Order is not a pleading. Nevertheless, the Plaintiff's Objection appropriately puts the issue of apportionment of liability in play.

In 2005, the Georgia General Assembly abolished the doctrine of joint and several liability in personal injury actions. The statute provides:

> Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

O. C. G. A § 51-12-33. The Plaintiff argues that because the Receiver's claims arise from the Defendants' breach of duties as stated in O.C.G.A. § 7-1-490 of the Financial

Institutions Code of Georgia, and O.C.G.A. § 51-12-33 applies only to claims arising from an "injury to person or property," the Defendants are not entitled to apportionment under the statute. The Court agrees. The Supreme Court of Georgia has held that O.C.G.A. § 51-12-33 is "in derogation of the common law … [and] must be limited strictly to the meaning of the language employed, and not extended beyond the plain and explicit terms of the statute." Couch v. Red Roof Inns, Inc., 291 Ga. 359, 364 (2012) (internal quotation omitted). The Plaintiff asserts that the Defendants violated their fiduciary duty under O.C.G.A. § 7-1-490 which provides: "Directors and officers of a bank or trust company shall discharge the duties of their respective positions in good faith and with that diligence, care, and skill which ordinarily prudent men would exercise under similar circumstances in like positions." O.C.G.A. § 7-1-493 (a) authorizes an action by a receiver against bank officers and directors for "[t]he neglect of, failure to perform, or other violation of his duties in the management of the bank or trust company or in the disposition of corporate assets committed to his charge."

The Defendants have not cited any case applying O.C.G.A. § 51-12-33 to a lawsuit against officers and directors of a bank who are alleged to have breached their fiduciary duties under O.C.G.A. § 7-1-490. Indeed, there are good reasons to believe

that the apportionment of liability statute would not be applied by the Georgia courts to a breach of fiduciary duties claim such as this. O.C.G.A. § 7-1-494 provides:

> A director of a bank or trust company who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his dissent shall be entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered or certified mail or statutory overnight delivery to the secretary of the bank or trust company within 24 hours after the adjournment of the meeting. Such right to dissent shall not apply to a director who, being present at the meeting, failed to vote against such action.

Thus, Georgia law presumes that the directors of a bank are acting in concert. The case law is clear that apportionment statutes do not apply to derivative or concerted actions. See PN Express, Inc. v. Zegel, 304 Ga. App. 672, 680 (2010); Kroger Co. v. Mays, 292 Ga. App. 399, 401 (2008). The Defendants in this case are not joint tortfeasors acting separately, but rather tortfeasors acting in concert. The Defendants acknowledge as much when they concede that they will offer no evidence or argument as to the relative liability of the individual Defendants. Their defense is that the Defendants collectively did not breach any duty to the Bank. Under these circumstances, the jury will not have any reasonable basis for apportioning liability among the Defendants (including any settling Defendants). In addition, the Defendants' attempt to have an apportionment of liability is untimely. The

Defendants have never supplemented their discovery responses to state any basis for apportioning liability among the Defendants.

III. Conclusion

For the reasons set forth above, the Plaintiff's Objection to Defendants' Request for Apportionment under O.C.G.A. § 51-12-33 [Doc. 136] is SUSTAINED.

SO ORDERED, this 5 day of October, 2016.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge