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

LUCKY CAPITAL MANAGEMENT, LLC,	
Plaintiff,	**CIVIL ACTION FILE**
v.	**NO. 1:14-CV-193-MHC**
MILLER & MARTIN PLLC,	
Defendant.	

ORDER

This case comes before the Court on Defendant Miller & Martin PLLC's ("Miller & Martin") Motion for Summary Judgment [Doc. 63] and Plaintiff Lucky Capital Management, LLC's ("Lucky") Motion for Partial Summary Judgment and/or Motion in Limine [Doc. 65].

I. BACKGROUND[1]

[1] At the outset, the Court notes that it views the evidence presented by the parties in the light most favorable to the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Sunbeam TV Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 1270 (11th Cir. 2013). In addition, the Court has excluded assertions of facts by the parties that are immaterial or presented as arguments or legal conclusions or any fact not supported by citation to evidence (including page or paragraph number). LR 56.1B(1), NDGa. Further, the Court accepts as admitted those facts in the parties' statements of material facts that have

Miller & Martin is a Tennessee Professional Limited Liability Company engaged in the practice of law, with its principal place of business in Chattanooga, Tennessee. Def.'s SUMF ¶ 1; Pl.'s Resp. to Def.'s SUMF ¶ 1. nValeo, LLC ("nValeo") was a start-up limited liability company formed in Florida in 2009 to market media content and products over the internet. Aff. of Scott McGinness [Doc. 63-6] ("McGinness Aff.") ¶ 3. In the spring of 2010, nValeo had three members: (1) Jeff Ritchie, Chief Executive Officer; (2) Buddy Poole, Chief Operating Officer; and (3) Leroy Sisco. Dep. of Chad Smith taken August 11, 2015 [Doc. 63-8] ("Smith Dep.") at 52; Def.'s SUMF ¶ 7; Pl.'s Resp. to Def.'s SUMF ¶ 7. nValeo retained Miller & Martin to provide legal services on a discrete task basis; Miller & Martin was not general counsel to nValeo but charged by the hour for its legal services. McGinness Aff. ¶ 4; April 15, 2010, Letter, attached as Ex. A to McGinness Aff. [Doc. 63-6]. It did not have access to nValeo's financial books and records. McGinness Aff. ¶ 4; Def.'s SUMF ¶ 6; Pl.'s Resp. to Def.'s SUMF ¶ 6. McGinness was the contact partner for nValeo, and was assisted by then-associate (and current partner) Tyler Hand. McGinness Aff. ¶ 6.

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not been specifically controverted with citation to the relevant portions of the record. LR 56.1B(2), NDGa. See Def.'s Statement of Undisputed Material Facts [Doc. 63-4] ("Def.'s SUMF"); Pl.'s Resp. to Def.'s Statement of Undisputed Material Facts [Doc. 78] ("Pl.'s Resp. to Def.'s SUMF").

In late May 2010, nValeo began negotiating with the founders of Lucky about investing in nValeo; by June 2, 2010, Lucky had been formed in Texas for the purpose of such an investment. Def.'s SUMF ¶ 8; Pl.'s Resp. to Def.'s SUMF ¶ 8; Smith Dep. at 93. The managing members of Lucky were Chad Smith and Chad Clary. Smith Dep. Ex. 42 [Doc. 63-10] at 159-61]. Miller & Martin never represented or provided legal services to Lucky. McGinness Aff. ¶ 7; Smith Dep. at 53, 59.

Miller & Martin prepared the Membership Purchase Agreement between nValeo and Lucky. McGinness Aff. ¶ 8. The Membership Purchase Agreement was executed on June 7, 2010, whereby Lucky purchased 2% of nValeo for $500,000. Def.'s SUMF ¶ 12; Pl.'s Resp. to Def.'s SUMF ¶ 12; Smith Dep. at 66-67; Membership Interest Purchase Agreement, attached as Ex. 9 to Smith Dep. [Doc. 63-9] at 79-89. The Membership Purchase Agreement incorporated the existing Amended and Restated Operating Agreement of nValeo, dated December 11, 2009, which was prepared by a prior counsel. Def.'s SUMF ¶ 13; Pl.'s Resp. to Def.'s SUMF ¶ 13; Amended and Restated Operating Agreement, attached as Ex. 3 to Smith Dep. [Doc. 63-9] at 32-63. nValeo and Lucky subsequently executed an Amended and Restated Membership Interest Purchase Agreement ("ARMIPA") on July 26, 2010, whereby Lucky purchased another 9% of nValeo

for an additional $2 million. Def.'s SUMF ¶ 14; Pl.'s Resp. to Def.'s SUMF ¶14; Smith Dep. at 138; Amended and Restated Membership Interest Purchase Agreement, attached as Ex. 25 to Smith Dep. [Doc. 63-10]. The money Lucky paid to nValeo for its membership interest belonged to nValeo. Def.'s SUMF ¶ 15; Pl.'s Resp. to Def.'s SUMF ¶ 15; Smith Dep. at 130.

In 2010, Ritchie, the CEO and majority member of nValeo, began withdrawing money from nValeo for personal reasons. Def.'s SUMF ¶ 16; Pl.'s Resp. to Def.'s SUMF ¶ 16; Smith Dep. at 138-47 & Ex. 26. In September 2010, nValeo, through Poole, contacted Hand to request a promissory note to document that Ritchie owed money to nValeo; Poole was authorized to make that request. Def.'s SUMF ¶ 18; Pl.'s Resp. to Def.'s SUMF ¶ 18; Hand Aff. ¶ 5; Smith Dep. at 161. nValeo did not request or hire Miller & Martin to determine whether the promissory note would conflict with nValeo's contractual obligations. Def.'s SUMF ¶ 20; Pl.'s Resp. to Def.'s SUMF ¶ 20; McGinness Aff. ¶ 12; Aff. of Tyler Hand [Doc. 63-7] ("Hand Aff.") ¶ 7. On September 28, 2010, Hand emailed a promissory note to Poole. Hand Aff. ¶ 8.

In March 2011, Smith reviewed the financial records of nValeo for the first time, and saw the withdrawals made by Ritchie which Poole had recorded in the

records. Smith Dep. at 125-27. Smith then learned of the promissory note that Miller & Martin had prepared. Id. at 127-28.

The parties dispute, and this case turns on, whether Miller & Martin was aware of Ritchie's improper withdrawals. In Poole's earlier deposition taken in a Texas state court case, he stated that Ritchie had requested a $2 million revolving line of credit in the promissory note. Dep. of Clarence Wilson Buddy Poole dated June 8, 2012 [Doc. 71] at 84-85. However, in this case, Poole's testimony is that: (1) Miller & Martin was hired on a task-by-task basis to provide discrete legal services to nValeo; (2) Miller & Martin did not have access to nValeo's Quickbooks or its internal communications; (3) Poole was the person who requested that Miller & Martin prepare the promissory note; (4) Poole does not know what Hand or McGinness understood about the promissory note; (5) Poole never told Miller & Martin about the amounts, dates, or impropriety of the withdrawals; (6) Poole was unsure as to how the sum of $2,000,000 was inserted into the revolving line of credit promissory note, but it was possible that he had made that request; (7) Poole never witnessed Ritchie communicating with Miller & Martin about the promissory note or the amounts taken; and (8) Miller & Martin did not aid and abet Ritchie to take money from nValeo. Dep. of Clarence Wilson

Buddy Poole dated Nov. 24, 2015 [Doc. 72] ("2015 Poole Dep.") at 42, 45-46, 48, 56-58, 60-61, 69-70, 72, 88.

Plaintiff's First Amended Complaint included the following claims: (1) legal malpractice (Count One); (2) aiding and abetting breach of fiduciary duty (Count Two); (3) procuring a breach of fiduciary duty (Count Three); (4) fraudulent concealment (Count Four); (5) civil conspiracy (Count Five); and (6) attorneys' fees and expenses of litigation (Count Six).[2] Am. Compl. ¶¶ 18-24. In an Order dated February 10, 2015, this Court dismissed Plaintiff's claims for legal malpractice (Count One), fraudulent concealment (Count Four), and civil conspiracy (Count Five). Order dated February 10, 2015 [Doc. 24] ("February 10 Order"). Further, this Court ruled that Plaintiff's claims for aiding and abetting the breach of a fiduciary duty (Count Two) and procuring the breach of fiduciary duty (Count Three) were duplicative of each other and were effectively the same cause of action. Id. at 17-21. Plaintiff's Second Amended Complaint, the operative complaint in this case, contains claims for aiding and abetting a breach of fiduciary duty and procuring a breach of fiduciary duty (Counts One and Two) and a claim

[2] The claim for attorneys' fees and expenses of litigation pursuant to O.C.G.A. § 13-6-11 is mistakenly labeled as Count "Five" instead of Count "Six."

for attorneys' fees and expenses pursuant to O.C.G.A. § 13-6-11 (Count Three). Second Am. Compl. [Doc. 52].

II. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A party seeking summary judgment has the burden of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," and cannot be made by the district court in considering whether to grant summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); see also Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1282 (11th Cir. 1999).

If a movant meets its burden, the party opposing summary judgment must present evidence that shows there is a genuine issue of material fact or that the movant is not entitled to judgment as a matter of law. Celotex, 477 U.S. at 324. In determining whether a genuine issue of material fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party

opposing summary judgment, "and all justifiable inferences are to be drawn" in favor of that opposing party. Anderson, 477 U.S. at 255; see also Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999). A fact is "material" only if it can affect the outcome of the lawsuit under the governing legal principles. Anderson, 477 U.S. at 248. A factual dispute is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Id.

"If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." Herzog, 193 F.3d at 1246. But, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment for the moving party is proper. Matsushita, 475 U.S. at 587.

III. DISCUSSION

Lucky alleges that Miller & Martin is liable for aiding and abetting a breach of fiduciary duty. In Georgia, a claim for aiding and abetting a breach of fiduciary duty requires a showing of each of the following elements:

> (1) through improper action or wrongful conduct and without privilege, the defendant acted to procure a breach of the primary wrongdoer's fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure; (3) the defendant's wrongful conduct procured a breach of the primary wrongdoer's fiduciary duty; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 25-26 (2006) (footnotes and citations omitted); see also O.C.G.A. § 51-12-30 ("In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury.").

A. Whether Miller & Martin Acted to Procure a Breach of Fiduciary Duty

Miller & Martin asserts that it undertook no act to procure a breach of a fiduciary duty by Ritchie. Def.'s Br. in Supp. of Mot. for Summ. J. [Doc. 63-1] ("Def.'s Br.") at 4-6. It contends it was not aware of amounts, dates, or any impropriety of Ritchie's withdrawals, was not contacted about preparing the promissory note until after Ritchie began his withdrawals, was not asked to review documents or determine whether the promissory note would conflict with nValeo's contractual obligations,[3] and had no communication with Ritchie about the

[3] Miller & Martin contends that, even if nValeo had requested that it review the operating agreement or ARMIPA, the documents did not prohibit a loan from nValeo to Ritchie, and the operating agreement actually gave nValeo the power and authority to conduct business, including to enter into contracts and to lend money. Def.'s Reply in Supp. of Mot. for Summ. J. [Doc. 81] ("Def.'s Reply") at 5-6. The ARMIPA only prohibited compensation in excess of his annual salary. Id. at 6. Miller & Martin also asserts that the September 2010 email from Poole

promissory note until after Lucky was aware of the note and the withdrawals. Id. at 4-5; see also McGinness Aff. ¶¶ 9-11, 15; Hand Aff. ¶¶ 3-4, 6, 11; Dep. of Pamela S. Duggar dated Dec. 18, 2015 [Doc. 63-11] ("Duggar Dep.") at 13-14, 20-22, 28, 32-33.[4]

Miller & Martin relies on White v. Shamrock Bldg. Sys., Inc., 294 Ga. App. 340 (2008).[5] Def.'s Br. at 5-6. In White, the court granted summary judgment to defendants on a claim for aiding and abetting a breach of fiduciary duty because

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references a loan, and the September 2010 phone call referenced advances (without specifying amounts), neither of which was a *per se* violation of either agreement. Id.

[4] Lucky asserts that Poole testified that he informed Hand and McGinness (and, thereby, informed Miller & Martin) that Ritchie had taken money to which he was not entitled; however, Poole actually testified that he did not recall the conversation. 2015 Poole Dep. at 41-42. Further, although Hand testified that Poole made him aware that Ritchie had taken out loans and/or advances from nValeo (Hand Dep. at 21-22), he never stated that Poole provided him with knowledge that the loans and/or advances were improper. In fact, Hand has clarified that Poole never informed him, and Miller and Martin was not aware, of amounts, dates, or impropriety of any of Ritchie's withdrawals. Hand Aff. ¶¶ 6, 11.

[5] Lucky contends that the Court, in its Order on Defendant's Motion to Dismiss, "rejected" Miller & Martin's argument regarding White. Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. [Doc. 79] ("Pl.'s Resp.") at 2. However, the Court's earlier Order simply held that Lucky had stated a claim based on White. Order [Doc. 24] at 20 ("While the evidence in this case may not ultimately support Plaintiff's allegations, they are sufficient to state a claim for aiding and abetting the breach of fiduciary duty.").

there was no evidence that the defendants "took any action to persuade" the primary wrongdoer to breach its duty; instead, the evidence showed that the primary wrongdoer solicited the contract with the defendants. 294 Ga. App. at 345. Similarly, in this case, the evidence demonstrates that Miller & Martin did not perpetrate or encourage any wrongdoing but only responded to a client request to prepare a promissory note. It did nothing to put any plan in motion, conceal the withdrawals, or injure Lucky. The Court finds Lucky's contrary arguments to be unsupported by the evidence. Lucky's speculation that Miller & Martin should have been aware of Ritchie's improper actions because it served as nValeo's counsel does not create a genuine issue of material fact to preclude the grant of summary judgment.

The Court is not persuaded by Lucky's inference that, because Hand and McGinness drafted the ARMIPA limiting officer compensation to fixed salary amounts, and Hand worked on the Amended and Restated Operating Agreement, they "had to have known" Ritchie's withdrawals violated these agreements. See Pl.'s Resp. at 4-5. The undisputed facts in the record are that Miller & Martin merely completed a task its client requested it to do; Lucky has cited no evidence in the record that supports its presumption that Miller & Martin knew of any improper action by Ritchie.

Lucky also focuses on the August 2010 voice mail message from nValeo's CPA Pam Duggar to Hand, stating that "Jeff Ritchie has taken a lot of money out of this company, umm, in the last seven (7) months and it just . . . The numbers just don't fit with what they are doing and I'm not sure what to do with all this money he's taken." Id. at 5. However, Duggar testified that her voicemail was intended to determine how to classify money (as revenue or a capital contribution) nValeo received from investors prior to the investment by Lucky; she did not mention the dates, amounts, or alleged impropriety of any withdrawals. Duggar Dep. at 13-14, 19-21; see also Hand Aff. ¶¶ 3-4. Therefore, Duggar's testimony does not support Lucky's contention that the voicemail gave Miller & Martin notice of any impropriety; in fact, it serves the opposite purpose by clarifying that her purpose in leaving the voicemail was unrelated to any impropriety of Ritchie's withdrawals.

Lucky further speculates that the fact that Lucky's additional stake in nValeo and the maximum principal indebtedness for Ritchie under the Revolving Line of Credit Promissory Note both were set at $2 million demonstrates knowledge by Miller & Martin of impropriety by Ritchie. See Pl.'s Resp. at 6-7. The Court finds that, even assuming Ritchie requested the $2 million figure, as Poole testified in his

earlier deposition,[6] the fact that the amounts are the same is insufficient to create a presumption of knowledge on Miller & Martin's part that Ritchie's actions were improper.

Finally, Lucky also relies on Ritchie's requests (through Poole) for the preparation of loan paperwork and contends that, when the first request did not succeed, he "sweetened the pot" with a $20,000 payment, resulting in Hand drafting the Line of Credit Note and emailing it to Poole that day. Id. at 8. Miller & Martin points out that, for the check to have arrived on September 28, it would have had to have been mailed days earlier, and Poole testified that Ritchie had no involvement in the timing of any payment to Miller & Martin. Def.'s Reply at 11-12; 2015 Poole Dep. at 48. Miller & Martin notes that it could obtain this form promissory note on the internet for free, the preparer of the note is immaterial to the note's legality and efficacy, and there is no indication that the note was prepared, approved, or endorsed by Miller & Martin. Def.'s Reply at 12. The Court finds that the evidence in the record fails to show a connection between the

[6] Poole's 2015 deposition makes clear that Miller & Martin was not aware of dates, amounts, or impropriety of any withdrawals by Ritchie.

$20,000 payment and the promissory note, and in no way demonstrates impropriety by Miller & Martin.

Therefore, there is no evidence in the record that supports Lucky's contention that Miller & Martin acted to procure a breach of a fiduciary duty. Having found that Lucky has failed to meet the first element of proof of aiding and abetting a breach of fiduciary duty, the Court could end the inquiry, but will proceed to analyze whether any action by Miller & Martin was undertaken purposely with malice and intent to injure Lucky.

B. Whether Miller & Martin Acted Purposely with Malice and Intent to Injure

Even if Lucky was able to demonstrate that Miller & Martin acted to procure a breach of a fiduciary duty, it also must demonstrate the actions were undertaken purposely with malice and intent to injure. An "act is malicious when the thing done is with the knowledge of plaintiff's rights, and with the intent to interfere therewith." Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 26, n. 13 (2006) (citation and quotation omitted). "Personal ill will or animosity is not essential;" rather, "any unauthorized interference, or any interference without legal justification or excuse" will suffice. Id. Intent has been defined "to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Colonial Penn Ins. Co. v.

Hart, 162 Ga. App. 333, 335 (1982) (quoting Restatement (Second) of Torts § 8A (Am. Law Inst. 1965)). Miller & Martin asserts that there is no evidence that it did anything with a malicious intent to injure Lucky or any party; it simply was requested to prepare a promissory note and not to audit any documents or determine the propriety of nValeo's actions. Def.'s Br. at 9.

Lucky relies on many of the same arguments made in support of its position that Miller & Martin acted to procure a breach of fiduciary duty in an attempt to establish malice. Pl.'s Resp. at 12-13. Lucky asserts that Miller & Martin was aware that nValeo was at risk of bankruptcy, was not current with its obligations, and that the proceeds of Lucky's investment were going to be used to pay debts and fund operations. Id. at 13. Lucky also alleges that Miller & Martin knew Lucky had purchased an 11% ownership interest in nValeo and Miller & Martin "had to believe" that damage was substantially certain to Lucky's interest in nValeo. Id.

Again, the Court finds that Lucky's speculations do not equate to evidence that establishes Miller & Martin acted with malice or intent to injure. Other than relying on arguments already rejected by the Court, Lucky's only assertion is that because Miller & Martin was aware of nValeo's financial problems, they should have known that damage to nValeo would result in damage to Lucky. However,

Lucky provides no evidence that Miller & Martin acted maliciously or with intent to injure. Therefore, the Court finds that Lucky has failed to demonstrate malice.[7] Because no genuine issue of material fact remains regarding Lucky's claim for aiding and abetting a breach of fiduciary duty,[8] Miller & Martin's Motion for Summary Judgment is hereby **GRANTED**.[9]

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant Miller & Martin PLLC's Motion for Summary Judgment [Doc. 63] is **GRANTED** and Plaintiff Lucky Capital Management, LLC's Motion for Partial Summary Judgment and/or Motion in Limine [Doc. 65] is **DENIED AS MOOT**.

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[7] Having found that Lucky has failed to satisfy the first two required elements of a claim for aiding and abetting a breach of fiduciary duty, there is no need for the Court to discuss the remaining elements.

[8] Because Plaintiff's substantive claim fails, the Court also grants Miller & Martin's Motion for Summary Judgment on Lucky's derivative claim for its attorneys' fees and expenses of litigation under O.C.G.A. § 13-6-11. Wilson v. Int'l Bus. Machs. Corp., No. 1:12-CV-1406, 2014 WL 11462883, at *5 (N.D. Ga. Sept. 30, 2014); Order Taker, Inc. v. Dedert Corp., No. 1:11-CV-3867-RWS, 2013 WL 628596, at *5 (N.D. Ga. Feb. 19, 2013).

[9] Concomitantly, Lucky's Motion for Partial Summary Judgment and/or Motion in Limine [Doc. 65] regarding certain of Miller & Martin's affirmative defenses regarding apportionment and Notices of Intent to Seek Apportionment to Non-Parties is **DENIED AS MOOT**.

IT IS SO ORDERED this 19th day of August, 2016.

Mark H. Cohen

MARK H. COHEN
United States District Judge