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JUDGE: M. A. Mahoney

PARTIES: Citizens Industrial Bank of Decatur, Lonnie L. Mixon, Timothy K. Roberts, Amy A. Roberts, Dozier, Hughley & Associats, P.C.

CHAPTER: 7

ATTORNEYS: T. G. F. Landry, L. B. Voit, B. A. Friedman

DATE: 7/24/97

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

CITIZENS INDUSTRIAL BANK OF DECATUR

Case No. 95-11824-MAM-7

Debtor.

LONNIE L. MIXON, TRUSTEE

Plaintiff

vs.

Adv. No. 96-1076

TIMOTHY K. ROBERTS

AMY A. ROBERTS

Defendants / Third-Party Plaintiffs

vs.

DOZIER, HUGHLEY & ASSOCIATES, P.C.

Third-Party Defendant.

ORDER

Thomas G. F. Landry and Lawrence B. Voit, Mobile, AL, Attorneys for Timothy K. Roberts and Amy A. Roberts
Barry A. Friedman, Mobile, AL, Attorney for Dozier, Hughley & Associates, P.C.

This matter is before the Court on a motion for summary judgment filed by Dozier, Hughley & Associates, P.C. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the motion for summary judgment is denied.

FACTS

Citizens Industrial Bank of Decatur (CIB) filed Chapter 7 on July 24, 1995. The bankruptcy petition was signed by Timothy Roberts as chief executive officer. On March 27, 1996, the trustee for CIB filed an adversary complaint against Timothy Roberts and his wife, Amy Roberts. The trustee seeks to recover assets which he alleges were wrongly removed from CIB's bankruptcy estate.

On August 15, 1996, the Roberts filed a third-party complaint against Dozier, Hughley & Associates, P.C. (DHA). DHA, a firm of certified public accountants, provided accounting services for CIB in 1994 and 1995. The third-party complaint states two causes of action: professional negligence and fraud. The professional negligence cause of action alleges that DHA certified the accuracy of audited financial statements that DHA prepared for CIB although the financial statements contained material misrepresentations. The complaint further alleges that DHA intended the financial statements be given to and knew the statements would be received by a group of persons to which the Roberts belong. The professional negligence cause of action also alleges that Timothy Roberts relied on the financial statements to conduct some of the transactions outlined in the trustee's complaint. Those particular transactions were transactions DHA intended the financial statements to influence, were substantially similar to transactions DHA intended the financial statements to influence, or were transactions DHA could reasonably have foreseen the financial statements would influence. Therefore, DHA failed to adhere to the required standard of care, and DHA's negligence is a direct and proximate cause of all damages the Roberts incurred or will incur.

DHA filed an answer to the third-party complaint on December 13, 1996. On April 30, 1997, DHA filed the motion for summary judgment at issue. In support of the motion, DHA submitted the affidavit of Tommy D. Hughley, the affidavit of G. Wayne Boggan, and excerpts from the deposition of Timothy Roberts. Tommy Hughley, a partner of DHA, stated in his affidavit that DHA had prepared an audit report for CIB as of October 31, 1994, and an accountants' compilation report as of April 30, 1995. The accountants' compilation report was not audited by DHA. Wayne Boggan, a certified public accountant practicing in Alabama, explained in his affidavit that an accountants' compilation report is limited to presenting in the form of financial statements information that is the representation of management. At his deposition on August 24, 1995, Timothy Roberts indicated that he did not look at the audit done in October 1994 after it was prepared, and he did not recall ever seeing the report done in April 1995.

In response to the motion for summary judgment, the Roberts submitted the affidavit of Timothy Roberts. In his affidavit, Timothy Roberts stated that at all times relevant to this proceeding he was an officer of CIB. Roberts indicated that the last audit report which DHA prepared for CIB concerned fiscal year 1994. The report was delivered to CIB on or around January 15, 1995. Roberts made numerous management decisions in reliance upon reports prepared by DHA.

At the hearing on the motion for summary judgment, both parties agreed that Alabama has adopted the Restatement (Second) of Torts § 552, which defines accountants liability for professional negligence. DHA argued that Timothy Roberts was not a third-party beneficiary; therefore, he was not a proper party under the provision.

LAW

A motion for summary judgment is granted “if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party moving for summary judgment has the burden of showing that there are no genuine issues of material fact that should be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593-94 (11th Cir. 1995); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). After a moving party has met its burden, the non-moving party must then “go beyond the pleadings,” and by its own affidavits or by “depositions, answers to interrogatories, and admissions on file,” show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the non-movant. *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989); *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). All reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First Nat. Bank of Mt. Pleasant*, 595 F.2d 994, 996-97 (5th Cir. 1979), quoting *Gross v. Southern Ry. Co.*, 414 F.2d 292 (5th Cir. 1969).

In order to determine the liability of DHA, this Court must look to the standard set forth in Restatement (Second) of Torts § 552 (1977). *Boykin v. Arthur Andersen & Co.*, 639 So.2d 504, 509-510 (Ala. 1994).

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

It is DHA's position that an "officer or classic insider" of a corporation is not a proper party under § 552. DHA offered no case law to support its position. The American Law Institute's official comment on subsection (2) states:

The person for whose guidance the information is supplied is often the person who has employed the supplier to furnish it, in which case, if it is supplied for a consideration paid by that person, he has at his election either a right of action under the rule stated in this Section or a right of action upon the contract under which the information is supplied.

The person who has employed the supplier has both a right under § 552 and a contractual right. In this case the employer was Citizens Industrial Bank. CIB has chosen not to sue DHA. The Roberts claim that they had a right to rely on the financial information as a person the accountants knew would be supplied with the information. The Court does not find that § 552 prohibits an officer or insider from bringing a professional negligence action against an accountant. There is no specific type of persons or entities which is automatically precluded from relief under § 552 of the Restatement (Second) of Torts. As the Fifth Circuit Court of Appeals stated in *First Nat. Bank of Commerce v. Monco Agency Inc.*, 911 F.2d 1053, 1060 (5th Cir. 1990):

[T]he Restatement adopts the cautious position that an accountant may be liable to a third party with whom the accountant is not in privity, but not every reasonably foreseeable consumer of financial information may recover.

Therefore, the fact that the Roberts are officers or shareholders of CIB is not a basis for summary judgment to DHA. If the Roberts have direct claims (as opposed to derivative claims of CIB), they are potentially actionable. At this time, the exact injuries alleged are not clear. DHA has not sustained its burden of showing the absence of a genuine issue as to any material fact.

DHA, in order to establish its burden under § 552 of the Restatement (Second) of Torts, would be required to show:

- (1) the Roberts have no claims for loss which are not claims of CIB; and
- (2) the Roberts are not parties whom DHA knew would rely on the financial reports.

The facts shown do not prove this.

THEREFORE IT IS ORDERED that the motion of Dozier, Hughley & Associates, P.C.
for summary judgment is DENIED.

Dated: July 24, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE