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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO * Docket 08-CV-3535-R
*
versus * New Orleans, Louisiana
*
JACKSON HEWITT TAX SERVICE, * April 1, 2009
INC., et al *
* * * * *

ORAL ARGUMENT BEFORE THE
HONORABLE SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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PROCEEDINGS

(April 1, 2009)

THE DEPUTY CLERK: All rise, please.

Court is in session. Please be seated. Civil
Action 08-3535, Pinero versus Jackson Hewitt Tax Service.

Counsel, please, make your appearances for the
record.

MR. SHARTLE: Bryan Shartle on behalf of the
plaintiff.

MR. HOMES: Justin Homes for the plaintiff.

MS. WILSON: Good morning, Your Honor. Donna Wilson
for the defendant, Jackson Hewitt, Inc. and Jackson Hewitt Tax
Service.

MR. WEIN: Andrew Wein also for Jackson Hewitt Tax
Service and Jackson Hewitt, Inc.

MR. BUCK: Thomas Buck for Crescent City Tax Service.

THE COURT: Okay. We are here on the motion to
dismiss.

MS. WILSON: Yes, Your Honor.

THE COURT: It's your motion. Let's proceed.

MS. WILSON: Good morning, Your Honor. What we have
at issue right now are three claims. The first two claims are
fraud and LUTPA and the third is breach of privacy. I'm going
to address the fraudulent inducement claims and LUTPA claims
first.

1 When Your Honor dismissed those claims in her
2 January 7 opinion and order and granted leave to amend,
3 Your Honor set forth the standard that had to be met in that
4 amendment. What Your Honor stated was that in order to state a
5 claim, especially given the two-year lapse of time between the
6 alleged promise that was made to the plaintiff and the time of
7 nonperformance, that the plaintiff had to state facts
8 sufficient to infer that at the time that the promise was made
9 by each defendant that defendant intended never to perform that
10 promise.

11 There are three reasons why the plaintiff has
12 failed in her amendments to meet that standard. First,
13 Your Honor, is that if you look at the allegations -- and I
14 think the primary allegations in the amendment are paragraphs
15 26 to 29. If you look at those allegations, they don't speak
16 as to the intent or the circumstances with any specificity as
17 to each defendant. Instead, those allegations speak
18 generically to defendants.

19 There's only one problem with that, Your Honor.
20 One is the franchisor/franchisee relationship, and the
21 complaint is replete with allegations that CCTSI is the owner
22 and operator of that franchise, not Jackson Hewitt. When you
23 read those allegations, for example, talking about defendant's
24 employees failed to do X, defendant's employees failed to do Y,
25 they don't speak as to Jackson Hewitt. This type of clumping

1 and group pleading is prohibited in the Fifth Circuit when you
2 are dealing with allegations of fraud.

3 Contrary to plaintiff's assertions, that group
4 pleading rule doesn't apply just to securities cases; it
5 applies to fraud cases generally. Your Honor, I think all the
6 cases that we cite in the brief cover that.

7 **THE COURT:** Uh-huh.

8 **MS. WILSON:** The only case that plaintiff cites in
9 opposition to that is a case called *Gammon*, which the plaintiff
10 basically asserts ruled that the group pleading rule doesn't
11 necessarily bar fraud pleading claims. The problem with that,
12 Your Honor, is *Gammon*, which is a one-page, unpublished opinion
13 from the Southern District of Texas, actually is applying
14 Rule 8(a), not Rule 9(b), to allegations regarding an ERISA
15 claim, not a fraud claim. It's just clear dicta, and in
16 contradiction of that we cite a number of cases stating that
17 group pleading simply is not permitted.

18 Basically, when you read these allegations,
19 Your Honor, like I said, what the plaintiff wants you to infer
20 is that Jackson Hewitt is the owner and operator of CCTSI, its
21 franchisee, but again that's contradicted by the plaintiff's
22 own allegations.

23 If you look at paragraphs 21 and 8 and, indeed,
24 the attached police report relating to this incident, it talks
25 about the franchise being owned by CCTSI and that, in turn,

1 CCTSI is owned by the Hirsch family, no mention of Jackson
2 Hewitt.

3 Again, it points to the fact that group pleading
4 simply is not allowed and that group pleading, as is the case
5 here, doesn't comply with Your Honor's directed rule on 9(b).
6 This group pleading or failure to abide by Rule 9(b) is
7 compounded by the fact that, when you look at the allegations,
8 they don't specify timing. It talks about: Defendants do not
9 do X; defendants do not do Y; defendants don't comply with the
10 privacy policy.

11 Your Honor repeatedly stated in her opinion on
12 the first motion to dismiss that timing was paramount here;
13 that when there's a two-year lapse, you better specify timing.
14 Timing is an important factor in determining whether there was
15 fraudulent intent at the time the promise was made. We don't
16 have that here.

17 Also compounding the failure of these
18 allegations to Rule 9(b) is the fact that these allegations
19 don't specify where these failures to abide by the privacy
20 policy actually occurred. So, for example, it talks about
21 defendants not securing buildings. Well, what buildings?
22 Where? If the buildings are in New York, how does that apply
23 to Ms. Pinero's claim?

24 Remember, Your Honor, we only have one claim
25 here. We have the claim of an individual, not a class. The

1 only franchise, the only buildings that are relevant here, is
2 to CCTSI.

3 **THE COURT:** Why doesn't it mean that those are the
4 buildings he is talking about?

5 **MS. WILSON:** It's unclear, Your Honor.

6 **THE COURT:** I don't think that is that difficult of
7 an inference to make. All right. What's your privacy
8 argument?

9 **MS. WILSON:** With respect to breach of privacy:
10 First, plaintiff admits that it's an intentional
11 tort.

12 Second, the plaintiff acknowledges that the
13 complaint basically disavows the allegation of intentional
14 conduct by Jackson Hewitt or, in fact, any of the defendants in
15 the second amended complaint. If you compare the two,
16 Your Honor, you can see, as we pointed out in our brief, that
17 as compared to they're talking about we intentionally did this
18 or we intentionally did that, those allegations have been
19 withdrawn.

20 What the plaintiff responds to our argument is,
21 you know, it doesn't matter what Jacobs Hewitt's intent is; it
22 doesn't matter. They're basically unveiling this new theory --
23 and, again, it's a back-door attempt to amend the complaint yet
24 again -- that are facts that are not in the complaint.

25 What the plaintiff states is, you know, this

1 employee of CCTSI intended to publicize this information and
2 this intent of an employee of the franchisee can, in turn, be
3 imputed to the franchisor, but there's no allegations from
4 which this Court can infer that there's an employer/employee
5 relationship here. To the contrary, the complaint repeatedly
6 speaks in terms of CCTSI, and I would argue --

7 **THE COURT:** You mean with Jackson Hewitt?

8 **MS. WILSON:** Pardon me, Your Honor?

9 **THE COURT:** You mean with Jackson Hewitt?

10 **MS. WILSON:** No. They talk repeatedly in terms of --

11 **THE COURT:** No, no. You mean there's no employment
12 relationship with Jackson Hewitt?

13 **MS. WILSON:** Yes, between this employee, the CCTSI
14 employee, and the franchisor Jackson Hewitt. Again, it's
15 contradicted by paragraphs 8, 21, and the attached police
16 report.

17 **THE COURT:** The police report says an employee of
18 whom?

19 **MS. WILSON:** It referred to an ex-employee of CCTSI.
20 Basically, what Ms. Hirsch, the owner of CCTSI, said was: "I
21 believe that an ex-employee of mine did this, basically, to
22 retaliate against the fact that I fired her." Not Jackson
23 Hewitt. "I fired her."

24 **THE COURT:** What was she arrested for?

25 **MS. WILSON:** No. It was under investigation by the

1 police department, and we don't know what happened.

2 **THE COURT:** What was the arrest for?

3 **MS. WILSON:** There was no arrest, but a police report
4 was made with respect to this incident.

5 **THE COURT:** Oh, this incident.

6 **MS. WILSON:** Yes, with respect to this incident,
7 Your Honor.

8 **THE COURT:** Let me hear from your opponent.

9 **MS. WILSON:** Thank you, Your Honor.

10 **MR. SHARTLE:** A few points, Your Honor. This is very
11 important to understand. Our fraud claim does not relate to an
12 unfulfilled promise or a statement as to future event. Timing
13 issues are only relevant when your fraud claim relates to one
14 of those two issues.

15 **THE COURT:** Let me tell you the problem I have with
16 your fraud claim. You are saying that two years ago, when she
17 walked into wherever, they told her, "We are going to protect
18 your private information," and in exchange for that she gave
19 them her information and did business with them.

20 **MR. SHARTLE:** More specific than just a general
21 representation that "We are going to protect your information,"
22 it was that "We have in place processes to protect your
23 information that comply with federal and state rules and
24 regulations."

25 **THE COURT:** Your allegations are that right now they

1 don't have that?

2 **MR. SHARTLE:** No. No, Your Honor. I'm arguing that
3 today and back then --

4 **THE COURT:** That's not what you pled. Your pleading
5 is in the present tense.

6 **MR. SHARTLE:** Well, Your Honor --

7 **THE COURT:** While your brief says that they made
8 statements that they knew to be false at the time, that's never
9 alleged in the complaint.

10 **MR. SHARTLE:** Well, Your Honor, if it's not,
11 certainly it was intended to be.

12 **THE COURT:** You need to fix it.

13 **MR. SHARTLE:** Okay. Then I would ask leave to fix
14 that because that is clearly what our arguments --

15 **THE COURT:** Now, you understand you have a huge
16 Rule 11 obligation when you are making fraud allegations?

17 **MR. SHARTLE:** Yes, Your Honor.

18 **THE COURT:** You have to allege -- and this all has to
19 be done with specificity -- who made the statement and that it
20 was knowingly false at the time it was made. If your
21 allegation was the reason it was knowingly false at the time
22 was that they said there were procedures in place but there
23 weren't, you have to allege that the procedures were not in
24 place at the time, not two years later.

25 **MR. SHARTLE:** I understand, Your Honor. I thought

1 that was clearly alleged in the complaint.

2 **THE COURT:** Well, you may have intended to do that,
3 but you didn't. It's all in the present tense.

4 **MR. SHARTLE:** Understood.

5 **THE COURT:** You need to get all that together. The
6 other thing is: What is it that you're saying about these
7 representations as between the franchisee and the franchisor?

8 **MR. SHARTLE:** Well, it's very clear. You look at
9 their privacy policy. It is a representation from all of them,
10 not only the local franchisor. They define in their privacy
11 policy the term *we*, which includes all of the defendants.
12 Regardless of whether or not the franchisor is actually
13 physically in the local office, they represent to consumers who
14 come into Jackson Hewitt because of the brand name that they
15 are going to protect that information, that they have policies
16 and procedures in --

17 **THE COURT:** Who is the contract with? Is it with the
18 franchisee or with the --

19 **MR. SHARTLE:** Candidly, Your Honor, I don't know all
20 the details because we haven't had any discovery in the case.
21 I pulled some of the 10K's and I have some general
22 understanding as to the relationship between the two, but --

23 **THE COURT:** You don't have the documents your clients
24 signed?

25 **MR. SHARTLE:** Oh, yes.

1 **THE COURT:** Who does that say her contract is with?

2 **MR. SHARTLE:** Well, there's not really a contract
3 per se that's in writing. It is an agreement between the
4 parties by which Jackson Hewitt is going to file the tax
5 returns. As part of that general contract, it's stated they
6 are going to protect this information and they have these
7 policies and procedures in place to do so.

8 I can't pull a physical document which says, you
9 know, you're to pay these fees. I think generally they use the
10 term *Jackson Hewitt*. I don't believe -- and, again, I would
11 like their input on this. I don't believe that there is any
12 document which is signed between the taxpayer and the local
13 company. People don't even understand that it's a franchise.
14 You come to Jackson Hewitt based upon the brand name, not
15 because you know that that local office is owned by Crescent
16 City.

17 **THE COURT:** Okay. I understand that argument. Now,
18 tell me about the privacy argument.

19 **MR. SHARTLE:** With respect to the privacy argument,
20 Your Honor, it's very simple. This isn't a case where the
21 documents accidentally ended up in the dumpster or the
22 Easter Bunny threw them away. Someone intentionally threw the
23 documents in the dumpster. They continue to argue that this
24 individual is a former employee. I can tell Your Honor two
25 things:

1 First, that's a factual issue not appropriately
2 decided on a motion to dismiss.

3 Secondly, I reached out last night to Richard
4 Angelico. If you recall, Your Honor, what happened here is
5 that an individual recovered the documents out of the dumpster,
6 eventually contacted Channel 6, and eventually was put in touch
7 with Mr. Angelico. I don't know the time span between when
8 that individual actually pulled the documents out of the
9 dumpster and they physically made their way over to
10 Mr. Angelico, but Mr. Angelico has reported to me that he had
11 the documents in his possession prior to the date that they
12 represent they fired this lady, so --

13 **THE COURT:** That sounds like an issue for --

14 **MR. SHARTLE:** It is, Your Honor, but my point is that
15 there's clearly an allegation of intentional conduct for which
16 they are responsible.

17 **THE COURT:** Okay. I've heard your argument. I'm
18 going to give you 15 days to amend this fraud claim. You
19 better do it right this time. Make sure you say who said what
20 when and that the allegation was that false statements were
21 knowingly made -- that they were knowingly false at the time
22 and the circumstances under which at the time made those
23 statements false. Okay?

24 **MR. SHARTLE:** Okay.

25 **THE COURT:** All right.

1 MR. SHARTLE: Thank you, Your Honor.

2 THE COURT: Thank you very much.

3 THE DEPUTY CLERK: All rise.

4 (WHEREUPON the Court was in recess.)

5 * * *

6 **CERTIFICATE**

7 I, Toni Doyle Tusa, CCR, FCRR, Official Court
8 Reporter for the United States District Court, Eastern District
9 of Louisiana, do hereby certify that the foregoing is a true
10 and correct transcript, to the best of my ability and
11 understanding, from the record of the proceedings in the
12 above-entitled and numbered matter.

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s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter

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