

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

CLIFFORD K. BRAMBLE, JR., and)	
KIRK PARKS,)	
)	
Plaintiffs,)	
)	CIVIL ACTION
v.)	
)	FILE NO. 2018-CV-301230
KEVIN L. RATHBUN,)	
)	
Defendant.)	

PARTIAL MOTION TO DISMISS AND BRIEF IN SUPPORT

Pursuant to O.C.G.A. § 9-11-12(b)(6), Defendant Kevin L. Rathbun (“Rathbun”) moves to dismiss Count Three of Plaintiffs Clifford K. Bramble, Jr.’s (“Bramble”) and Kirk Parks’ (“Parks”) (Bramble and Parks are sometimes referred to collectively as “Plaintiffs”) Complaint for Declaratory Judgment (the “Complaint”).

Plaintiffs’ only substantive claims underlying their claims for attorneys’ fees are for declaratory judgment. Plaintiffs seek a declaratory judgment based on their “uncertainty” regarding their rights, status, and legal relations. However, Georgia law is clear that a claim for fees pursuant to O.C.G.A. § 13-6-11 cannot be based on such declaratory judgment claims. Additionally, Plaintiffs do not seek any compensatory damages, and thus cannot recover attorneys’ fees. Plaintiffs’ Count III therefore fails as a matter of law, and should be dismissed.

FACTUAL BACKGROUND

Accepting Plaintiffs’ allegations as true, this case is about a “dispute between three members ... who own varying portions of each of [Kevin Rathbun Steak, LLC, Krog Bar LLC, SteakBar, LLC and 154 Krog Street, LLC (collectively, the “Companies”)].” (Compl. ¶ 1.) Plaintiffs have resigned from their positions with the Companies, and the parties disagree as to whether, under the Companies’ operating agreements, this gives Rathbun and/or the Companies the right to buy out Plaintiffs’ membership interests and, if so, for what amount. (Id. at ¶¶ 31-52.)

Plaintiffs allege three counts based on this disagreement. Counts One and Two are for declaratory relief, under which Plaintiffs seek declaratory judgment regarding the parties’ rights, status, and legal relations under the Companies’ operating agreements, which Plaintiffs allege remain “uncertain[n].” (Compl. ¶¶ 58-59, 65-66.) Count Three seeks an award of Plaintiffs’ attorneys’ fees and expenses of litigation pursuant to O.C.G.A. § 13-6-11. Plaintiffs do not seek any compensatory damages.

ARGUMENT AND CITATION TO AUTHORITY

I. Legal Standard

Pursuant to O.C.G.A. § 9-11-12(b)(6), a claim may be dismissed where it fails to state a claim upon which relief may be granted. “The main consideration

of such a motion to dismiss is whether, under the assumed set of facts, a right to some form of legal relief would exist. If material allegations are missing from a pleading, then the pleading fails.” *Cumberland Contractors, Inc. v. State Bank & Trust Co.*, 327 Ga. App. 121, 126 (2014).

Construing the allegations of the Complaint in the light most favorable to Plaintiffs, Count Three should be dismissed.

II. Plaintiffs’ Claim for Attorneys’ Fees Fails to State a Claim upon which Relief Can Be Granted.

A. Plaintiffs’ claim for attorneys’ fees fail because they seek a declaratory judgment and allege they are uncertain as to their rights.

Under Georgia law, to state a viable claim for declaratory relief, one must allege the existence of some “uncertainty” or “insecurity” with respect to the parties’ rights, status, and other legal relations. O.C.G.A. § 9-4-1.

On the other hand, the existence of a bona fide controversy between the parties negates an O.C.G.A. § 13-6-11 claim. Gen. Hosps. of Humana, Inc. v. Jenkins, 188 Ga. App. 825, 829 (1988). Accordingly, where a plaintiff’s O.C.G.A. § 13-6-11 claim is based on a declaratory judgment claim seeking to resolve a dispute over uncertain contract rights between the parties, a plaintiff is not entitled to recover fees:

“Uncertainty” and “insecurity” are, by definition, necessary before the courts will entertain an action for a declaratory judgment, and its purpose is to permit one to seek direction from the courts as to the propriety of

future conduct which might jeopardize one's interest. Absent this requirement of uncertainty on the part of appellee, no declaratory judgment would have been possible. However, this same requirement of uncertainty makes the award of attorney fees under OCGA § 13-6-11 to appellee in this action impossible.

Jenkins, 188 Ga. App. at 828 (internal citation omitted); see also Eden v. Schinazi,

Case No. 2012-CV-224395, 2015 WL 10384360, *11 (Ga. Super. Ct. 2015)

(“Respondents acted in accordance with their interpretation of the disputed rights...the uncertainty that allowed Eden to bring a declaratory judgment action precludes her from asserting a claim for attorneys’ fees.”) (emphasis added).

Plaintiffs allege there is uncertainty and insecurity regarding the parties’ rights under the Companies’ operating agreements giving rise to their declaratory judgment claims. Thus, they are not entitled to attorneys’ fees under O.C.G.A. § 13-6-11.

B. Plaintiffs’ claim for attorneys’ fees fails because Plaintiffs do not seek compensatory damages.

In order to prevail on a claim for attorneys’ fees under O.C.G.A. § 13-6-11, the defendant must have “acted in bad faith, ha[ve] been stubbornly litigious, or ha[ve] caused the plaintiff unnecessary trouble and expense....” Claims under O.C.G.A. § 13-6-11 are derivative in nature, and will only lie where there are underlying compensatory damages. D.G. Jenkins Homes, Inc. v. Wood, 261 Ga. App. 322, 325 (2003). See also Gardner v. Kinney, 230 Ga. App. 771, 772 (1998)

("OCGA § 13-6-11 does not create an independent cause of action. That statute merely establishes the circumstances in which a plaintiff may recover the expenses of litigation as an additional element of his damages.").

Here, there is no claim for monetary damages. Because there are no possible damages for Plaintiffs to recover in this case, Plaintiffs' claim for attorneys' fees should be dismissed.

CONCLUSION

For the foregoing reasons, Rathbun seeks dismissal of Count Three of the Complaint.

Respectfully submitted this 16th day of March 2018.

/s/ Alexa R. Ross

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CERTIFICATE OF SERVICE

I hereby certify that on this day I have served the foregoing **PARTIAL MOTION TO DISMISS AND BRIEF IN SUPPORT** by electronically filing it with the Clerk of the Court using the Odyssey eFileGA system, which will automatically send an email notification of such filing to all counsel of record.

This 16th day of March, 2018.

Alexa R. Ross
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