

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN L. PADGETT

Plaintiff,

v.

GEORGIA REPUBLICAN PARTY, INC

Defendant.

CIVIL ACTION FILE

NO: 2021CV354612

ORDER GRANTING SUMMARY JUDGMENT

This matter came before the Court on the Georgia Republican Party, Inc's (the "GAGOP") Motion for Summary Judgment. The Court heard oral arguments on August 22, 2023. Upon review of all the evidence presented, consideration of the oral arguments presented by counsel for each of the Parties, and review of the entire record of the case, the Court, for the reasons set forth below, hereby **GRANTS** the GAGOP's *Motion for Summary Judgment* in support of its counterclaim for breach of fiduciary duties against John L. Padgett ("Mr. Padgett").

FINDINGS OF FACT

The Court makes the following findings of fact and conclusions of law. Mr. Padgett was elected Chairman of the Georgia Republican Party in 2013. At the time of Mr. Padgett's election as Chairman, the public records of the Secretary of State reflect that the GAGOP was an unincorporated entity. On February 3, 2014, Mr. Padgett's personal executive assistant, Qiana Keith ("Ms. Keith") complained to her supervisor about the treatment she received, citing racial discrimination and offensive treatment she had allegedly endured while working under Mr. Padgett's administration (the "Racial Allegations"). Seven days after the "Racial Allegations," public records reflect that Mr. Padgett incorporated the GAGOP. Upon incorporating the GAGOP, Mr. Padgett also became the GAGOP's CEO and CFO.

On July 8, 2014, Ms. Keith filed her discrimination lawsuit against the GAGOP and Mr. Padgett in his capacity as Chairman of the GAGOP (the “Keith Lawsuit”) [NDGA 1:14-cv-02159-CAP]. Mr. Padgett was only named in his “official capacity” as Chairman of the GAGOP.

The GAGOP employed its then general counsel (who was handpicked by Mr. Padgett), Anne Lewis (“Ms. Lewis”) and her law firm, to defend the Keith Lawsuit. While the GAGOP was represented by Ms. Lewis, Mr. Padgett selected his own personal counsel. Mr. Padgett, on his own accord, hired Tex McIver of the law firm Fisher Phillips (“Fisher Phillips”) and signed an engagement letter with Fisher Phillips, whereby he agreed to be individually responsible for Fisher Phillips’ fees in the Keith Lawsuit.

At the time of the Keith Lawsuit, the case law in Georgia and the Eleventh Circuit surrounding official capacity suits was well settled. Suits against corporate officers in their “official capacity” failed as a matter of law and were consistently dismissed. Yet, despite having separate counsel, Mr. Padgett did not file a Motion to Dismiss the Keith Lawsuit from the onset.

On October 24, 2014, WSBTV reported that John Padgett had been sued for racial discrimination in the Keith Lawsuit (the “News Report”). Upon the airing of the News Report, Vanessa Dewberry (“Ms. Dewberry”), a former employee of Mr. Padgett’s ambulance company (“Southeast Ambulance”) contacted Ms. Keith’s counsel alleging that she had experience similar discriminatory treatment working for Mr. Padgett and Southeast Ambulance. Mr. Padgett subsequently received notice of Ms. Dewberry’s discrimination charge on November 18, 2014, and proceeded to hire Fisher Phillips and Cohen, Cooper, Estep & Allen, LLC (“CCE&A”) to represent him against Ms. Dewberry’s allegations.

On January 7, 2015, Ms. Keith filed the *Declaration of Vanessa Dewberry* in support of her discrimination claims against Mr. Padgett in the Keith Lawsuit. Mr. Padgett subsequently

attempted to resolve his dispute with Ms. Dewberry through an EEOC mediation, whereby it became apparent that Ms. Dewberry had a recording of alleged discrimination statements made by Mr. Padgett (the “Dewberry Tapes”). The record reflects the EEOC mediation was unsuccessful, and Mr. Padgett directed his counsel to challenge the use of the Dewberry Tapes.

On February 27, 2015, Ms. Dewberry initiated a discrimination lawsuit against Mr. Padgett, his wife, and Southeast Ambulance in the Northern District of Georgia (the “Dewberry Lawsuit”) [NDGA 1:15-cv-00603-MHC]. On March 2, 2015, the GAGOP and Mr. Padgett attempted to mediate the Keith Lawsuit (the “Keith Mediation”). Mr. Padgett attended the Keith Mediation on behalf of himself, and as the Chairman of the GAGOP and CEO, whereby he had the authority to settle the Keith Lawsuit. Present at the Keith Mediation were counsel for the GAGOP, and Mr. Padgett's personal counsel at Fisher Phillips.

The record reflects that the parties exchange settlement offers at the Keith Mediation. The record further reflects that while Mr. Padgett was considering an offer to resolve the Keith Mediation, the Atlanta Journal Constitution reported that Mr. Padgett was personally sued for discrimination by a former employee, to wit: Ms. Dewberry. Upon learning that he was sued in the Dewberry Lawsuit, Mr. Padgett terminated the Keith Mediation.

Mr. Padgett subsequently used the Keith Lawsuit, at the GAGOP's expense, to advance his personal defense in the Dewberry Lawsuit. The record is replete of instances whereby Mr. Padgett used the discovery powers in the Keith Lawsuit for his benefit in the Dewberry Lawsuit and purposefully timing the filing of motions in the Keith Lawsuit to benefit his litigation strategy in the Dewberry Lawsuit. As part of this strategy, Mr. Padgett was able to obtain the Dewberry Tapes through Discovery in the Keith Lawsuit and had the GAGOP pay the invoices of the Audio Visual Expert used to challenge the use of the Dewberry Tapes.

Notably, the record reflects that on May 6, 2015, Fisher Phillips prepared a draft *Motion to Dismiss* Mr. Padgett from the Keith Lawsuit. However, Mr. Padgett held off on filing the *Motion to Dismiss* until July 12, 2015 – after all the depositions were completed and almost eighteen months after the filing of the Keith Lawsuit. Such a delay in filing was not missed by the Federal Court, and the Magistrate Judge, in granting the *Motion to Dismiss*, found that Mr. Padgett’s delay in filing the *Motion to Dismiss* “is without a doubt inexcusable, because Padgett’s [sic] being sued in his official capacity should have triggered a motion to dismiss earlier in the case.” Mr. Padgett was dismissed from the Keith Lawsuit on February 9, 2016 – almost two years after the filing of the Keith Lawsuit.

The record reflects that the GAGOP was unable to settle the Keith Lawsuit while Mr. Padgett was in office. The GAGOP settled the Keith Lawsuit after Mr. Padgett’s term as Chairman ended.

On June 17, 2016, Mr. Padgett was sued by Fisher Phillips for failing to pay his legal fees. Mr. Padgett settled this dispute with Fisher Phillips and initiated the present action against the GAGOP seeking to be indemnified for his personal legal expenses in the Keith Lawsuit on September 16, 2021 (the “*Complaint*”). The GAGOP filed its Answer and Counterclaim on March 15, 2022 (the “*Answer and Counterclaim*”)

The Court proceeded to grant the Parties multiple discovery extensions. Despite the discovery extensions, Mr. Padgett failed to provide all responsive documents to the GAGOP’s discovery requests. The Court proceeded to grant the GAGOP’s *Motion to Compel* and Ordered Mr. Padgett to produce all responsive documents by February 2, 2023. The Court subsequently signed a scheduling Order on May 23, 2023 (filed May 24, 2023), whereby (1) Mr. Padgett was required to sit for his deposition by June 16, 2023, (2) all dispositive motions were due by June

23, 2023, and (3) all responses were due within thirty (30) days after the filing of the dispositive motions.

On June 23, 2023, the day of the dispositive motions' deadline, Mr. Padgett dismissed his *Complaint*. The GAGOP proceeded to timely file its *Motion for Summary Judgment* on its *Counterclaim* for Breach of Fiduciary Duty against Mr. Padgett.

Mr. Padgett failed to file a timely response to the GAGOP's *Motion for Summary Judgment*. On August 18, 2023, twenty-five (25) days late, Mr. Padgett filed an untimely response to the GAGOP's *Motion for Summary Judgment* alongside with an unsworn "*Declaration of John Padgett*" in support of his response.

CONCLUSIONS OF LAW

I. STANDARD

On a motion for summary judgment, the burden is on the movant to show that no jury question remains, and that the movant is entitled to judgment as a matter of law. O.C.G.A. §9-11-56(c). Only after the movant discharges its burden, is the non-movant required to come forward with evidence giving rise to a triable issue. *Wellstar Health Sys., Inc. v. Painter*, 288 Ga. App. 659, 660, 655 S.E.2d 251, 252 (2007). In reviewing a Motion for Summary judgement, the Court must view the evidence, and all reasonable inferences drawn from therefore, in the light most favorable to the nonmovant. *Parrish v. Chrysler Fin. Servs. Americas, LLC*, 332 Ga. App. 683, 683, 774 S.E.2d 746, 746 (2015). Once a party moves for summary judgment, the responding party has thirty (30) days to respond to the motion for summary judgment. *See* Uniform Superior Court Rule 6.2. The failure to file a timely response waives the non-movants right to present evidence in opposition to the motion for summary judgment. *Se. Sitecast, Inc. v. Buoncore*, 310 Ga. App. 907,

909, 714 S.E.2d 6868,688 (2011). The burden remains on the movant to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.*

II. MR. PADGETT'S UNTIMELY RESPONSE

Pursuant to Uniform Superior Court Rule 6.2, a party has thirty (30) days to respond after the service of a motion. A party's failure to respond within thirty (30) days does not create a default summary judgement. *McRae v. Hogan*, 317 Ga. App. 813, 817, 732 S.E.2d 853, 857 (2012). Rather, the effect of failure to timely file a response "waives the opponent's right to present evidence in opposition to the motion." *Id.*; *Buoncore*, 310 Ga. App. at 909 (2011).

Turning to the present case, this Court's *Scheduling Order* dated May 24, 2023, set a dispositive motion deadline for June 23, 2023, and gave responding parties thirty (30) days to file a response to dispositive motions. The record reflects that the GAGOP filed their *Motion for Summary Judgment* and supporting documents on June 23, 2023, Therefore, Mr. Padgett's response was due on or about July 23, 2023¹.

Mr. Padgett failed to file a response by July 23, 2023. Instead, Mr. Padgett filed an untimely response on August 18, 2023 – a mere two business days before the Court's scheduled oral arguments. Because Mr. Padgett failed to file a response within thirty (30) days, he has waived his right to present evidence in opposition to the motion. *Hogan*, 317 Ga. App. at 817 (2012); *Buoncore*, 310 Ga. App. at 909 (2011). As such, this Court will not consider any evidence presented by Mr. Padgett to oppose the GAGOP's *Motion for Summary Judgment*.

¹ Thirty (30) days from June 23, 2023, was Sunday, July 23, 2023. As the date fell on the weekend, the Court counts the next business day as the deadline to file a response.

III. A DECLARATION IS NOT AN AFFIDAVIT

Assuming Mr. Padgett had filed a timely response, which he failed to do, the Court cannot consider any of the “facts” referenced in Mr. Padgett’s response that are listed in the *Declaration* he filed on August 18, 2023, in support of his *Response to the GAGOP Motion for Summary Judgement*. Pursuant to Uniform Superior Court Rule 6.2, a response relying on allegations of stipulated facts must contain supporting affidavits or citations to evidentiary material on the record.

Here, Mr. Padgett submitted a *Declaration* to support his responsive pleading. The Court cannot consider this *Declaration* because a declaration is not the same as an affidavit. The case law in Georgia is well established as to what constitutes an affidavit. For an affidavit to be valid, it must conform to O.C.G.A. § 9-11-56(e) by satisfying three essential elements: (a) a written oath embodying the facts sworn to be in the affidavit; (b) the signature of the affiant; and (c) the attestation by an officer authorized to administer the oath that the affidavit was actually sworn by the affiant before the officer. *Roberson v. Ocwen Fed. Bank FSB*, 250 Ga. App. 350, 352, (2001); *Glenn v. Marta*, 158 Ga. App. 98,99 (1981). Conversely, a Declaration pursuant to 28 USC § 1746 is an unsworn declaration used in federal court.

In reviewing Mr. Padgett’s *Declaration*, it is clear to this Court that the *Declaration* fails to comply with three requirements to be a valid affidavit. Most notably, the *Declaration* was not sworn before an officer of the Court and is not notarized. *See Roberson*, 250 Ga. App. at 352 (2001). While a Declaration may be a proper legal instrument in the federal court system, there is nothing in the Georgia Civil Practice Act that allows a party to submit a Declaration as a substitute for an affidavit. SUMMARY JUDGMENT: DRAFTING AND FILING A SUMMARY JUDGMENT MOTION, OPPOSITION, AND REPLY (GA), Practical Law Practice Note w-000-4657 (explaining that [n]o provision in Georgia law authorizes the use of an unsworn declaration (by an attorney or other

person under penalty of perjury) in lieu of a sworn affidavit in superior and state court actions. Courts disregard unsworn declarations.) Therefore, Mr. Padgett's *Declaration* is an unsworn statement that cannot be regarded as an affidavit. *See Schluter v. Perrie, Buker, Stagg & Jones, P.C.*, 230 Ga. App. 776, 778, 498 S.E.2d 543, 546 (1998) (explaining that unsworn statements are not regarded as affidavits and do not constitute competent evidence to support a motion for summary judgment).

For the reasons set forth above, this Court **STRIKES** Mr. Padgett's unsworn *Declaration* and does not consider the unsworn *Declaration* when making its determination of summary judgment *Schluter*, 230 Ga. App. at 778 (1998).

IV. THE GAGOP MET ITS BURDEN ON SUMMARY JUDGMENT

It is well settled that corporate officers and directors have a fiduciary relationship to the corporation and must act in good faith. *Lambeth v. Three Lakes Corp.*, 357 Ga. App. 546, 549, 851 S.E.2d 181, 184 (2020). The Corporation and the officers have a duty to protect corporate property. *Id.* In the context of a non-profit corporation, the “‘fundamental rules and principles of law of profit and business corporation are equally applicable’, unless otherwise noted in the Georgia Non-Profit Code.” *Harris v. S. Christian Leadership Conf., Inc.*, 313 Ga. App. 363, 364, 721 S.E.2d 906, 908 (2011).

To state a claim for breach of fiduciary duty, a plaintiff must show (1) the existence of a fiduciary duty; (2) breach of that duty, and (3) damage proximately caused by the breach. *Ewing v. Scott*, 366 Ga. App. 466, 472, 883 S.E.2d 410, 415 (2023). An officer may try to avoid liability by invoking the business judgment rule. *See Fed. Deposit Ins. Corp. v. Loudermilk*, 295 Ga. 579, 761 S.E.2d 332 (2014).

Turing to the present case, the business judgment rule does not avail Mr. Padgett of liability. As the Magistrate Judge found in the Keith Lawsuit, Mr. Padgett's delay in filing a motion to dismiss was totally inexcusable.

As previously ruled, Mr. Padgett waived his right to present evidence in opposition to the GAGOP *Motion for Summary Judgment*. Due to this waiver, the burden is on the GAGOP to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law on its *Counterclaim* for breach of fiduciary duties. *Buoncore*, 310 Ga. App. at 909 (2011). A burden that the GAGOP has met.

The record reflects that Mr. Padgett was the Chairman, CEO, and CFO of the GAGOP. Based on these positions, it is undisputed that Mr. Padgett owed statutory fiduciary duties to the GAGOP and was required to perform his duties in good faith. O.G.C.A. §14-3-842. The GAGOP has established the first element of its breach of fiduciary duty claim.

Next, the record reflects that Mr. Padgett did not act like a prudent person and breached his fiduciary duties to the GAGOP by intentionally remaining in the Keith Lawsuit for his own personal benefit. That is, Mr. Padgett put his personal interest of protecting Southeast Ambulance and himself in the Dewberry Lawsuit over the interest of the GAGOP in resolving the Keith Lawsuit. Mr. Padgett's testimony in combination with the documents produced and motions filed by the GAGOP depict a harrowing picture of a non-profit's CEO and CFO disregarding his duties to the GAGOP and putting his personal interests first by (1) terminating the Keith mediation when he became aware that he was sued in the Dewberry Lawsuit, (2) refusing to settle the Keith Lawsuit, and (3) leveraging discovery and subpoena power in the Keith Lawsuit for his own personal gain in the Dewberry Lawsuit.

The record further shows that Mr. Padgett found it proper to use information gained in the Keith Lawsuit for his benefit in the Dewberry Lawsuit. By his own admission, Mr. Padgett believed taking such actions was proper because he was “paying for it”. This Court can only conclude that Mr. Padgett took these actions because he was aware that using the Keith Lawsuit as a vehicle to fight the Dewberry Lawsuit personally benefited him. Therefore, it follows that Mr. Padgett waited until discovery had closed in the Keith Lawsuit to file the *Motion to Dismiss* that should have dismissed Mr. Padgett from the onset of the litigation.

While this litigation strategy appears to have benefited Mr. Padgett personally, such actions were an abdication of the fiduciary duties Mr. Padgett owed to the GAGOP. Therefore, GAGOP has established the second element of its breach of fiduciary claim.

The final element of a breach of fiduciary duty claim is damages proximately caused by the breach. *Scott*, 366 Ga. App at 472 (2023). The record reflects that Mr. Mr. Padgett decision to expand the scope of the litigation in the Keith Lawsuit benefited him personally. As a result of this expansion, Mr. Padgett secured the Dewberry Recordings, was able to retain an expert to challenge the Dewberry Recordings, established that the Dewberry Tapes were manipulated, and had the opportunity to depose Ms. Dewberry in the Keith Lawsuit. Armed with the knowledge he obtained in the Keith Litigation, Mr. Padgett was able to destroy Ms. Dewberry’s credibility in the Dewberry Litigation. However, Mr. Padgett’s personal success came at a direct cost to the GAGOP.

The expansion of discovery in the Keith Lawsuit caused GAGOP to incur additional attorneys’ fees and expert fees defending the Keith Lawsuit – fees that would have never been spent if Mr. Padgett filed a Motion to Dismiss at the onset of the Keith Litigation. Moreover, Mr. Padgett’s decision to terminate the Keith Mediation because the news reported the Dewberry Lawsuit prevented the GAGOP from settling the Keith Lawsuit at mediation. Mr. Padgett was

more concerned about the optics surrounding his personal lawsuit than doing what was in the best interest of the GAGOP – settling the Keith Lawsuit.

For the reasons set forth above, the GAGOP has established all three elements of a breach of fiduciary claim. The Court will hereby schedule a hearing date on the amount of damages the GAGOP incurred as a result of Mr. Padgett’s breach of fiduciary duties to the GAGOP.

IT IS HEREBY ORDERED, that Mr. Padgett’s *Response to the GAGOP’s Motion for Summary Judgment* is untimely and cannot be considered by this Court;

IT IS FURTHER ORDERED, that the *Declaration of John Padgett* filed in support of its *Response to GAGOP’s Motion for Summary Judgment* is hereby **STRICKEN**;

IT IS FURTHER ORDERED, that the GAGOP *Motion for Summary Judgment* as to liability is **GRANTED**²;

IT IS FURTHER ORDERED, that a damages hearing shall be scheduled within forty (45) days of the entry of this *Order*.

SO ORDERED this 29 day of September 2023.



Alford J. Dempsey Jr., Senior Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

² The GAGOP has preserved its breach of fiduciary claim as it relates to campaign finance and reporting. It appears Mr. Padgett has refiled the *Complaint* that that he previously dismissed. Neither of these claims are before the Court as it relates to the GAGOP’s *Motion for Summary Judgment*.