

## SUPREME COURT OF GEORGIA

# RES-GA McDonough, LLC v. Taylor English Duma LLP

302 Ga. 444 (2017) · Decided October 30, 2017

### SUMMARY

The Georgia Supreme Court affirmed dismissal of RES-GA McDonough, LLC's legal malpractice action against Taylor English Duma LLP and its attorneys. The court held that RES-GA lacked standing to pursue the underlying fraudulent-transfer claim under the former Georgia Uniform Fraudulent Transfers Act because the claim was subject to Georgia's nonassignment statute. The court also rejected RES-GA's arguments that the Uniform Commercial Code or FIRREA preempted the nonassignment statute.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                              |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Georgia                                                                                                                                                                                                                                                                                                                     |
| WRITING FOR THE COURT | Boggs, Justice; All other Justices                                                                                                                                                                                                                                                                                                           |
| JURISDICTION          | Georgia                                                                                                                                                                                                                                                                                                                                      |
| DECIDED               | October 30, 2017                                                                                                                                                                                                                                                                                                                             |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                                     |
| PROCEDURAL POSTURE    | RES-GA appealed the trial court's dismissal of its legal malpractice, breach-of-fiduciary-duty, attorney-fee, and punitive-damages claims for failure to state a claim. The appeal was transferred from the Georgia Court of Appeals to the Supreme Court of Georgia because RES-GA raised a federal preemption issue.                       |
| STANDARD OF REVIEW    | A motion to dismiss for failure to state a claim is reviewed under the rule that dismissal is proper only when the allegations show with certainty that the claimant would not be entitled to relief under any provable facts, and the pleadings are construed most favorably to the claimant. The trial court's ruling is reviewed de novo. |
| PRECEDENTIAL VALUE    | Published, precedential opinion of the Supreme Court of Georgia.                                                                                                                                                                                                                                                                             |
| PARTIES               | RES-GA McDonough, LLC v. Taylor English Duma LLP, Taylor English Duma LLP's two attorneys                                                                                                                                                                                                                                                    |

### TOPICS

professional negligence

motions to dismiss

statutory interpretation

federalism

commercial litigation

## PRACTICE AREAS

legal malpractice

commercial litigation

civil procedure

statutory interpretation

federal preemption

## QUESTIONS PRESENTED

1. Whether RES-GA could establish the underlying UFTA claim necessary to support its legal-malpractice action despite Georgia's statutory prohibition on assigning rights of action arising from fraud.
2. Whether the Uniform Commercial Code displaced or preempted OCGA § 44-12-24's nonassignment provision as applied to RES-GA's UFTA claim.
3. Whether the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 preempted OCGA § 44-12-24 for downstream assignees of FDIC assets.
4. Whether the trial court properly dismissed the complaint for failure to state a claim.

## HOLDINGS

1. RES-GA lacked standing under the former UFTA to pursue the assigned fraudulent-transfer claim because OCGA § 44-12-24 made a right of action arising from fraud nonassignable, and RES-GA was a downstream assignee rather than the FDIC or its direct assignee. Because RES-GA could not have prevailed on the underlying claim, it could not establish the causation element of legal malpractice.
2. The UCC did not displace or preempt OCGA § 44-12-24 as applied to RES-GA's underlying UFTA claim.
3. FIRREA did not preempt OCGA § 44-12-24 with respect to downstream assignees of assets initially transferred by the FDIC.

## KEY QUOTATIONS

*“In a legal malpractice action, the plaintiff must establish three elements: (1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff.” (446)*

*“Thus, to prevail on [its] preemption claim, Appellant was required to show the ‘clear and manifest purpose of Congress’ to preempt [OCGA § 44-12-24]’ with respect to downstream assignees.” (450)*

## FACTUAL BACKGROUND

Greenleaf Developers and Construction, Inc. and its guarantor, Michael Langino, owed a debt that was assigned by the FDIC to Multibank and later to RES-GA. After RES-GA became the plaintiff in an underlying collection action, it alleged that Langino had fraudulently transferred real property to his wife and instructed Taylor English to pursue a claim under Georgia's former Uniform Fraudulent Transfers Act. Before the wife was added as a defendant, she sold the property to a bona fide purchaser, and RES-GA later obtained a judgment against Langino but could not execute against the property. RES-GA then sued Taylor English for malpractice, alleging that counsel's delay caused the loss of the property.

## PROCEDURAL HISTORY

Taylor English moved to dismiss, arguing that RES-GA could not establish a viable underlying Uniform Fraudulent Transfers Act claim and therefore could not establish legal malpractice. The trial court granted the motion to dismiss on the ground that RES-GA lacked standing to pursue the fraudulent-transfer claim and denied related motions as moot. The Supreme Court of Georgia affirmed.

## DISPOSITION

affirmed

## CASES CITED

- *Abramyan v. State of Ga.*, 301 Ga. 308, 309-310 (800 SE2d 366) (2017)
- *Leibel v. Johnson*, 291 Ga. 180, 181-182 (728 SE2d 554) (2012)
- *RES-GA Hightower, LLC v. Golshani*, 334 Ga. App. 176 (778 SE2d 805) (2015)
- *Security Feed & Seed Co. of Thomasville, Inc. v. NeSmith*, 213 Ga. 783 (102 SE2d 37) (1958)
- *Callaway Blue Springs, LLLP v. West Basin Capital, LLC*, 341 Ga. App. 535 (801 SE2d 325) (2017)
- *Merrill Ranch Props., LLC v. Austell*, 336 Ga. App. 722, 732 (3) (784 SE2d 125) (2016)
- *Alexander Properties Group v. Doe*, 280 Ga. 306, 309 (1) (626 SE2d 497) (2006)
- *Castillo-Solis v. State*, 292 Ga. 755, 763 (5) (740 SE2d 583) (2013)
- *O'Melveny & Myers v. Federal Deposit Insurance Corp.*, 512 U.S. 79, 85 (II) (114 S.Ct. 2048, 129 L.Ed.2d 67) (1994)
- *Norfolk S. Ry. v. Zeagler*, 293 Ga. 582, 598 (3) (a) (748 SE2d 846) (2013)
- *Babies Right Start, Inc. v. Ga. Dept. of Public Health*, 293 Ga. 553, 554 (1) (748 SE2d 404) (2013)
- *Ward v. McFall*, 211 Ga. 649, 651 (1) (593 SE2d 340) (2004)
- *Community & Southern Bank v. Lovell*, 302 Ga. 375 (807 SE2d 444) (2017)

## OPINION

BOGGS, J.

BOGGS, Justice. Plaintiff RES-GA McDonough, LLC (“RES-GA”) brought this legal malpractice action against Taylor English Duma LLP and two of its attorneys (collectively, “Taylor English”). RES-GA contends that Taylor English failed to timely assert a Uniform Fraudulent Transfers Act claim, thus damaging RES-GA’s ability to satisfy its judgment against a debtor.

Taylor English moved to dismiss the complaint, contending that RES-GA had failed to allege a viable underlying cause of action to support its malpractice claim. The trial court agreed and granted Taylor English’s motion to dismiss. From this order, RES-GA appeals.<sup>1</sup> For the reasons stated below, we affirm.

The facts, as alleged in RES-GA’s amended complaint, show that in November 2006, Greenleaf Developers and Construction, Inc. executed a promissory note and deed to secure debt in favor of

FirstCity Bank. In connection with that loan, Michael Langino, the personal guarantor, executed a total of three personal guaranties for the repayment of the note.

In 2009, FirstCity Bank was declared insolvent, and the FDIC was appointed as receiver. In February 2010, the FDIC assigned the Greenleaf note, deed to secure debt, and guaranties to Multibank 2009-1 RES-ADC Venture, LLC (“Multibank”).

In April 2010, Taylor English began representing Multibank in collection efforts on the note against Greenleaf and Langino. In September 2010, Taylor English filed suit on behalf of Multibank against Langino on the guaranties (“the underlying action”).

On September 13, 2010, Multibank assigned the note, guaranties and security deed to RES-GA. After a stay pursuant to Langino’s bankruptcy petition was lifted, in June 2012, RES-GA was substituted as the plaintiff in the underlying action. RES-GA alleges that “[a]round the time that [RES-GA] was substituted as the plaintiff in the [underlying [a]ction,” RES-GA informed Taylor English that in October 2008, Langino had transferred real property to his wife, Debbie Langino, in an apparent \*445fraudulent transfer.

Taylor English agreed to pursue setting aside that transfer under the former Georgia Uniform Fraudulent Transfers Act, OCGA § 18-2-70 et seq. (“UFTA”).<sup>2</sup> On August 10, 2012, the complaint in the underlying action was amended to assert UFTA claims against Michael Langino and to seek to set aside the transfer.

In January 2013, Taylor English recorded a notice of lis pendens regarding the UFTA claims, and also filed a motion to add Debbie Langino as a defendant in the underlying action. On February 21, 2013, however, while the motion remained pending, Debbie Langino sold the property to a third party.<sup>3</sup> The trial court refused to add the third party as a defendant in the underlying action, finding that he was a bona fide purchaser who took without notice of the UFTA claims against Debbie Langino.

On May 24, 2013, RES-GA obtained a judgment against Michael Langino. In 2015, RES-GA filed this action asserting claims of legal malpractice, breach of fiduciary duty, attorney fees, and punitive damages. It contends that because of Taylor English’s failure to assert an UFTA claim against Debbie Langino in a timely manner, it lost the opportunity to execute its judgment against the transferred property. The parties filed numerous additional pleadings.

Taylor English moved to dismiss the complaint; RES-GA responded and filed a supplementary response and amended its complaint; Taylor English filed an additional brief in support of its motion to dismiss and a motion for judgment on the pleadings, and RES-GA filed a motion to strike.

After oral argument, the trial court granted the motion to dismiss on the basis that RES-GA lacked standing to pursue the UFTA claim. It also denied the motion to strike and the motion for judgment on the pleadings as moot. This appeal followed.

We begin with the well-settled standard that a motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

If, within the framework of the complaint, evidence may be introduced which \*446will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

On appeal, a trial court's ruling on a motion to dismiss for failure to state a claim for which relief may be granted is reviewed de novo. (Citations and punctuation omitted.) *Abramyan v. State of Ga.*, 301 Ga. 308, 309-310 (800 SE2d 366) (2017).

We therefore look at the elements of RES-GA's legal malpractice claim in light of the underlying UFTA claims, in order to determine whether the trial court erred in dismissing the action. 1. "In a legal malpractice action, the plaintiff must establish three elements: (1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff." (Citations and punctuation omitted.)

*Leibel v. Johnson*, 291 Ga. 180, 181 (728 SE2d 554) (2012). And "[i]n order to establish the final element, the plaintiff must show that, but for the attorney's negligence in the underlying case, the plaintiff would have prevailed." (Citations and punctuation omitted.) *Id.* at 182.

The validity of RES-GA's legal malpractice claim therefore turns upon the merits of the underlying UFTA claim, which RES-GA contends that Taylor English did not timely pursue. At the time relevant to this action, former OCGA § 18-2-74 (a) provided in part: A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation... [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor [.]

Such a transfer could be avoided, or other remedies pursued, if the transferee did not take the property in good faith and for a reasonably equivalent value. See former OCGA §§ 18-2-77, 18-2-

78. However, the provisions applicable here defined a “creditor” only as “a person who has a claim,” see former OCGA § 18-2-71 (4), and “claim” as “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, \*447unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”<sup>4</sup> Former OCGA § 18-2-71 (3).

And, as the trial court correctly noted, we must also consider the separate nonassignment provision of OCGA § 44-12-24 (What rights of action may and may not be assigned): Except for those situations governed by Code Sections 11-2-210 and 11-9-406, a right of action is assignable if it involves, directly or indirectly, a right of property. A right of action for personal torts, for legal malpractice, or for injuries arising from fraud to the assignor may not be assigned.

Our Court of Appeals recently considered this Code section and its effect on a claim under UFTA in *RES-GA Hightower, LLC v. Golshani*, 334 Ga. App. 176 (778 SE2d 805) (2015). In a remarkably similar fact situation, Golshani personally guaranteed a note for a limited liability company and later defaulted. When the lender became insolvent, the FDIC, as receiver for the bank, assigned its interest in the debt to Multibank 2009-1 RES-ADC Venture, LLC, which in turn assigned its interest to RES-GA Hightower, LLC. Before that assignment occurred, Golshani had conveyed real property to his relatives in apparently fraudulent transfers.

RES-GA filed suit seeking to set aside the conveyances under UFTA, and the trial court granted summary judgment on the basis that RES-GA lacked standing due to the nonassignment provisions of OCGA § 44-12-24. *Id.* at 177-178.

The Court of Appeals affirmed, relying upon the nonassignment statute and this Court’s decision in *Security Feed & Seed Co. of Thomasville, Inc. v. NeSmith*, 213 Ga. 783 (102 SE2d 37) (1958), to hold that Multibank’s claim was a “right of action... arising from fraud” and thus not assignable. 334 Ga. App. at 178-179 (1) (a). While NeSmith predated the enactment of UFTA, the Court of Appeals concluded that NeSmith had not been superseded by UFTA because the plain language of UFTA evinced no intent to “displace [ ] NeSmith’s construction of the nonassignment statute, which fraud provisions have not been amended in any material way [Cit.]” *Id.* at 179-180 (1) (a).

Finally, the Court of Appeals noted that when the General \*448Assembly replaced UFTA in 2015, it for the first time expressly allowed subsequent assignees to pursue fraudulent transfer claims under UVTA, thus presumptively indicating a change in the existing law. *Id.* at 181-182 (1) (b).

The court therefore concluded that RES-GA lacked standing under UFTA to pursue the fraudulent transfer claim, and affirmed the trial court’s grant of summary judgment. The Court of Appeals has relied upon the nonassignment statute and NeSmith in subsequent decisions. See *Callaway Blue Springs, LLLP v. West Basin Capital, LLC*, 341 Ga. App. 535 (801 SE2d 325) (2017); *Merrill Ranch Props., LLC v. Austell*, 336 Ga. App.

722, 732 (3) (784 SE2d 125) (2016). We agree with the reasoning of the Court of Appeals in Golshani, Callaway, and Merrill, that our decision in NeSmith correctly stated the law until it was changed by the enactment of UVTA, which expressly states that it does “[n]ot apply to a transfer made or obligation incurred before July 1, 2015” or “to a right of action that has accrued before July 1, 2015.” Ga. L. 2015, pp. 996, 1029.5 RES-GA therefore had no standing to pursue a fraudulent transfer claim, and accordingly cannot demonstrate that “Tut for the attorney’s negligence in the underlying case, [it] would have prevailed.” (Citation and punctuation omitted.)

Leibel, *supra*, 291 Ga. at 182.6 2. RES-GA argues that OCGA § 44-12-24 conflicts with the Uniform Commercial Code because the note and guaranties were negotiable instruments. Therefore, RES-GA contends, its rights under the UCC, liberally construed as provided in OCGA § 11-1-103, preempt the nonassignment statute. RES-GA’s underlying claim, however, was not made upon the note and guaranties, but pursuant to UFTA as a petition to set aside a fraudulent transaction.

UFTA and the UCC contain identical language expressing the General Assembly’s intent to retain “the principles of law and equity,” including those pertaining to fraud, “[u]nless displaced by the provisions of this article.” See former OCGA § 18-2-80 (a); OCGA § 11-1-103 (b). Just as the plain language of UFTA shows no “clear indication in its language that displaces NeSmith’s \*449 construction of the nonassignment statute, which fraud provisions have not been amended in any material way,” Golshani, *supra*, 334 Ga. App. at 179-180 (1) (a), the plain language of the UCC shows no intent to displace the provisions of OCGA § 44-12-24.

Moreover, in the first sentence of that Code section, the General Assembly expressly removed two provisions of the UCC from its scope: “Except for those situations governed by Code Sections 11-2-210 and 11-9-406... Applying the rules of statutory construction, “*Expressum facit cessare taciturn*” (if some things are expressly mentioned, the inference is stronger that those omitted were intended to be excluded) and its companion, the venerable principle, “*Expressio unius est exclusio alterius*” (“The express mention of one thing implies the exclusion of another”), the list of actions in OCGA § [44-12-24] is presumed to exclude actions not specifically listed.

[Cits.] Alexander Properties Group v. Doe, 280 Ga. 306, 309 (1) (626 SE2d 497) (2006). The UCC therefore does not preempt the application of OCGA § 44-12-24 to RES-GA’s underlying claim under UFTA. 3. Finally, RES-GA asserts that OCGA § 44-12-24 is preempted by the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 (“FIRREA”).<sup>7</sup> It relies upon 12 USC § 1821 (d) (2) (A) (i), which provides: (A) Successor to institution.

The Corporation<sup>[8]</sup> shall, as conservator or receiver, and by operation of law, succeed to — (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, account holder, depositor, officer, or director of such institution with respect to the

institution and the assets of the institution[.] Acknowledging that FIRREA contains no language “stating that [its application] extended to subsequent assignees,” RES-GA nevertheless asserts that it “stepped into the shoes” of the bank as a downstream or subsequent assignee, and therefore is not subject to the nonassignment provisions of OCGA § 44-12-24.

We disagree. \*450FIRREA and the decisions cited by RES-GA expressly refer only to the power of the FDIC to assign or transfer assets of the institution. RES-GA’s lengthy discussion of the rights and powers of the FDIC and the public policy questions involved therefore is wholly irrelevant to the question of whether powers granted to the FDIC may be extended to subsequent downstream assignments or transfers between private entities or individuals.<sup>9</sup> RES-GA argues that, because FIRREA “is silent on that issue,” it therefore “is not plain from its face that it does not extend to the FDIC’s subsequent assignees” (emphasis in original), and the trial court should have concluded that FIRREA preempted OCGA § 44-12-24.

But this contention runs directly counter to the well-established rule that “Georgia law is preempted only (1) where there is direct conflict between state and federal regulation; (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; or (3) where Congress has occupied the field in a given area so as to oust all state regulation.

[Cits.]” *Castillo-Solis v. State*, 292 Ga. 755, 763 (5) (740 SE2d 583) (2013). As the United States Supreme Court has noted, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.

[Cits.] *O’Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U. S. 79, 85 (II) (114 SCt 2048, 129 LE2d 67) (1994). “Thus, to prevail on [its] preemption claim, Appellant was required to show the ‘clear and manifest purpose of Congress’ to preempt [OCGA § 44-12-24]” with respect to downstream assignees. *Castillo-Solis*, supra, 292 Ga. at 763 (5). This RES-GA has failed to do, and OCGA § 44-12-24 therefore bars the underlying claim.

RES-GA is therefore unable to establish a claim for legal malpractice as a matter of law, and the trial court did not err in dismissing its complaint. Judgment affirmed. All the Justices concur. \*451Decided October 30, 2017. Neel, Robinson & Stafford, Shawn D. Stafford, Emilie O. Denmark, Kate B. Klug, for appellant. Freeman Mathis & Gary, Dana K. Maine, Kevin R. Stone, for appellees.

This appeal initially was filed with the Court of Appeals of Georgia, which transferred it to this Court because RES-GA asserts that OCGA § 44-12-24 is preempted by federal law. “The preemption doctrine is a product of the Supremacy Clause, see U. S. Const., Art. VI, Cl. 2, which

invalidates state laws that interfere with, or are contrary to, federal law.” (Citations and punctuation omitted.)

Norfolk S. Ry. v. Zeagler, 293 Ga. 582, 598 (3) (a) (748 SE2d 846) (2013). The preemption argument invokes this Court’s constitutional question jurisdiction. See Ga. Const. of 1983, Art. VI, Sec. VI, Par. II (1); Babies Right Start, Inc. v. Ga. Dept. of Public Health, 293 Ga. 553, 554 (1) (748 SE2d 404) (2013); Ward v. McFall, 211 Ga. 649, 651 (1) (593 SE2d 340) (2004).

The Uniform Fraudulent Transfers Act was superseded by Ga. L. 2015, p. 996, effective July 1, 2015, and is now known as the Uniform Voidable Transactions Act (“UVTA”). Debbie Langino was added to the underlying action as a party defendant on March 7, 2013. Those definitions now provide that “ ‘Creditor’ means a person who has a claim, regardless of when the person acquired the claim, together with any successors or assigns,” (emphasis supplied) OCGA § 18-2-71 (4), and that “ ‘Claim,’ except for claim for relief, means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” (Emphasis supplied.)

OCGA § 18-2-71 (3). RES-GA’s argument that it should not be bound by Golshani because that decision changed the applicable law is therefore without merit. While acknowledging that “the trial court did not explicitly state it was using that analysis,” RES-GA argues that the trial court improperly evaluated its legal malpractice claim by considering evidence and “reached a fact-based conclusion” inappropriate for a motion to dismiss.

RES-GA also argues that dismissal was inappropriate because standing was never challenged in the underlying action, and whether a challenge would have been asserted and would have been successful, was a question of fact. But in the absence of standing, as a matter of law RES-GA could not have prevailed in the underlying action. Consequently, RES-GA cannot show the third element of its claim for legal malpractice under any state of provable facts asserted in support of its allegations.

RES-GA Hightower, LLC attempted to assert preemption by FIRREA in Golshani, supra, but the Court of Appeals found that the argument was waived because it was raised for the first time on appeal. 334 Ga. App. at 182 (2).

The term “Corporation” means the Federal Deposit Insurance Corporation. 12 USC § 1811 (a). Another case decided today, Community & Southern Bank v. Lovell, 302 Ga. 375 (807 SE2d 444) (2017), is distinguished on its facts because it involves a direct assignee of the FDIC rather than a subsequent downstream assignee such as RES-GA.