IN THE COURT OF APPEALS
STATE OF GEORGIA

DIANA HUMBLE, Cross-Appellant/Plaintiff,	:	Case No. A23A0205
v.	:	
MALCOLM SIDNEY MOORE, JR., Cross-Appellee/Defendant.	:	

BRIEF OF CROSS-APPELLANT

COMES NOW, DIANA HUMBLE, Cross-Appellant/Plaintiff in the above-styled appeal (hereinafter "Plaintiff"), and respectfully shows the Court as follows:

I. PART ONE

This cross-appeal raises the limited but interesting issue of the extent to which a trial court may deny a Plaintiff almost all of her requested discovery in a tort case while simultaneously finding the existence of a jury question on the same issues. A Summary of the Argument will be found in Part III-A, below.

A. Statement of Material Facts. In April, 2013, Plaintiff Diana Humble met Cross-Appellee/Defendant, Sidney Moore (hereinafter "Defendant") (R. 368, ¶ 2). The parties lived together for a short period of time when Defendant asked Plaintiff to marry him and confirmed that engagement with an expensive diamond ring. Thereafter, he introduced Plaintiff to friends, professional acquaintances, and relatives as his "fiancé" (R. 5, ¶ 5). According to her verified Complaint in this action

(R. 4-10), Plaintiff made important financial and life decisions in reliance on Defendant's promise to marry her, including selling her Mother's house, and disposing of furnishings that Defendant did not approve of (R. 5, ¶ 6). Following their engagement, the parties continued to live together for approximately three and one-half years, during which Defendant made excuses to delay their marriage until Plaintiff learned, on or about December 22, 2018, that Defendant was involved and had been involved during their relationship in a series of lewd and lascivious relationships with various prostitutes and women of ill repute (see R. 5, ¶ 3). At that time, Plaintiff broke off their engagement, separated from Defendant, and the parties have lived separate and apart ever since (R. 5, ¶ 7).

Plaintiff may raise additional facts germane to the merits of the case in her brief in the main appeal.

B. Course of Proceedings and Disposition in the Court Below. On December 23, 2019, Plaintiff brought the instant action, alleging Breach of Promise to Marry (Count I), Fraud (Count II), Trover (Count III), and Punitive Damages (Count IV) (R. 4-10). Subsequently, Plaintiff served written discovery on Defendant, as well as a number of third-party Requests for Production (see R. 27-44).[1] Defendant responded by filing objections to all of the third-party requests, essentially asserting

[1] It should be noted that at no point has Defendant propounded any written discovery, so everything discussed in this cross-appeal relates to discovery sought by Plaintiff.

that nothing sought by them was in any way discoverable (see R. 50-190). He also brought a Motion for Protective Order (R. 192, et seq.), relating to the written discovery served on him, and Plaintiff filed a Motion to Compel (R. 225, et seq.), relating to these issues.

After oral argument and additional briefing (R. 392-409), on February 8, 2021, the trial court entered an Order on Discovery Issues ((R. 410 (hereinafter "the 2021 Order")) granting Defendant's Motion for Protective Order and denying Plaintiff's Motion to Compel, effectively precluding much significant discovery in this matter, including *all* third-party discovery. At Plaintiff's request, the trial court granted a Certificate of Immediate Review (R. 417), which this Court, however, subsequently denied (R. 821).

The trial court did allow party depositions to be taken, although based in large part on that court's discovery order, Defendant refused to answer a number of deposition questions.

Subsequently, Defendant filed Motions for Partial Summary Judgment on Plaintiff's Breach of Promise (R. 649, et seq.) and Fraud (R. 663, et seq.) claims. In addition to opposing those motions, which are the subject of the main appeal, Plaintiff filed a Motion to Reopen Discovery pursuant to O.C.G.A. § 9-11-56(f) seeking

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The Court may also wish to take notice of the fact that discovery was delayed in this matter by Covid protocols.

to obtain additional evidence with which to oppose the summary judgment motions (R. 733, et seq.).

Following oral argument, the trial court on February 8, 2022[2] entered an Order denying Defendant's Partial Summary Judgment Motions (R. 807), which is the subject of the main appeal, and another Order denying Plaintiff's Motion to Reopen Discovery (R. 800 (hereinafter "the 2022 Order")). This cross-appeal is therefore from both the 2021 and 2022 Discovery Orders, and the reasons the trial court erred with respect to each are addressed hereinbelow.

C. Statement of Means by which Error Was Preserved. Pursuant to Rule 25(a)(1), Plaintiff shows that she preserved for the record her objections made to the rulings herein by filing her Brief in Opposition in the trial court (R. 225, et seq; 707 et seq.) and Request for Oral Argument (R. 741), followed by a timely Notice of Cross-Appeal pursuant to O.C.G.A. § 5-6-38(a) (R. 1).[3]

II. PART TWO

A. Enumeration of Errors.

Enumeration of Error No. 1

[2] Exactly one year after the 2021 Order.

[3] Even though the Orders enumerated as erroneous herein are not "final judgments," O.C.G.A. § 5-6-38(a) provides that "the appellee may present for adjudication on the cross appeal all errors or rulings adversely affecting him…."

The trial court erred in its February 8, **2021** Order on Discovery Issues, which denied Plaintiff's Motion to Compel Discovery and granted Defendant's Motion for Protective Order.

Enumeration of Error No. 2

In the event this Court finds on the present record an insufficient evidentiary basis for the trial court's denial of summary judgment, that court erred in its February 8, **2022** Order on Motion to Reopen Discovery.

B. Statement of Jurisdiction. This Court, and not the Supreme Court, has jurisdiction of this appeal because it is not within the classes of cases reserved to the Supreme Court by reason of Ga. Const., Art. VI, § VI, ¶¶ II and III, and jurisdiction is therefore proper in this Honorable Court pursuant to Ga. Const., Art. VI, § IV, ¶ III. Moreover, this cross-appeal is authorized by O.C.G.A. § 5-6-38(a), as discussed in Part I-C, above.

III. PART THREE

A. Summary of the Argument. Although the trial court is granted broad discretion in ruling on discovery issues, that discretion is not unlimited, and must not be exercised in a way that prevents a party from proving her case, including on the issue of damages. Here, Defendant had the burden in the trial court of establishing that his discovery objections were well grounded in law and fact. This is something

he wholly failed to do. Instead, he essentially provided nothing in the way of discovery except for a series of blanket objections, and sought to turn the discovery process into a back-door summary judgment proceeding by asking the trial court to determine the sufficiency of Plaintiff's legal allegations, something that is wholly out of place at that stage of the case. Plaintiff will first address the 2021 Order (Enumeration of Error No. 1), and then the 2022 Order (Enumeration of Error No. 2).

B. Statement of the Standard of Review. "While the trial judge has a discretion as to limiting discovery, in a situation of this sort where the issue is vital to plaintiffs' remaining in court we find the refusal to permit plaintiffs at least a reasonable opportunity to establish their basis for [the claim] to constitute an abuse of discretion." *Camp v. Sellers & Co., Ltd.*, 158 Ga. App. 646, 647 (1981). Courts should "[keep] in mind that the discovery procedure is to be construed liberally in favor of supplying a party with the facts," (*Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 210 (2000)), and also that "[w]hile the extent of discovery is generally within the discretion of the trial court judge, this discretion must be based on sound legal analysis with an eye to promoting the purpose of discovery and limiting its abuse." *Medical Center, Inc. v. Bowden*, 327 Ga. App. 714, 716 (2014) (quoting *International Harvester Co. v. Cunningham*, 245 Ga. App. 736, 739(1) (2000) (citation and footnote omitted)).

This case involves a number of tortious or tort-like claims arising out of Defendant's breach of his promise to marry Plaintiff and conduct related thereto, such as consorting with prostitutes on the side. Obviously, a great deal of what Plaintiff needs to prove these claims (cell phone records, credit card receipts, etc.) is in the possession of Defendant or his vendors and can only be obtained by discovery. However, Defendant objected to, and the trial court upheld, Plaintiff's obtaining discovery of almost anything beyond Defendant's name and address, thus denying Plaintiff much of the evidence she needs to prove her claims, including the issue of damages. In that respect, this case is like *International Harvester Co. v. Cunningham*, 245 Ga. App. 736 (2000). There, the plaintiff was injured by an allegedly defective crank handle on a disc harrow manufactured by the defendant. Although plaintiff's "expert had unlimited access to the crank handle" (*id*. at 736), the trial court refused to allow defendant's expert equal access to the crank handle as part of the discovery process. Noting that "[t]he goal of discovery is the fair resolution of legal disputes, 'to remove the potential for secrecy and hiding of material'" (*Id*. at 738 (quoting *Hanna Creative Enters. v. Alterman Foods*, 156 Ga. App. 376, 378(2) (1980)), this Court held:

> Discovery should ensure that a party is not placed at a disadvantage simply because it does not have custody of certain evidence…. While the extent of discovery is generally within the discretion of the trial court judge [cit.], this discretion must be based on sound legal analysis with an eye to promoting the purpose of discovery and limiting its

> abuse. Discovery should not be prohibited where the effect is to frustrate that purpose and prevent legitimate discovery. [Cits.] The trial court abused its discretion under the circumstances in this case. Accordingly, this case is reversed.

245 Ga. App. at 739. That is exactly the situation the trial court has placed Plaintiff in here, with Defendant having custody of almost all the relevant evidence, and unless the trial court's discovery orders are reversed, Plaintiff will be denied the means to prove her case, especially including the element of damages.

C. Argument and Citation of Authority.

1. The 2021 Order (Enumeration of Error No. 1). As narrated in Part I-B, above, both parties moved for relief as to all of the written discovery, and the trial court, very early on in the case and before any depositions had even been taken, essentially disallowed all of the disputed written discovery, holding in effect as a matter of law that the information sought was neither relevant nor "appear[ed] reasonably calculated to lead to the discovery of admissible evidence." O.C.G.A. § 9-11-26(b)(1). Although it is true that Plaintiff's discovery seeks the disclosure of some sensitive or embarrassing information, that is the nature of the evidence in a claim such as this. Plaintiff offered repeatedly to cooperate in the entry of an appropriate confidentiality agreement and/or protective order (R. 365), which was rejected by Defendant.

In her Motion to Compel and Response to Defendant's Motion for Protective Order (R. 225, et seq.), Plaintiff exhaustively broke down each of Defendant's discovery objections by category and by document, and provided legal authority why each objection was meritless and each document was discoverable. This involved some 16 pages of briefing, and as it is already in the record (R. 225-241), Plaintiff will here simply summarize her right to the discovery in question as to the disputed elements of her claim[4] as follows:

(a) Breach of Promise to Marry. As will be discussed further in the main appeal, the action for Breach of Promise to Marry continues to be recognized in Georgia. See *Kelley v. Cooper*, 325 Ga. App. 145(1) (2013) (en banc). Although the action is said to sound in contract, the measure of damages is more akin to that followed in tort actions. *Parker v. Forehand*, 99 Ga. 743 (1896); *Brown v. Douglas*, 104 Ga. App. 769 (1961). Here, Plaintiff alleged all the elements of a Breach of Promise claim in her complaint, including the gift of an engagement ring and Defendant holding the parties out to others as engaged (Complaint, ¶ 5). Clearly, under the broad rules governing civil discovery, she is entitled to discovery on this and the other counts of her Complaint. In *Ewing v. Ewing*, 333 Ga. App. 766 (2015), the wife sought discovery of "private" emails on the husband's iPhone, relevant to her

[4] Defendant did not move for partial summary judgment on Counts III and IV of Plaintiff's Complaint, so those issues are not addressed herein.

claim for adultery. The husband sought a protective order, and in upholding the trial court's denial of it, this Court referenced the following basic discovery rules:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" (Punctuation omitted.) OCGA § 9–11–26(b)(1). "[I]n the discovery context, courts should and ordinarily do interpret 'relevant' very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation." (Citation and punctuation omitted.) *Bowden v. The Medical Center, Inc.*, 297 Ga. 285, 291(2)(a) (2015).
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> "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (Punctuation omitted.) OCGA § 9–11–26(b)(1). Moreover, in divorce cases, … in which the equitable division of property is at issue, the conduct of the parties, including evidence of a spouse's alleged adultery, is relevant and admissible. See *Wood v. Wood*, 283 Ga. 8, 11(5) (2008). Accordingly, the wife is entitled to engage in discovery which might lead to admissible evidence of the husband's alleged adultery. See OCGA § 9–11–26(b)(1). Cf. *Smith v. Smith*, 293 Ga. 563, 566(5) (2013) (trial court did not abuse its discretion in denying husband's motion for new trial based on newly discovered evidence of wife's adultery where husband had opportunity to engage in discovery concerning the possibility of alleged adultery and he chose not to).

333 Ga. App. at 768. The instant case, which involves very similar conduct, should be governed by similar principles. As stated above, Plaintiff offered to enter into a confidentiality agreement relative to discovery, but Defendant rejected that offer.

(b) Fraud (Count II). Plaintiff also alleged fraud on the part of Defendant. She contends that Defendant never had any intention of marrying her as he had promised to do, because he continued to delay the promised marriage, despite promises to the

contrary, upon which she relied justifiably. As in *Kelley v. Cooper, supra*, the lack of any present intention of marrying Plaintiff on the part of Defendant is also evidenced, inter alia, by his multiple sexual relations with other women during the time of their engagement (R. 369, ¶ 3). In *Kelley*, "at the very time that he gave her a $10,000 ring and proposed marriage, [Kelley] was having an affair with another woman that began before his proposal to marry and continued after Cooper accepted the proposal." 325 Ga. App. at 148. Given Defendant's similar misconduct here, Plaintiff obviously should be allowed to conduct discovery to flesh out her allegations.

2. The 2022 Order (Enumeration of Error No. 2). Assuming this Court agrees that the trial court abused its discretion in the 2021 Order, as discussed above, this Enumeration is moot and this Court need not address it.[5] However, if the Court for some reason finds in the main appeal an insufficient evidentiary basis for the trial court's denial of summary judgment on the present record, before it makes any ruling on the merits, this Court should first consider the contention that the lower court erred in its 2022 Order denying Plaintiff's Motion to Reopen Discovery. Briefly:

> [W]hen a party is "faced with a motion for summary judgment and the unavailability of evidence to rebut such motion," a party must seek relief under OCGA § 9–11–56(f). *NationsBank, N.A. v. SouthTrust Bank of Ga., N.A.*, 226 Ga. App. 888, 895(2) (1997) (physical precedent

[5] Plaintiff is still asking to reopen discovery based on the erroneous grant of the 2021 Order, as discussed in Part III-C-1, above, but that would be pursuant to O.C.G.A. § 9-11-26, et seq., as opposed to the summary judgment statute.

only). See also *Thompson v. Tom Harvey Ford Mercury*, 193 Ga. App. 64 (1989). That statute provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken *or discovery to be had*, or may make such other order as is just.

915 Indian Trail, LLC v. State Bank and Trust Co., 328 Ga. App. 524, 533-34 (2014) (physical precedent only) (emphasis added). The test is whether the additional discovery sought will add anything of substance to the party's claim. *Id*. at 535 (citing *Dodson v. Sykes Indus. Holdings, LLC,* 324 Ga. App. 871, 875–876(1) (2013)). In such cases, "[a]s a general rule, this Court does not condone the grant of summary judgment while a motion to compel discovery is pending, unless it can be determined that the disallowed discovery would add nothing of substance to the party's claim" (Citation and punctuation omitted). *Parks v. Hyundai Motor America*, 258 Ga. App. 876, 877(1) (2002). The same reasoning should hold true when a motion to reopen discovery is pending, as was the case here, and for the reasons set forth in Part III-C-(1), above, it is clear that there is plenty of substantial evidence left undiscovered in this matter, which is exactly why Defendant is fighting it so hard.

Thus, it would be manifestly unjust for this Court to reverse on the main appeal and hold that summary judgment should have been granted, without allowing

Plaintiff the additional discovery she needs, and as a matter of due process should be entitled to, concerning matters that have become highly relevant due to Defendant's conduct of this litigation. For example, Plaintiff first discovered that Defendant was consorting with prostitutes by examining text messages on his cell phone (R. 572 (Pla. depo., p.129)). Yet Defendant, on advice of counsel, refused to answer any questions during his deposition about his cell phone or any other electronic media of his[6] (R.___[7] (Def. depo, pp. 26-27)). This refusal was based in part on the trial court's 2021 Discovery Order. The circumstances of this case, however, changed dramatically in light of the parties' deposition testimony, as discussed in Part III-C-1, above. At a bare minimum, Plaintiff should have been allowed to proceed with her third party discovery with respect to each of the matters to which Defendant refused to answer questions in his deposition.

As will be discussed more fully in the Appellee's Brief in the main appeal, Defendant, at least ten times in his deposition, invited a jury to draw inferences adverse to him in this case concerning his tortious conduct towards Plaintiff. Nothing could be more substantial or relevant to her claims than the actual evidence behind these privileged assertions. Thus, if this Court is inclined to determine that summary

[6] Defendant also repeatedly asserted his privilege against self-incrimination. The legal effect of this will be discussed in Appellee's Brief in the main appeal.
[7] Defendant's deposition was omitted from the initial record on appeal, and although the record has been supplemented, Plaintiff does not at this time know how it is paginated. Plaintiff will supply this cite in her response brief.

judgment should have been granted on the basis of the present record, as a matter of fundamental due process it should first remand and require the trial court to reopen discovery for the reasons specified herein, and allow Plaintiff to fully prove her case.

IV. CONCLUSION

Plaintiff/Cross-Appellant respectfully submits that the trial court clearly abused its discretion in forbidding discovery on issues as to which it simultaneously found a jury question, and she prays that this Court remand with directions that the requested discovery be allowed.

Cross-Appellant certifies that this submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 20th day of September, 2022.

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CERTIFICATE OF SERVICE

In accordance with Rule 6 of this Court and other applicable provisions of law, I hereby certify that, based upon a prior agreement with the recipient party I have this day served a PDF copy of the within and foregoing document via email upon all parties and counsel in this action, to:

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I further certify that there is a prior agreement with all parties and counsel herein to allow documents in a PDF format sent via email to suffice for service.

This 20th day of September, 2022.

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