

The Order of the Court is stated below:

Dated: May 23, 2019
05:23:39 PM

/s/ KEITH KELLY
District Court Judge



Matthew L. Lalli (6105)
Zaven A. Sargsian (14776)
SNELL & WILMER L.L.P.
15 West South Temple
Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101
Telephone: 801.257.1900
Facsimile: 801.257.1800
Email: mlalli@swlaw.com
zsargsian@swlaw.com

*Attorneys for Defendants R. Todd Neilson, D. Ray
Strong and Berkeley Research Group, LLC*

**IN THE THIRD DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

SUE SHREEVE, as the Co-Trustee of The
Thomas Williamson 101 Trust and The Sue
Shreeve 101 Trust; MICHAEL BRUNNER, as
the Trustee of The Patricia Brunner 101 Trust;
THOMAS D. WILLIAMSON, as Co-Trustee
of The Thomas Williamson 101 Trust and The
Sue Shreeve 101 Trust,

Plaintiffs,

v.

R. TODD NEILSON; D. RAY STRONG;
BERKELEY RESEARCH GROUP, LLC, a
foreign limited liability company; and DOES 1
through 50, whose true identities are unknown,

Defendants,

and

R. TODD NEILSON, court-appointed receiver,

**RULING AND ORDER CONVERTING
DEFENDANTS' MOTION TO DISMISS
AND GRANTING SUMMARY
JUDGMENT**

Case No. 180909358

Honorable Judge Keith Kelly

On January 28, 2019, Defendants R. Todd Neilson, D. Ray Strong, and Berkeley Research Group, LLC (“BRG”), (collectively “Defendants”) moved to dismiss Plaintiffs’ First Amended Complaint under Utah Rule of Civil Procedure 12(b)(6) (the “Motion”).¹ On February 22, 2019, Plaintiffs opposed the Motion. The Court heard oral argument on April 22, 2019. Defendants were represented at the hearing by their counsel, Matthew L. Lalli and Zaven A. Sargsian. Plaintiffs were represented at the hearing by their counsel Timothy Clark Dudley. Having considered the memoranda and oral arguments, the Court now enters the following ruling and order.

MOTION CONVERTED TO MOTION FOR SUMMARY JUDGMENT

Under Rule 12 of the Utah Rules of Civil Procedure, if on a 12(b)(6) motion, “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Here, matters outside the pleading were presented by Defendants and not excluded by the Court. The Court shall therefore treat Defendants’ Motion as one for summary judgment under Rule 56 of the Utah Rules of Civil Procedure.

STANDARD OF REVIEW

Summary judgment is appropriate when there is “no genuine issues to any material fact” and the “moving party is entitled to a judgment as a matter of law.” Utah R. Civ. P. 56(c). When a motion for summary judgment is properly supported, an adverse party may not rest on allegations only, but “by affidavits or as otherwise provided . . . must set forth specific facts showing that there is a genuine issue” of fact. Utah R. Civ. P. 56(e). “Absent a genuine issue of

¹ On January 29, 2019, Defendants filed an Errata to Motion to Dismiss. Plaintiffs did not object and the Court has accepted the corrected Motion to Dismiss.

material fact, ‘the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment.’” *Busch Corp. v. State Farm Fire & Casualty Co.*, 743 P.2d 1217, 1219 (Utah 1987). “[B]are contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude the entry of summary judgment.” *Schnuphase v. Storehouse Markets*, 918 P.2d 476, 477-78 (Utah 1996).

MATERIAL FACTS

In this case, there is no genuine dispute as to any material facts. In their Motion, Defendants provided numerous facts, none of which Plaintiffs dispute.

CONCLUSIONS AND RULING

Defendants’ Motion is granted on the following bases: First, the Receiver was authorized to act upon the Entities. The Entities—over which the Receiver was appointed—were subject to the jurisdiction of the California court, which entered the receivership order (the “Receivership Order”). This is significant because a California court can enter a receivership order concerning the management of a company which is subject to California jurisdiction, but which may have assets in other states. The receiver can then, pursuant to the order, manage the company wherever it is located and wherever its assets are located. Second, Plaintiffs fail to state a claim because they brought the Amended Complaint against Defendants individually, yet all of the alleged bad acts were done, if at all, by the Receiver and the Professionals in their official capacity and within the scope of their duties under the Receivership Order. Third, Defendants are entitled to judicial immunity because Defendants were acting within the scope of their duties under the Receivership Order. Fourth, this suit is barred by the anti-suit injunction in paragraphs 14 and 15(c) of the Receivership Order, which this Court recognizes and enforces based on interstate comity. Thus, the Court declines to adopt Plaintiffs’ argument asserting that the Court should abate the action, rather than dismiss, to allow Plaintiffs to obtain permission from the California court, which entered the anti-suit injunction. Fifth, the fact that the Receiver was

ultimately appointed ancillary receiver through this Court's Order Granting Petition to Appoint Ancillary Receiver and Give Effect to California Receivership Order ("Appointment Order") did not mean that he was without power prior to that time under the California Receivership Order to take actions in Utah and to be subject to immunity for those actions taken as a Receiver.

The Court does not address Defendants' remaining arguments that Plaintiffs' lawsuit is barred by the *Barton* doctrine or that Plaintiffs lack standing to sue directly.

ORDER

The Court converts Defendants' Motion to Dismiss to a motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure.

The Court grants Defendants' motion for summary judgment pursuant to Utah Rule of Civil Procedure 56 and dismisses Plaintiffs' Amended Complaint. Plaintiffs' Amended Complaint fails to state a claim for relief against Defendants in their individual capacity. Moreover, to the extent Plaintiffs' Amended Complaint alleges actions taken by Defendants in their official capacity as Receiver and the Professionals, it is barred because Defendants have judicial immunity. Plaintiffs filed this suit in violation of the anti-suit injunction in the Receivership Order. Thus, the Court declines to adopt Plaintiffs' argument that that the Court should abate the action, rather than dismiss, to allow Plaintiffs to obtain permission from the California court, which entered the anti-suit injunction. Finally, the fact that the Receiver was ultimately appointed ancillary receiver through this Court's Appointment Order did not mean that he was without power prior to that time under the California Receivership Order to take actions in Utah and to be subject to immunity for those actions taken as a Receiver. Therefore, the Amended Complaint must be dismissed.

Although all claims against Defendants are dismissed, this case shall remain open to allow for the administration of the ancillary receivership. Furthermore, nothing in this order prevents Plaintiffs from filing another complaint on grounds different from those asserted in the original or amended complaints here.

-----**END OF ORDER**-----

Pursuant to Rule 10(e) of the Utah Rules of Civil Procedure, this Order will be entered by the Court's signature at the top of the first page.

STIPULATED AS TO FORM:

/s/ Timothy Clark Dudley _____

Vernon C. Jolley

Timothy Clark Dudley

Attorneys for Plaintiffs

*(Signed by Filing Attorney with permission
from Timothy Clark Dudley)*

/s/ Sarah Goldberg _____

Annette W. Jarvis

Peggy Hunt

Sarah Goldberg

Attorneys for R. Todd Neilson, California

Court-Appointed Receiver

*(Signed by Filing Attorney with permission
from Sarah Goldberg)*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2019, I caused a true and correct copy of the foregoing **[PROPOSED] RULING AND ORDER CONVERTING DEFENDANTS' MOTION TO DISMISS AND GRANTING SUMMARY JUDGMENT** was served via the court electronic system upon the following:

Vernon C. Jolley
Timothy Clark Dudley
JOLLEY & JOLLEY, P.C.
37 West 9000 South
Sandy, Utah 84070
Attorneys for Plaintiffs

Annette W. Jarvis
Peggy Hunt
Sarah Goldberg
DORSEY & WHITNEY LLP
111 S. Main Street, 21st Floor
Salt Lake City, Utah 84111-2176
*Attorneys for R. Todd Neilson, California
Court-Appointed Receiver*

/s/ Susan Ballif_____