

STATE OF NORTH CAROLINA
CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 07 CvS 1400

TRACI BOLICK,)
Plaintiff)

vs.)

TODD SIPE: MOLLY MOPS CLEANING))
SERVICE, LLC, ESTON BUSINESS)
GROUP INCORPORATED, and ESTON)
INDUSTRIAL, LLC,)
Defendants.)

vs.)

JASON FINGER, WINK FINGER,)
Unknown Defendants, each acting in their)
personal capacity and doing business as)
“Classi Clean” and CLASSI CLEAN, INC)

**THIRD-PARTY DEFENDANT’S
BRIEF IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

THE Defendants, through counsel, file this Memorandum in support of the Third Party Defendant’s Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. This brief is in compliance with local Business Court Rules, including rule 15.8.

I. INTRODUCTION

Third-Party Defendants, Jason and Wink Finger submit this brief in support of their Motion for Summary Judgment and in defense of Defendant’s Third-Party Complaint. As to Third-Party Defendant’s, the Defendant’s Third-Party Complaint stands without supporting factual merit. The underlying lawsuit, filed by a sister against her brother, both of which worked together under the umbrella of a common business entity has various complicated, contractual and factual issues, none of which impact or concern the Third-Party Defendants. As such, Third-Party Defendants have been subjected to the rigorous nature of this legal action based on nothing

more than speculation and undocumented assumptions by the Defendant which have no basis in law nor fact.

On or about September 27, 2007, Third-Party Defendant's filed an Answer to Defendant's Third-Party Complaint in which all allegations of involvement or interference were denied. Third-Party Defendant's, by herein attached affidavits, provide the only factual record of the Defendant's alleged issues, and as such, constitute, along with the pleadings and supporting documents, the only evidence of Third-Party Defendant's actions. Despite numerous attempts to schedule depositions or informally mediate this matter, Defendant, Sipe has presented no specific evidence and has instead chosen to rely on nonexistent factual assumptions that clearly fall beneath even minimal factual scrutiny. Therefore, in spite of Defendant's assertions that Wink Finger and Jason Finger conspired with Plaintiff and committed tortious interference with contracts through a deliberate effort to fraudulently induce various entities, the evidence, supporting affidavits, and the scope of the law clearly indicate absolutely no specific claims nor relevant questions of fact that support the Defendant's broad accusations.

II. STATEMENT OF THE FACTS

The facts of the case at bar, as pertaining to Third-Party Defendant's are that Jason and Wink Finger are non-related acquaintances of Plaintiff, Traci Bolick. The Fingers, not being any part of the various business arrangements between Plaintiff and Defendant, Todd Sipe, were thrust into this action by Defendant Sipe under the auspice of fraudulent inducement and or conspiracy.

Defendant's Third-Party Complaint alleges the potential for Fraudulent Inducement to breach an alleged non-compete, which, even if found to be valid, does in no way encompass or

restrict any actions of Third-Party Defendants. Defendant's Third-Party Complaint further attempts to commingle alleged actions of Plaintiff with Third-Party Defendants while using the language of "intentions" to act, thus never fully alleging or attempting to acknowledge any actual breach. The Defendant's Fourth Claim for Relief, "Fraudulent Inducement" beginning with Complaint line 185 is the first mention of any potential action by Third-Party Defendants and even then merely states in line 193 that, "[u]pon information and belief, in September 2006, Plaintiff intended to start a competitive business with Third Party Defendant Jason Finger." Defendant's Third-Party Complaint goes on to allege Plaintiff and Third-Party Defendant had enough funds and conspired to sabotage Defendant's accounts, specifically the Lincoln Charter School account without providing specific allegations of such claims. Attached to the Motion for Summary Judgment are affidavits from Jason and Wink Finger, and other relevant factual material, which combined with the pleadings in this matter, provide the only factual evidence of these claims and thereby settle all factual issues on all matters pertaining to Third-Party Defendants.

III. LEGAL DISCUSSION

I. NO QUESTIONS OF FACT EXIST AS TO DEFENDANT'S CLAIMS OF CIVIL CONSPIRACY, FRAUDULENT INDUCEMENT, AND TORTIOUS INTERFERENCE

Summary judgment is proper if the pleadings, depositions, answers to interrogatories or admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. *N.C. Gen. Stat.* §1A-1, *N.C. R. Civ. P.* 56 (c)(2005). The purpose of summary judgment in North Carolina is to eliminate formal trials where only questions of law are involved by permitting the penetration of

an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. *Draughon v. Harnett County Bd. Of Educ.*, 158 N.C. App. 208, 211-12 (2004) *affd. without opinion* 358 N.C. 137 (2004).

The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact. *Id.* Once the moving party meets its burden, the nonmovant, in order to survive the summary judgment motion, must "produce a forecast of evidence demonstrating that the [nonmovant] will be able to make out at least a prima facie case at trial." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). **Additionally, a defendant may show he is entitled to summary judgment by: "(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense."** *Draughon v. Harnett County. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (internal quotation and citation omitted), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004). The nonmovant "may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005).

In all claims presented against the above named Third-Party Defendants the Defendant fails to specifically plead and factual illuminate the relevant elements of the particular claims thus creating the necessity for the granting of summary judgment in favor of Third-Party Defendants.

A. Civil Conspiracy

The Third-Party Defendants now turns to Defendant’s claim alleging Third-Party Defendants committed wrongful acts pursuant to a conspiracy. “A claim for civil conspiracy requires the showing of an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way that results in damages to the claimant.” *Dalton v. Camp*, 138 N.C. App. 201, 213, 531 S.E.2d 258, 266 (2000), *rev'd on other grounds*, 353 N.C. 647, 548 S.E.2d 704 (2001); *see also Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 373, 555 S.E.2d 634, 642 (2001). Plaintiff must also present evidence of an "overt act" committed by at least one conspirator committed in furtherance of the conspiracy. *Dalton*, 138 N.C. App. at 212, 531 S.E.2d at 267. Cases similar to the issue at bar have made clear that the claimant must “create more than a mere suspicion or conjecture in order to justify submission of the issue to a jury.” *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981).

In the present Third-Party Complaint, Defendant has presented no evidence or “overt act,” and relies completely on the speculation and suspicion of a relationship between Plaintiff and Third-Party Defendants. Understanding that Third-Party Defendants are outside operators, unrestricted by any alleged non-compete or prior working arrangement, Defendant nevertheless maintains that the Fingers, “intended” to act in a certain way. This alleged, “intention” is of itself not an overt act and is further unsupported by factual assertions or evidence sufficient to survive summary judgment.

B. Fraudulent Inducement

In the present case, Defendant alleges that Third-Party Defendants, Jason and Wink

Finger, and “Classi Clean,” acted in such a manner as to fraudulently induce alleged breaches by Plaintiff. For the purposes of this action, “[t]he essential elements of an action based on fraud are (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) which results in damage to the injured party. *Hunter v. Spaulding*, 97 N.C. App. 372, 377, 388 S.E.2d 630, 634 (1990). N.C. Gen. Stat. § 1A-1, Rule 9(b) (1992) further requires that a complaint charging fraud allege these elements with particularity. If the party fails to allege said elements with particularity, summary judgment is proper. *See Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 205, 377 S.E.2d 285, 289, cert. denied, 324 N.C. 578, 381 S.E.2d 774 (1989)(summary judgment proper on fraudulent representation claim where plaintiffs failed to allege defendants' intent at the time the alleged fraudulent misrepresentations were made and thus failed to satisfy Rule 9(b)). In, *Trull v. Central Carolina Bank & Trust Co.*, 117 N.C. App. 220 (1994), the Court agreed with Defendant’s argument that summary judgment was proper because plaintiff's complaint failed to allege the essential elements of fraud with particularity. They further found that, “[a] complaint charging fraud against a corporation must specifically allege the time and occasion of the misrepresentation or concealment of material fact and the individual who made the misrepresentation or concealment in order to satisfy the requirements of Rule 9(b). *Coley v. North Carolina National Bank*, 41 N.C. App. 121, 125, 254 S.E.2d 217, 220 (1979).

Here, Defendant simply alleges various unspecified “intentions” to act in certain ways without specifically describing any conduct by Third-Party Defendants, Jason and Wink Finger or “Classi Clean.” This failure to describe with particularity the actual false representation, or present any evidence as to intent to deceive or deceit in fact, coupled with no actual proof of

damages, makes any attempt to claim fraud invalid.

C. Tortious Interference with Existing and Prospective Contracts and Business Relations.

To establish a claim for tortious interference with contract, plaintiff must show:

"(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff." *Beck v. City of Durham*, 154 N.C. App. 221, 232, 573 S.E.2d 183, 191 (2002) (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)).

It is further understood that, "[i]n order to maintain an action for tortious interference with prospective advantage, Plaintiff must show that Defendants induced a third party to refrain from entering into a contract with Plaintiff without justification. Additionally, Plaintiff must show that the contract would have ensued but for Defendants' interference." *Daimler Chrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 585, 561 S.E.2d 276, 286, (*citing Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917 (1982)), temporary stay allowed, 355 N.C. 284, 560 S.E.2d 798 (2002).

Here, Defendant attempts to claim interference with contracts or other relations while submitting no such specific arrangements, including any such with Lincoln Charter School or any other alleged business, nor specifically alleging that Third-Party Defendants had knowledge of or intention to inducement breach of alleged contracts without justification.

In essence, Defendant has attempted with numerous claims to cast a net around Third-Party Defendants with only cursory connection to the Plaintiff, while neglecting to provide the court with any factual bait. The Defendant's Third-Party Complaint is thus heavy on assumption and "intentions" but provides no factual disclosures sufficient to survive Third-Party

Defendant's motion for Summary Judgment.

WHEREFORE, no genuine issues of material fact exist regarding Defendant's Third-Party Complaint filed against the above named Third-Party Defendants and as such, Third-Party Defendants respectfully request that the Court order that all the above claims be dismissed and Third-Party Defendants be granted any further relief deemed just and proper by the Court.

This the 31st day of December, 2007

SIGMON, SIGMON & ISENHOWER

Wes W. Barkley /s

Wes Barkley
Attorney for Third-Party Defendants
Post Office Box 88