

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 5938

ESSA COMMERCIAL REAL)
ESTATE, INC.,)
)
Plaintiff,)
)
v.)
)
FIVE TREES, LLC, KEITH)
CANDIOTTI, and MARK)
WALKER,)
)
Defendants.)

ORDER

THIS CAUSE, designated a mandatory complex business case by Order of the Chief Justice of the Supreme Court of North Carolina, pursuant to section 7A-45.4 of the General Statutes of North Carolina, and assigned to the undersigned Special Superior Court Judge for Complex Business Cases by Order of the Senior Special Superior Court Judge for Complex Business Cases, came before the court for hearing upon the Defendants' respective Motions to Dismiss, and was so heard on September 10, 2007; and

THE COURT, having considered the Defendants' Motions to Dismiss, the argument and briefing in support of and in opposition to the Motions to Dismiss, the Plaintiff's Motion to Amend Complaint and proposed Amended Complaint, appropriate matters of record as discussed herein, and the ends of justice, FINDS and CONCLUDES that:

I.

PROCEDURAL BACKGROUND

1. Plaintiff Essa Commercial Real Estate, Inc. (“Plaintiff” or “Essa”) filed its Complaint on April 27, 2007.

2. On July 16, 2007, Defendant Five Trees, LLC (“Five Trees”) filed its Motion to Dismiss (“Five Trees’ Motion”), pursuant to Rules 9(b), 12(b)(1), and 12(b)(6), North Carolina Rules of Civil Procedure (“Rule(s)”).

3. Also on July 16, 2007, Defendant Mark Walker (“Walker”) filed his Motion to Dismiss (“Walker’s Motion”), pursuant to Rules 9(b), 12(b)(1), and 12(b)(6).

4. Also on July 16, 2007, Defendant Keith Candiotti (“Candiotti”) filed his Motion to Dismiss (“Candiotti’s Motion”), pursuant to Rules 9(b), 12(b)(1), 12(b)(3), and 12(b)(6).

5. Five Tree’s Motion, Walker’s Motion, and Candiotti’s Motion (collectively, the “Motions to Dismiss”) have been fully briefed and argued, and are ripe for determination.

6. On August 6, 2007, Plaintiff filed its Motion to Amend Complaint (“Plaintiff’s Motion”) and proposed Amended Complaint. The period for briefing Plaintiff’s Motion has expired, and it is ripe for determination.

II.

THE PLAINTIFF’S CLAIMS

1. The allegations and claims of the Complaint and the proposed Amended Complaint are materially similar. Further, although it was filed subsequent to the Motions to Dismiss, the amendment does not prejudice the merits of Defendants’

Motions to Dismiss. Therefore, in the exercise of its discretion, the court CONCLUDES that the Plaintiff's Motion should be GRANTED. Rule 15(a).

2. In substance, the Plaintiff's Amended Complaint alleges that:

a. Essa is a corporation organized and existing under the laws of the State of North Carolina and operating with its principal place of business in Guilford County;

b. Upon information and belief, Five Trees is a limited liability corporation organized and existing under the laws of the State of North Carolina;

c. Upon information and belief, Candiotti is a citizen and resident of the State of Florida;

d. Upon information and belief, Walker is a citizen and resident of the State of Florida;

e. Upon information and belief, Walker and Candiotti have sufficient contacts with the State of North Carolina for the assertion of *in personam* jurisdiction by the Courts of North Carolina;

f. In or about the fall of 2003, Fred and Susan Rubenstein approached Essa and requested Essa's assistance in the construction, development and management of a retail shopping center to be located in Greensboro, North Carolina (the "Initial Project");

g. Fred Rubenstein represented to Essa that he had the financial ability to conduct such an undertaking, but that he required Essa's knowledge and expertise;

h. On November 4, 2003, Essa and Fred Rubenstein entered into a Project Consulting Agreement whereby Essa agreed to act as the exclusive project consultant until completion of the Initial Project, which was estimated to be December 30, 2005;

i. On November 4, 2003, Essa and Fred Rubenstein also entered into an Exclusive Representation Agreement (“Representation Agreement”) and a Listing Agreement of Property for Lease (“Listing Agreement”) in which Fred Rubenstein granted Essa the exclusive right to lease the property and otherwise act as his agent until April 30, 2011;

j. Thereafter, Essa began to provide valuable services towards the completion and success of the Initial Project;

k. In or about early 2004, Fred and Susan Rubenstein¹ admitted to Essa that they were struggling to meet the financial requirements of the Initial Project and the various agreements;

l. As a result of the financial condition of Fred and Susan Rubenstein² and at their specific request, Essa prepared detailed packages and met with prospective investors regarding the Initial Project, including, but not limited to Candiotti and Walker;

m. On or about April 5, 2004, Fred Rubenstein, Jeff Rubenstein (collectively, the “Rubensteins”) and Essa entered into a new or modified Project Consulting Agreement, Representation Agreement and Listing Agreement

¹ The Amended Complaint is unclear as to which of the Rubensteins are encompassed in this allegation; however, read in context, it appears to be Fred and Susan.

² See *infra*. n. 1.

(collectively the “Modified Agreements”; hereinafter, the Listing Agreement, Representation Agreement, November 4, 2003 Project Consulting Agreement and Modified Agreements are collectively the “Agreements”);

n. Upon information and belief, in or about April 2004, Candiotti and Walker agreed to partner with the Rubensteins in undertaking and completing the construction and development of the retail shopping center;

o. Both Candiotti and Walker represented to Essa that they had the financial ability and willingness to undertake and complete the construction, development and management of a larger retail shopping center (the “Big Project”; hereinafter the Initial Project and the Big Project are collectively the “Project”) and to fulfill the terms of the Agreements;

p. Thereafter, in reliance upon the representations of all Defendants, Essa provided additional valuable services toward the completion and success of the Big Project;

q. Thereafter, Essa continued, at the request of the Rubensteins, Walker and Candiotti (the “Partnership”), to provide valuable services pursuant to the Agreements and in addition thereto;

r. Upon information and belief, on or about November 5, 2004, the Rubensteins, Candiotti and Walker formally incorporated Five Trees with the North Carolina Secretary of State;

s. Upon information and belief, the Rubensteins transferred their interest in the Project and the Agreements to the Partnership and, subsequently, to Five Trees; although the Rubensteins continued thereafter to remain active in

the Big Project as principals and/or agents of the Partnership and, later, of Five Trees;

t. Thereafter, Essa continued, in reliance upon the representations of Defendants and at the request of Defendants, to provide valuable services to the Partnership and Five Trees pursuant to the Agreements and in addition thereto;

u. From time to time, the size of the retail center for which Essa was directed by Defendants to focus its efforts changed or shifted between a smaller, medium and larger-sized retail center;

v. At all times alleged herein, Defendants accepted the benefits of Essa's services, made some payments to Essa pursuant to the Agreements and, upon information and belief, otherwise assumed the rights and obligations of the Rubensteins under the Agreements;

w. As Essa's work toward the retail center proceeded, Defendants ceased making payments to Essa for its services, although they received the benefits of Essa's services;

x. Upon information and belief, Defendants formulated a scheme to use all of the valuable services of Essa (for which they had not yet fully paid), and sought to eliminate Essa from the retail center so that they could keep all of the profits for themselves and avoid payments to Essa;

y. In or about January of 2005, Defendants made additional misrepresentations to Essa in furtherance of their scheme. These misrepresentations included: (a) that Five Trees wanted to develop the smaller

project first with Essa, and then develop the larger project with Essa soon after;
and (b) that Five Trees accepted the obligations of a new agreement with Essa;

z. On or about February 14, 2005, Essa ceased work due to the failure and refusal of Defendants to pay money owed pursuant to the Agreements and for services rendered;

aa. Defendants wrongfully and prematurely terminated the Agreements; and failed to pay Essa monies owed for services rendered;

bb. Essa has performed services for the benefit of Defendants pursuant to and in addition to those set out in the Agreements;

cc. In performing such services, Essa conferred a non-gratuitous benefit upon Defendants;

dd. Defendants consciously accepted said benefits from Essa, but have failed to pay or reimburse Essa for said benefits and services;

ee. Defendants deceived Essa by means of false representations of material facts, concealment of material facts, or both;

ff. Among other things, Defendants falsely represented to Essa that:

i. They had the financial ability and willingness to undertake the development and construction of a retail shopping center;

ii. Essa would be the exclusive listing and managing agent for the retail shopping center;

iii. They would honor and uphold the Agreements entered into by the Rubensteins;

- iv. Five Trees accepted the obligations of a new agreement with Essa;
- v. They would enter into additional development projects with Essa if Essa would handle the Project; and
- vi. They had contacts in the retail and development businesses.
- gg. The misrepresentations made by Defendants were reasonably calculated to deceive Essa, and Defendants intended to deceive Essa or made such representations with reckless indifference as to their truth;
- hh. Essa reasonably relied upon the false representations made by Defendants and was, in fact, deceived by the representations of Defendants;
- ii. Essa could not have learned of the fraud of Defendants with due diligence;
- jj. Essa suffered damages and continues to suffer damages as a result of the fraud of Defendants;
- kk. The actions of Defendants were fraudulent and willful and wanton;
- ll. On or about March 6, 2006, arbitration proceedings (“the Arbitration”) were held before the Honorable Peter McHugh, pursuant to section 1-569.7 of the North Carolina General Statutes and the April 5, 2004 Project Consulting Agreement, by and between Essa and the Rubensteins;
- mm. The Arbitration, which lasted approximately six (6) days, arose predominantly out of the same events and issues as exist in this pending action, and all but one of the members of the Partnership and Five Trees, Walker, testified therein;

nn. At the conclusion of the Arbitration and after the submission of briefs by the parties, an award (“Arbitration Award”) was entered in favor of Essa in the amount of \$325,051.83 in liquidated damages arising out of the Project Consulting Agreement; and

oo. The Arbitration Award was confirmed by the Court and entered as a Judgment on or about September 27, 2006.

3. Based on such allegations, Plaintiff contends that Defendants breached the Agreements, have been unjustly enriched, defrauded Essa, committed unfair and deceptive trade practices, and are liable for both the Arbitration Award and punitive damages.

4. Accordingly, the five claims for relief stated in the Amended Complaint are Breach of Contract (First Claim for Relief), Unjust Enrichment (Second Claim for Relief), Fraud (Third Claim for Relief), Unfair and Deceptive Trade Practices (Fourth Claim for Relief) and Recovery of Arbitration Award (Fifth Claim for Relief).

5. Neither the Complaint nor the Amended Complaint bear any attachments.

III.

THE DEFENDANTS’ MOTIONS TO DISMISS PURSUANT TO RULE 12

1. The Motions to Dismiss each seek to dismiss the Amended Complaint, in part or in whole, pursuant to Rules 12(b)(1) and/or 12(b)(6). In this regard, the Defendants’ briefs in support of their respective Motions incorporate the arguments of each other. Candiotti’s Motion further seeks to dismiss the Amended Complaint pursuant to Rule 12(b)(3). However, such basis for dismissal has not been addressed in the Defendants’ briefing and no argument has been provided as to why the Amended

Complaint should be dismissed for improper venue or division. Accordingly, the court, in its discretion, declines to consider the Rule 12(b)(3) motion. See BCR 15.11 (“A motion unaccompanied by a required brief may, in the discretion of the Court, be summarily denied.”)

A.

LEGAL STANDARDS

2. Rule 12(b)(1):

a. Dismissal of an action is appropriate under Rule 12(b)(1) if the court lacks subject matter jurisdiction. Rule 12(b)(1).

b. A court lacks subject matter jurisdiction over a claim that is brought by a party without standing to bring such claim. *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006)(citation omitted). Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter. *Id.*

c. When determining the existence of jurisdiction over the subject matter under a Rule 12(b)(1) motion, the court may consider and weigh matters outside of the pleadings. *Cline v. Cline*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988); *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978).

3. Rule 12(b)(6):

a. Dismissal of an action is appropriate under Rule 12(b)(6) when the complaint fails to state claim upon which relief can be granted. Rule 12(b)(6).

b. When deciding a Rule 12(b)(6) motion, the well-pleaded allegations of the complaint are taken as true and admitted, but conclusions of law or

unwarranted deductions of facts are not admitted. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

c. A complaint fails to state a claim upon which relief can be granted when either (i) the complaint on its face reveals that no law supports plaintiff's claim, (ii) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (iii) some fact disclosed in the complaint necessarily defeats plaintiff's claim. *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986). However, a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond a reasonable doubt that plaintiff could prove any set of facts in support of his claim which would entitle him to relief. *Sutton*, 277 N.C. at 108, 176 S.E.2d at 169.

d. When determining whether a complaint states a claim upon which relief can be granted under a Rule 12(b)(6) motion, the court may consider documents that are the subject of the action and specifically referenced in the complaint. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60–61, 554 S.E.2d 840, 847 (2001) ("This Court has further held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant.")(citation omitted); *Coley v. N.C. Nat'l Bank*, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979) ("[b]ecause these documents were the subjects of some of plaintiffs' claims and plaintiffs specifically referred to the documents in their complaint, they could properly be considered by the trial court in ruling on a motion under Rule 12(b)(6)").

However, if other 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. Rule 12(b).

B.

DISCUSSION

4. In support of their Rule 12 motions, Defendants contend that the claims of the Amended Complaint were adjudicated in the Arbitration; and that -- pursuant to the doctrines of one satisfaction, *res judicata*, election of remedies, and/or collateral estoppel -- such claims are no longer justiciable or are otherwise barred as a matter of law and should therefore be dismissed pursuant to either Rule 12(b)(1) or 12(b)(6).

5. In this regard, Defendants point out that the Amended Complaint admits that “the Arbitration, which lasted approximately six (6) days, arose predominantly out of the same events and issues as exist in this pending action” (Am. Compl. ¶ 51.)

6. In substance, the Defendants argue that there is no construction of the Amended Complaint that escapes the preclusive effects of the prior Arbitration, because North Carolina’s:

a. One-satisfaction doctrine serves to bar the claims of the Amended Complaint since the Plaintiff was fully compensated for the same injuries in the Arbitration; and, accordingly, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6);

b. *Res judicata* doctrine prevents the Plaintiff from bringing this suit, which is based on the same cause of action as the Arbitration; and, accordingly,

the Amended Complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6);

c. Election of remedies doctrine required Essa to elect from whom it would seek recovery for its alleged injuries, and Essa elected to seek such recovery from the Rubensteins via the Arbitration; and, accordingly, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6); and

d. Collateral estoppel doctrine prevents Essa from further litigating the claims of the Amended Complaint since all issues raised therein were determined in the Arbitration; and, accordingly, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6).

7. Comparing the face of the Amended Complaint with the Arbitration Complaint,³ it is apparent that the claims of this action and those of the Arbitration are substantially similar. Indeed, the Amended Complaint borders on being identical to the Arbitration Complaint, although it alleges that Five Trees, Candiotti, and Walker committed those wrongs that the Arbitration Complaint attributes to the Rubensteins and/or Five Trees.

³ The Arbitration Complaint, dated December 5, 2005, which instituted the Arbitration and is attached as Exhibit D to Five Trees' Brief in Support of Motion to Dismiss; the Arbitration Award, dated August 2, 2006, which reflects the arbitrator's findings and conclusions resulting from the Arbitration and is attached as Exhibit B to Five Trees' Brief in Support of Motion to Dismiss; and the Order Confirming Arbitration Award and Judgment, dated September 27, 2006, which reduces the Arbitration Award to judgment and is attached as Exhibit E to Five Trees' Brief in Support of Motion to Dismiss, are each properly before the court in a Rule 12(b)(6) setting since the Amended Complaint makes specific reference to, and premises a claim upon, the Arbitration, the Arbitration Award, and the Order Confirming Arbitration Award and Judgment (Am. Compl. ¶¶ 50–53). Further, such documents are properly before the court in a Rule 12(b)(1) setting. Still further, Plaintiff expressly waived any objection it may have to the court's consideration of the pleadings, depositions, and testimony from the Arbitration or any of the previous civil actions between Essa, Five Trees, and the Rubensteins for the purposes of determining the merits of Defendants' *res judicata* and collateral estoppel arguments. (Pl.'s Br. Opp. Mots. Dismiss 6.)

8. On its face, the Amended Complaint seeks relief for events that culminated in Essa ceasing work related to the Project on or about February 14, 2005 (Am. Compl. ¶ 26), some nine months before the filing of the Arbitration Complaint.

i.

COLLATERAL ESTOPPEL

9. In North Carolina, collateral estoppel applies when (a) the issues to be concluded are the same as those involved in a prior action, (b) such issues were raised and actually litigated in the prior action, (c) those issues were material and relevant to the disposition of the prior action, and (d) the determination made of those issues in the prior action was necessary and essential to the resulting judgment. *Beckwith v. Lewellyn*, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990)(citation omitted). Such determination requires a very close examination of the matters actually litigated in the prior action, and if the underlying issues are not identical, collateral estoppel will not apply. *Id.*

10. Traditionally, it also was required that the party asserting the collateral estoppel was either a party to the earlier suit or in privity with such party. *See Thomas M. McInnis & Assocs., Inc., v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986) (explaining that such privity was often expressed as “mutuality of estoppel,” and required that both parties to the new action be bound by the prior judgment). However, North Carolina no longer requires mutuality of estoppel for the defensive use of collateral estoppel. *Id.* at 434–35, 349 S.E.2d at 560. That is, if the party against whom the estoppel is asserted had a full and fair opportunity to litigate an issue in the prior

action, and the determination of that issue was necessary to the judgment in the prior action, that party may be estopped from litigating an identical issue by anyone. *Id.*

11. An arbitration award that has been confirmed by a trial court may serve as the basis upon which collateral estoppel is applied. *See Murakami v. Wilmington Star News, Inc.*, 137 N.C. App. 357, 362, 528 S.E.2d 68, 70 (2000) (addressing the analysis necessary to determining the applicability of collateral estoppel when the arbitration award has not been converted to a judgment). When collateral estoppel does apply, it serves as an absolute bar to further litigation of the issues previously decided. *Id.* at 359, 528 S.E.2d at 69.

12. In the instant matter, the face of the Amended Complaint reveals that Plaintiff contends and/or concedes that:

a. The relief sought in this action is for events that culminated in Essa ceasing work related to the Agreements or the Project on or about February 14, 2005 (Am. Compl. ¶ 26);

b. Essa suffered damage from (i) breach of the Agreements (Am. Compl. ¶¶ 27–29), (ii) its provision of uncompensated services related to the Agreements and the Project (Am. Compl. ¶¶ 30–34), (iii) fraudulent conduct that Essa relied upon in providing services related to the Agreements and the Project (Am. Compl. ¶¶ 35–43), and (iv) unfair and deceptive conduct occurring during the course of Essa’s work related to the Agreements and the Project (Am. Compl. ¶¶ 44–48);

c. In support of its fraud claims, Essa alleged that the Defendants falsely represented that (i) they had the financial ability to undertake the

development of a retail shopping center, (ii) Essa would be the exclusive listing agent for the retail shopping center, (iii) they would honor and uphold the Agreements entered into by the Rubensteins, (iv) Five Trees accepted the obligations of a new agreement with Essa, (v) they would enter additional development projects with Essa if Essa would handle the development of the shopping center, and (vi) they had contacts in the retail and development businesses (Am. Compl. ¶¶ 25, 37);

d. The Defendants were agents and/or principals of the Rubensteins (Am. Compl. ¶ 19); the Rubensteins and the Defendants were partners (Am. Compl. ¶¶ 14, 17, 19), and/or; the Rubensteins transferred their interest in the Project and the Agreements to the Defendants, resulting in an assignment but not a novation (Am. Compl. ¶¶ 19, 22);⁴

e. The Rubensteins, Candiotti and Walker are the organizers, if not the members, of Five Trees (Am. Compl. ¶ 18); and

f. “[T]he Arbitration, which lasted approximately six (6) days, arose predominantly out of the same events and issues as exist in this pending action” (Am. Compl. ¶ 51.)

⁴ Notably, Essa will not be able to succeed on any theory that requires it deny that the Rubensteins were bound by the Agreements, because -- although the Amended Complaint alleges that the Rubensteins “transferred their interest in the Battleground properties, the Big Project and the Agreements to the Partnership and subsequently to Five Trees” -- the Arbitration Complaint and Arbitration Award, at a minimum, demonstrate that in this action Essa should be estopped from denying that the Rubensteins were bound by the Agreements. (*Compare* Arbitration Complaint ¶ 25 (“[Essa] seeks a declaratory judgment which declares and decrees that: (a) the Rubensteins are bound by the terms of the Agreements”) *and* Arbitration Award (holding that the Rubensteins were liable to Essa on the grounds that they were bound by one or more of the agreements); *with Whitacre P’ship v. Biosignia, Inc.*, 358 N.C. 1, 27–38, 591 S.E.2d 870, 887–95 (2004)(explaining that the discretionary election by the trial court to invoke the equitable doctrine of judicial estoppel is most appropriate when the estopped party (a) has persuaded a prior tribunal to accept a factual position, and then (b) takes a subsequent factual position that is clearly inconsistent with the accepted factual position of the earlier adjudication, and (c) the assertion of the inconsistent position would be unfair).

13. Further, a close examination of the Arbitration Complaint and the Arbitration Award reflects that in the Arbitration:

a. The relief sought by Essa was for events that culminated in Essa ceasing work related to the Agreements or the Project on or about February 14, 2005 (Arbitration Compl. ¶ 20);

b. Essa alleged that it suffered damages from (i) breach of the Agreements (Arbitration Compl. ¶¶ 26–28); (ii) its provision of uncompensated services related to the Agreements and the Project (Arbitration Compl. ¶¶ 29–33); (iii) fraudulent conduct that Essa relied upon in providing services related to the Agreements and the Project (Arbitration Compl. ¶¶ 34–42); and (iv) unfair and deceptive conduct occurring during the course of Essa’s work related to the Agreements and the Project (Arbitration Compl. ¶¶ 43–46);

c. In support of its fraud claims, Essa alleged that the Rubensteins falsely represented that (i) they had the financial ability to undertake the development of a retail shopping center, (ii) Essa would be the exclusive listing agent for the Initial Project, (iii) they would enter additional development projects with Essa if Essa handled the development of the retail shopping center, (iv) they had contacts in the retail and development businesses, and (v) they had assigned their rights and obligations under the Agreements to Five Trees, who would fulfill the terms of the Agreements and make payment to Essa for its services (Arbitration Compl. ¶ 36);

d. Essa raised the issue of what parties were bound by the Agreements and the respective rights and obligations of the parties under the Agreements (Arbitration Compl. ¶¶ 24–25);

e. Essa raised the issue of the Rubensteins relationship to the Defendants and the transfer of any interest in the Agreements or the Project from the Rubensteins to the Defendants (Arbitration Compl. ¶¶ 13, 14, 22–25);

f. Essa contended that the Rubensteins, Candiotti and Walker were the organizers, if not the members, of Five Trees. (Arbitration Compl. ¶¶ 13–14); and

g. The Arbitrator awarded Essa the sum of \$324,648.00, plus the sum of \$403.83 in full satisfaction of all claims submitted to the Arbitrator (Arbitration Award at 5 ¶¶ 1–7).

14. Upon such review and examination, it appears that the issues raised in this action regarding the damages suffered by Essa from the alleged (i) breach of the Agreements, (ii) unjust enrichment resulting from the services provided by Essa in relation to the Project, (iii) fraudulent conduct that Essa relied upon in providing services related to the Project, and (iv) any unfair and deceptive conduct occurring during the course of Essa’s work related to the Agreements and the Project, are identical to issues litigated in the Arbitration. Both actions require determination of the damages resulting from breach of the same contracts and the same work performed in relation to the same projects. Essa had a full and fair opportunity to litigate these issues in the Arbitration, and the issues were determined by the Arbitrator as a necessary part of the Arbitration Award (Arbitration Award at 5 ¶ 7 (“This Award is in full satisfaction of all claims

submitted to the Arbitrator. All claims not expressly granted herein are hereby denied.”).⁵

15. Accordingly, upon the facts of this case, taking the allegations of the Amended Complaint as true, the doctrine of collateral estoppel serves to bar Essa from relitigating the issue of its damages resulting from breach of the Agreements and/or those services it provided related to the Project before it ceased providing such services on or about February 14, 2005. *See Thomas M. McInnis & Assocs., Inc.*, 318 N.C. at 434–35, 349 S.E.2d at 560 (providing that “[u]nder the doctrine of collateral estoppel the plaintiff should be unable to augment an award which was rendered by a prior court in a case in which it was a party by institution of a second action on the very question decided by the prior court.”).

16. Therefore, the Defendants’ Motions to Dismiss pursuant to Rule 12(b)(6) should be granted in regard to those claims of the Amended Complaint that seek a determination of damages due Essa for Breach of Contract (First Claim for Relief), Unjust Enrichment (Second Claim for Relief), Fraud (Third Claim for Relief), and Unfair and Deceptive Trade Practices (Fourth Claim for Relief).

17. Collateral estoppel does not, however, provide a basis upon which to dismiss the Amended Complaint’s claim for Recovery of Arbitration Award (Fifth Claim for Relief). *See generally* N.C. Gen. Stat. § 1-113(4)(2007)(providing that when a

⁵ *C.f. Thomas M. McInnis & Assocs., Inc.*, 318 N.C. at 435–41, 349 S.E.2d at 561–64 (Billings, C.J., concurring in result)(concurring in the result reached by the majority but disagreeing with the application of collateral estoppel on the grounds that the relevant issue had not been determined on the merits by the judge in the prior trial, who had found that the plaintiff waived the determination of such issue); *Murakami*, 137 N.C. App. at 361, 528 S.E.2d at 71 (holding that language in an arbitration award that provided that the award addressed “damages for all personal injuries proximately caused by the collision [at issue]” indicated that the issue of the plaintiff’s compensatory damages had been raised and litigated in the arbitration -- so as to bar the relitigation of such issue pursuant to the doctrine of collateral estoppel -- since the amount of compensatory damages was a necessary outcome of the arbitration).

plaintiff has brought an action against one party jointly and severally liable upon the contract, and has obtained a judgment from that defendant that remains unsatisfied, the plaintiff may by separate civil action recover of another party who is jointly and severally liable upon the contract, upon proving such later defendant's joint liability -- notwithstanding that the later defendant was not named in the original action).

ii.

RES JUDICATA

18. In North Carolina the doctrine of *res judicata* applies to a judgment entered on an arbitration award as it does to any other final judgment. *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985). The doctrine provides that a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. *Thomas M. McInnis & Assocs., Inc.*, 318 N.C. at 428, 349 S.E.2d at 556.

19. In this jurisdiction, contracts joint in form are several in legal effect; therefore, the same cause of action is not involved when a plaintiff brings a second suit regarding the same contract against a defendant who is a privy of the defendant in the first suit. *Id.* at 429, 349 S.E.2d at 556 (citing section 1-72 of the North Carolina General Statutes, which provides that: "In all cases of joint contracts of partners in trade or others, suit may be brought and prosecuted against all or any number of the persons making such contracts."). Therefore, *res judicata* will not serve to bar such a second suit. *Id.*

20. Accordingly, *res judicata* does not provide grounds on which to dismiss the remaining claim of the Amended Complaint, under either Rule 12(b)(1) or 12(b)(6). *C.f. id.*, 318 N.C. at 435–41, 349 S.E.2d at 561–64 (Billings, C.J., concurring in result) (agreeing with the majority’s conclusion that section 1-72 of the North Carolina General Statutes permits a plaintiff to sue all or any number of the persons making a joint contract, even if that plaintiff has already sued and obtained a judgment against another party to the contract, and explaining that a satisfaction of such judgment would satisfy all debts of the joint obligors)(citing *Sherwood v. Collier*, 14 N.C. 380, 381 (1832)).

iii.

ONE SATISFACTION

21. Under this State’s one-satisfaction doctrine, a plaintiff cannot recover for losses for which he has already been compensated. *Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 138–39, 535 S.E.2d 594, 596 (2000). When applying the one-satisfaction doctrine in the face of a prior adjudication or settlement agreement, the court must determine the intended scope and effect of such prior resolution to determine whether it was intended to make the plaintiff whole. *Kogut v. Rosenfeld, CPA*, 157 N.C. App. 487, 491–92, 579 S.E.2d 400, 403 (2003).

22. A settlement agreement regarding the Arbitration Award, entered into by Essa and the Rubensteins, is attached as Exhibit F to Five Trees’ Brief in Support of its Motion, and was referenced by both the Plaintiff and the Defendants during oral argument. However, this agreement -- even if properly before the court -- contains

numerous contingencies, the scope of which the court is unable to determine at this stage of the litigation.⁶

23. Therefore, the court is unable to determine whether the Arbitration Award yet has been satisfied. Accordingly, at this stage of this civil action, the one-satisfaction doctrine does not provide a basis upon which to dismiss the remaining claim of the Amended Complaint.

iv.

ELECTION OF REMEDIES

24. North Carolina's election of remedies doctrine provides that once a party prosecutes one remedial right to judgment, that party has made a conclusive election that bars it from subsequently prosecuting an inconsistent remedial right. *Pete Wall Plumbing Co. v. Harris*, 266 N.C. 675, 685-86 147 S.E.2d 202, 209 (1966). Generally, the election of remedies doctrine prevents a party from pursuing a claim that is inconsistent with a claim it already has pursued to adjudication, and thereby serves to prevent judgment on inconsistent claims. *See Nye v. Lipton*, 50 N.C. App. 224, 229, 273 S.E.2d 313, 316 (1980) (holding that the election of remedies doctrine did not bar plaintiff from pursuing separate, consistent claims that arose out of the same transaction, even if the satisfaction of one would extinguish the other).

25. In support of their election of remedies argument, the Defendants point out that the Amended Complaint specifically alleges that the Rubensteins had an agent/principal relationship with the Defendants (Am. Compl. ¶ 19); and argue that the

⁶ In its brief in opposition to the Motions to Dismiss, Plaintiff lodged objections to consideration by the court of Exhibits H and F to Five Trees' Brief in Support of its Motion to Dismiss. Neither of these exhibits has been considered by the court in determining the Motions to Dismiss.

traditional rule is that the party seeking damages must elect whether he will hold the principal or the agent liable, and cannot hold both. In support of this argument, the Defendants cite, among other authority, *Howell v. Smith*, 261 N.C. 256, 134 S.E.2d 381 (1964), which provides that such rule ordinarily applies when an undisclosed principal of a contracting party becomes known to the aggrieved party before such time as suit is filed.

26. Whether or not Defendants' argument defeats certain theories of the Amended Complaint that may be inconsistent with theories Plaintiff propounded in the Arbitration, such argument does not, in a Rule 12 setting, provide grounds upon which to dismiss the remaining claim of the Amended Complaint, which may be supported by a theory consistent with the claims made in the Arbitration.

C.

CONCLUSION

27. Upon the face of the Amended Complaint and other documents properly before the court in a Rule 12(b)(6) setting, the court CONCLUDES that:

a. Defendants' Motions to Dismiss the Amended Complaint pursuant to Rule 12(b)(6) should be GRANTED, pursuant to the doctrine of collateral estoppel, as to the Claims of the Amended Complaint for Breach of Contract (First Claim for Relief), Unjust Enrichment (Second Claim for Relief), Fraud (Third Claim for Relief), and Unfair and Deceptive Trade Practices (Fourth Claim for Relief); and

b. Defendants' Motions to Dismiss the Amended Complaint should be DENIED as to the Claim of the Amended Complaint for Recovery of Arbitration

Award (Fifth Claim for Relief); whether such award has been satisfied so as to defeat Essa's claim remains to be determined in due course.

28. In light of the above, the court need not reach the merits of the Defendants' Motions to Dismiss pursuant to Rule 9.

29. The conclusions reflected in this Order would be no different under Rule 12(b)(1), as the written settlement agreement between Essa and the Rubensteins -- the only document discussed herein that is not properly before the court in a Rule 12(b)(6) setting, and whose consideration in such setting Plaintiff has not consented to, but which may be properly before the court in a Rule 12(b)(1) setting -- is without effect on the determinations herein. *See infra* Section III ¶ 22.

NOW THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it hereby is ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff Essa Commercial Real Estate, Inc.'s Motion to Amend Complaint is GRANTED, pursuant to Rule 15(a); and the Amended Complaint is deemed FILED in this action.

2. Defendants Five Trees, LLC, Keith Candiotti, and Mark Walker's Motions to Dismiss are GRANTED, pursuant to Rule 12(b)(6), in regard to the First through the Fourth Claims for relief of the Amended Complaint; and said Claims hereby are DISMISSED.

3. Except as granted herein, Defendants Five Trees, LLC, Keith Candiotti, and Mark Walker's Motions to Dismiss are DENIED.

4. The parties shall confer and submit a Case Management Report, pursuant to Rule 17 of the Business Court Rules, on or before July 15, 2008.

This the 13th day of June, 2008.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases