

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 12469

REGIONS BANK,

Plaintiff,

v.

REGIONAL PROPERTY DEVELOPMENT
CORP.,

Defendant,

And

REGIONS BANK,

Third-Party Plaintiff,

v.

LAWRENCE J. SHAHEEN AND J. MICHAEL
SHAHEEN, Individually,

Third-Party Defendants.

**REGIONS BANK'S BRIEF IN SUPPORT
OF AMENDED MOTION TO DISMISS
COUNTERCLAIM**

NOW COMES Plaintiff and Third-Party Plaintiff Regions Bank ("Regions"), through counsel, and pursuant to Rule 15 of the General Rules of Practice and Procedure for the North Carolina Business Court, and hereby submits its Brief in Support of its Amended Motion to Dismiss Counterclaim.

INTRODUCTION AND BACKGROUND

On or about May 24, 2002, Regions loaned \$745,000 to Lancaster Industrial Park, LLC ("Borrower" or "Lancaster") for a real estate development project. Defendant Regional Property Development Corp. ("Regional Property") is one of four members who collectively own Borrower. After several extensions, the loan finally came due in November 2005, but Borrower

failed to repay Regions. Thereafter, the other members of Borrower told Regions the loan remained unpaid because Defendant Regional Property did not have enough money to contribute its share of the loan payoff. In late February 2006, Regions accepted an offer from the other members of Borrower to purchase the loan so Regions could avoid the additional delay and expense of foreclosing on collateral that secured repayment of the loan. Regions did not sell the loan at a discount. Indeed, the sale of the loan discharged all further contractual obligations of Borrower and Guarantors on the defaulted loan, including the obligations of Larry and Michael Shaheen, who are the sole owners of Defendant Regional Property.

On May 24, 2007, Defendant filed a demand for arbitration against Regions before the American Arbitration Association ("AAA") asserting claims – allegedly arising out of the sale of the loan – for: (i) breach of fiduciary duty, (ii) aiding and abetting a breach of fiduciary duty; (iii) breach of the duty of good faith; (iv) breach of contract; and (v) unfair trade practices.

On June 22, 2002, Regions Bank filed a Complaint for Declaratory Relief asking this Court to find that Regions has no liability to Regional Property as a matter of law. Defendant Regional Property filed an Answer and Counterclaim on October 8, 2007. Regional Property's sole cause of action against Plaintiff Regions is a claim for aiding and abetting a breach of fiduciary duty.

On December 7, 2007, Regions filed a Motion to Dismiss and Reply Subject to Motion on the grounds that North Carolina courts have not recognized a claim for aiding and abetting breach of fiduciary duty in this context. On December 10, 2007, Regions filed an Amended Motion to Dismiss Counterclaim pursuant to N.C.G.S. §1A-12, Rule 12(b)(7), 17 (real party in interest) and 19 (necessary joinder).

**REGIONAL PROPERTY'S CLAIM FOR AIDING AND ABETTING
BREACH OF FIDUCIARY DUTY**

Regional Property, in its Answer and Counterclaim filed on October 8, 2007, alleges that Mark Carpenter (“Carpenter”), as a Member/Manager of Borrower Lancaster breached his duty to of good faith to Regional Property by purchasing the default loan from Regions. See Defendant’s Answer and Counterclaim at ¶21. Regional Property further claims that Carpenter’s actions were not in the best interests of either Borrower Lancaster or Regional Property and that Carpenter’s actions causes damage to Regional Property. Id. at ¶23-24. Regional Property alleges that as a result, Mark Carpenter received over \$600,000 in distributions from Lancaster that were not otherwise due to him. Id. at ¶18. By inference, Regional Property claims that it suffered damages as a result in the diminution of value of its share in Lancaster.

Regional Property further alleges that Regions was aware of Carpenter’s intention to breach his fiduciary duty and alleges that Regions participated in and provided substantial assistance to Carpenter.

Even taking all of Regional Property’s claims at face value, as required in a Rule 12(b)(6), Regional Property’s Counterclaim should be dismissed pursuant to N.C.G.S. §1A-1, Rule 12(b)(6), 12(b)(7), 17 and 19 for two main reasons. First, a claim for aiding and abetting a breach of fiduciary duty has never been recognized in North Carolina under these circumstances. Second, even assuming that there is a cause of action for breach of fiduciary duty, Regional Property cannot sustain a claim for injuries on its own behalf unless it alleges an injury “separate and distinct” to itself or the injuries arise out of a special duty running from the alleged

wrongdoer (in this instance, Regions) to the claimant (Regional Property). Regional Property's claims fail to meet either requirement.

I. North Carolina Courts do not recognize a claim for aiding and abetting breach of fiduciary duty in this context.

A civil action for aiding and abetting a breach of fiduciary duty has only been addressed by one North Carolina appellate court. Blow v. Shaughnessy, 88 N.C. App. 484, 364 S.E.2d 444 (1988). In Blow, the North Carolina Court of Appeals held that a claim for aiding and abetting a breach of fiduciary duty could be substantiated where there was (1) the existence of a securities law violation by the primary party; (2) knowledge of the violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation. Blow, 88 N.C. App. at 490, 364 S.E.2d at 447 (1988). However, the reasoning in Blow, was predicated on a review of existing federal court opinions pertaining to securities fraud cases based on a violation of Section 10(b) and the Securities Exchange Act of 1934 and Rule 10b-5. Blow, 88 N.C. App. at 489, 364 S.E.2d at 447 (1988).

In 1994, the foundations of the Blow decision were severely compromised when the United States Supreme Court held that there was no private cause of action for aiding and abetting a securities fraud violation. Central Bank of Denver v. First Interstate Bank, 176 U.S. 683, 114 S. Ct. 1439, 44 L. Ed. 638 (1994).

Since 1994, neither the North Carolina Supreme Court nor the North Carolina Court of Appeals have addressed the issue of whether or not a claim for aiding and abetting breach of fiduciary duty exists in the North Carolina. The United States Bankruptcy Court for the Middle District of North Carolina has recognized the claim. However, the decisions upholding a claim have been based entirely on the findings set forth in Blow and do not address the Central Bank

decision. See, In re, Lee Memory Gardens, 333 B.R. 76 (Bankr. M.D.N.C. 2005), In re Vendsouth, Inc., 2003 WL 22399581, *14-17 (Bankr. M.D.N.C. 2003). The United States District Court for the Eastern District of North Carolina has held that a claim for aiding and abetting a breach of fiduciary duty based on tort principals will survive in North Carolina. Equitable Life Assurance Soc’y of the U.S. v. Am. Bankers Ins. Co. of Fla., No. 88-535-CIV-5-H, 1995 U.S. Dist. LEXIS, 10880 at *34 (E.D.N.C. May 12, 1995).

On multiple occasions, this Court has expressed serious question as to whether or not such a claim exists in North Carolina. See, e.g., 2007 NCBC 33, ¶¶68-70 (noting “doubt” as to whether or not North Carolina recognizes claim for aiding and abetting breach of fiduciary duty); 2005 NCBC 2, ¶¶8-12 (noting that the decisions from the Bankruptcy Court rely on Blow, which ha been “eliminated” by Central Bank).

No binding authority exists to support a claim for aiding and abetting breach of fiduciary duty in North Carolina. Furthermore, no authority whatsoever exists to allow a claim for aiding and abetting breach of fiduciary duty by an individual member of a limited liability company against a lender that sold a defaulted loan and relieved the LLC of all further debt obligations.

II. Regional Property cannot make a claim against Regions in its individual capacity.

Even assuming that North Carolina does recognize a claim for aiding and abetting a breach of fiduciary duty, no claim can be made in a situation where an individual member of a limited liability company seeks recovery against a third party for loss of equity investment, which is exactly what Regional Property seeks to do in this case¹. While there is some conflict on the issue of whether or not a claim for aiding and abetting breach of fiduciary duty exists in North

¹ Regional Property has not asserted a derivative action pursuant to N.C.G.S. §57C-8-01.

Carolina, the law on individual claims made against third parties for a diminution in value of the corporate body is clear – absent very specific circumstances (which do not exist in this case) no such claim can be made.

In 2000, the North Carolina Supreme Court addressed the issue in a case of first impression. The Court held that absent specific circumstances, a limited partner lacks standing to maintain an individual suit against a third-party for a loss of its equity investment. Energy Investors Fund v. Metric Constructors, 351 N.C. 331, 525 S.E.2d 441 (2000). Specifically, the Court endorsed the “well-established rule . . . that shareholders cannot pursue individual causes of actions against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock.” Id., 351 N.C. at 333, 525 S.E.2d at 444² The Court noted that there were only two exceptions to the rule: (1) where claimant alleges a “separate and distinct injury,” or (2) the injuries result from a “special duty” from the alleged wrongdoer to claimant. Id., 351 N.C. at 333, 525 S.E.2d at 444

In the instant case, Regional Property cannot show that it meets the exception to either rule. Specifically, in its counterclaim, Regional Property fails to allege any injury to it that was not suffered by the other members of Lancaster. Instead, the only allegations of specific damages are from an alleged \$600,000 in distributions from Lancaster to Carpenter. See, Answer and Counterclaim at ¶18. Far from any “separate and distinct injury” to Regional Property, this allegation suggests that the injury resulted in a diminution in value to Regional Property’s

² It should be noted that the opinion also includes language explaining that the status of a partner in a limited liability corporation is analogous to a shareholder in a corporation. See also, Dawson v. Atlanta Design, 144 N.C. App. 716, 551 S.E.2d 877 (2001)(noting in a footnote that there is no reason why the law applied in Energy Investors should be any different to a limited liability company).

interests in Lancaster – the exact type of claim that is prohibited by the Energy Investors decision. Id., 351 N.C. at 335-6, 525 S.E.2d at 444.

The only other exception to the rule against an individual claim by a member or shareholder against a third party exists when the injuries arise out of some special relationship between the wrongdoer and the claimant. Id.

In this case, it is undisputed that there was no direct contractual relationship between Regional Property and Regions and that Regional Property’s claims arise out of the relationship between Lancaster and Regions in a lender/borrower capacity. Specifically, Regional Property alleges in its Counterclaim that the promissory note between Lancaster and Regions was “the basis of this lawsuit.” See, Answer and Counterclaim at ¶1.

Finally, even assuming that there is some “special relationship” between Regions and Regional Property that would allow Regional Property to bring its own claim against Regions *outside* the context of a derivative action, the existence of such relationship would still entitle Regions to a dismissal of Regional Property’s claim for aiding and abetting breach of fiduciary duty on the grounds that such claim requires that the abettor does not stand in a fiduciary relationship to the claimant. See, 2007 NCBC 33, ¶69 (stating that even assuming that North Carolina law recognizes a claim for aiding and abetting a breach of fiduciary duty, it applies only to third parties with no relationship to claimant); 2005 NCBC 2, ¶12 (noting that claim is redundant where there is allegation of fiduciary duty).

CONCLUSION

Accordingly, for the reasons set forth above, Regions respectfully prays that Regional Property's Claims against it be dismissed, with prejudice, pursuant to N.C.G.S. §1A-1, Rule 12(b)(6), Rule 12(b)(7), Rule 17 and Rule 19.

CERTIFICATE OF COMPLIANCE WITH BCR 15.8

The undersigned hereby certifies that this Brief in Support of Amended Motion to Dismiss Counterclaim is in compliance with BCR 15.8.

This 10th day of December, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that ***REGIONS BANK'S BRIEF IN SUPPORT OF AMENDED MOTION TO DISMISS COUNTERCLAIM*** was served on the parties in this matter as follows:

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This 10th day of December, 2007.

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