

NORTH CAROLINA
GRAHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 7

PHILLIPS AND JORDAN, INC.)

Plaintiff,)

vs.)

JOSEPH E. BOSTIC, JR., JEFFREY)
L. BOSTIC, MELVIN MORRIS, JAMES)
BOWMAN, TYLER MORRIS, BOSTIC)
DEVELOPMENT, LLC, AND BOSTIC)
DEVELOPMENT AT ASHEVILLE, LLC)

Defendants.)

**BRIEF IN SUPPORT OF
MOTION FOR RULE 11
SANCTIONS**

NOW COME Defendants Jeffrey L. Bostic and Joe E. Bostic, Jr. (collectively referred to as the “Bostics”), by and through their undersigned counsel, pursuant to Rule 11 of the North Carolina Rules of Civil Procedure, and respectfully submits this Brief in support of their Motion for Rule 11 Sanctions against Phillips and Jordan, Inc. (“Plaintiff”) and Plaintiff’s counsel, which Motion for Rule 11 Sanctions was filed with this Court contemporaneously herewith.

STATEMENT OF THE FACTS

Joe E. Bostic, Jr. (“Joe Bostic”) formed Bostic Brothers Construction Company in 1991 with his brother, Jeffrey L. Bostic (“Jeff Bostic”) for the purpose of constructing multi-family complexes. The company later expanded its operations to include the construction of student housing projects throughout the Southeast. On or about January 1, 2003, Joe Bostic sold his interest in the company and its affiliated entities to Melvin E. Morris (“Mel Morris”) and the company’s name was changed from “Bostic Brothers Construction” to “Bostic Construction, Inc.” to reflect Joe Bostic’s departure. After the sale, Mel Morris became a 66% owner and President of Bostic Construction, and Jeff Bostic became a Vice President and retained his 33%

ownership in the company. From and after January 1, 2003, Joe Bostic had no direct or indirect involvement with Bostic Construction or its related entities other than as a minority member in certain LLCs which owned projects being constructed by Bostic Construction. In those projects in which either Joe Bostic, Jeff Bostic or an affiliated entity held a membership interest, they guaranteed, with others, the construction loans for these projects.

During 2003 and 2004, Bostic Construction continued to build multi-family and student housing projects. Jeff Bostic was a citizen and resident of Duluth, Georgia and had no involvement with the daily operations of the construction company during that time.

In or about 2002, Bostic Development at Asheville, LLC (“BDA”) entered into a construction contract with Bostic Construction for the construction of a multi-family apartment complex located in Asheville, Buncombe County, North Carolina known as “Westmont Commons” (the “Project”). Bostic Construction subsequently entered into a subcontract dated August 28, 2002 with Plaintiff to provide materials, labor and supplies to the Project (the “Contract”). A copy of the Contract is attached to the Complaint as Exhibit 1. The Contract incorrectly denotes the property owner as Bostic Brothers Development, Inc. when in fact the correct owner of the Project was BDA. The Contract is signed by Aaron Akers, the project manager for Bostic Construction; it is not signed by either Jeff Bostic or Joe Bostic.

Prior and subsequent to the execution of the Contract there were no personal communications, whether orally or in writing, by and between Jeff Bostic or Joe Bostic and anyone employed by Plaintiff regarding either the Contract or the Project. As set forth in the deposition testimony of Randy Jordan, Joe Bostic was briefly introduced by Mel Morris to Randy Jordan during one of Randy Jordan’s visits to the Bostic Brothers Construction offices in McLeansville, North Carolina. However, Joe Bostic has no recollection of such meeting and in

any event, neither the Project nor the Contract was discussed. The only conversation with one of Plaintiff's employees or agents that Joe Bostic does recall occurred sometime in 2006 with Plaintiff's Project Manager, Dale Irons. Joe Bostic and Dale Irons happened to be at the same diner in Cullowhee, NC and were introduced to each other by acquaintances. Again, neither the Project nor the Contract was discussed. See Affidavit of Jeffrey L. Bostic attached hereto as Exhibit A; Affidavit of Joe E. Bostic, Jr. attached hereto as Exhibit B; Deposition of Randy Jordan, p. 35- 36, attached hereto as Exhibit C.

In or about 2002, BDA obtained a construction loan in the original sum of \$8.6 million for the purpose of paying draw requests submitted to it by Bostic Construction for services and work being performed in connection with the Project.

On or about September 7, 2002 and pursuant to the Contract, Plaintiff first furnished materials, labor and supplies to the Project. On or about April 2, 2004, Plaintiff last furnished materials, labor and supplies to the Project. During the time that materials, labor and supplies were furnished by Plaintiff to the Project, Plaintiff received certain payments from Bostic Construction for its services and the work performed.

According to the public records in Buncombe County, N.C., Plaintiff filed a Claim of Lien on July 28, 2004 against the Project contending that additional amounts were owed to Plaintiff under the Contract (the "Claim of Lien"). A copy of the Claim of Lien is attached hereto as Exhibit D. Contrary to the Plaintiff's allegations in the Amended Complaint, the Claim of Lien correctly denotes the owner of the Project as BDA. Plaintiff, by and through the same counsel in this case, subsequently filed a timely¹ lawsuit on August 17, 2004 to enforce its Claim

¹ The Bostics concede that the Claim of Lien and the Lawsuit were timely filed but take no position at this time whether the Claim of Lien and the Lawsuit were properly asserted. As a first tier subcontractor, Plaintiff could have filed, but did not file, a Notice of Lien against funds purportedly owed by BDA to Bostic Construction.

of Lien (the “Lawsuit”), again correctly denoting the Project owner as BDA. A copy of complaint filed in the Lawsuit (excluding exhibits) is attached hereto as Exhibit E.

In January, 2005, an involuntary bankruptcy petition under Chapter 7 of the Bankruptcy Code was filed against Bostic Construction in the United States Bankruptcy Court for the Eastern District of Tennessee (the “Bankruptcy Case”). The case subsequently was transferred to the United States Bankruptcy Court for the Middle District of North Carolina where it is proceeding under Chapter 7.

On or about November 14, 2005, Plaintiff, by and through its counsel, took a voluntarily dismissal of the Lawsuit. On or about January 5, 2006, Plaintiff, by and through its counsel, gave notice of its cancellation of the Claim of Lien against the Project.

Plaintiff filed the instant action on January 17, 2008 asserting fraud and unfair and deceptive claims against BDA, Bostic Development, LLC (“BD”), and certain individuals some of whom, but not all, are associated with either BDA, BD or Bostic Construction. The Bostics filed an answer denying the allegations and sought to dismiss the Complaint. On January 26, 2009, the Plaintiff filed an Amended Complaint alleging constructive fraud against the Bostics and other individual defendants.

ISSUES

1. Whether the Plaintiff’s claims in the Amended Complaint for fraud and unfair and deceptive trade practices are well-grounded in fact?
2. Whether the Plaintiff’s claims in the Amended Complaint for fraud and unfair and deceptive trade practices are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law?
3. Whether the previous denial of the Bostics’ motion to dismiss under Rule 12(b)(6) precludes sanctions under Rule 11?

ARGUMENT

Under Rule 11 of the North Carolina Rules of Civil Procedure, the signature of an attorney or party on a pleading constitutes a certificate that “to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose.” N.C.R.Civ.P. 11(a). If a pleading is signed in violation of this Rule, the Court “shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading . . . , including a reasonable attorney’s fee.” Id. Thus, under Rule 11, “the signer certifies that three distinct things are true: the pleading is (1) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); (2) well grounded in fact; and (3) not interposed for any improper purpose.” Bumgardner v. Bumgardner, 113 N.C.App. 314, 322, 438 S.E.2d 471, 476 (1994). “A violation of *any* one of these requirements mandates the imposition of sanctions under Rule 11.” Johns v. Johns, ___ N.C.App. ___, 672 S.E.2d 34 (2009) (quoting Dodd v. Steele, 114 N.C.App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E. 521 (1994) (emphasis added).

Plaintiff alleges in its Complaint and Amended Complaint that the Bostics committed fraud and unfair and deceptive trade practices by misrepresenting the owner of the Project in the Contract so as to deprive Plaintiff of its lien rights. These allegations are both factually and legal insufficient. First, the Bostics were not parties to the Contract, did not sign the Contract, never discussed the Contract or the Project with Plaintiff’s employees, and had no knowledge of the Contract or the contents thereof at the time it was executed. Second and more importantly,

Plaintiff was not deprived of its lien rights as it timely asserted the Claim of Lien against the correct owner of the Project and timely filed the Lawsuit to enforce its Claim of Lien against the correct owner of the Project. Third, the Bostics, as directors or officers of Bostic Construction are not liable, merely because of their official designation, for the purported fraud or false representation by other officers or agents of the corporation regarding the owner of the Project as set forth in the Contract, absent their active and direct involvement with the Contract. Fourth, the statute of limitations for assertion of the fraud claim based on the incorrect owner designation expired prior to the filing of the initial Complaint as the Plaintiff knew or should have known that the ownership designation was incorrect in 2004 when it filed its Claim of Lien.

Absent any legal or factual basis, the claims in the Amended Complaint for fraud and unfair and deceptive trade practices appear to have been interposed for the improper purpose of harassing the Bostics and trying to extract a settlement from the Bostics in this case. See Perkins v. Healthmarkets, Inc., 2007 WL 2570242, *6 (N.C. Super. 2007) (citing Teachers' Ret. Sys. v. Hunter, 477 F.3d 162, 172 (4th Cir. 2007); Terry v. Terry, 302 N.C. 77, 85, 273 S.E. 2d 674, 678(1981) (both expressing views of courts and commentators that fraud claims are often advanced only for their nuisance of settlement value and with little hope of success on the merits.) Therefore, this Court should impose sanctions against Plaintiff and Plaintiff's counsel pursuant to the mandates of Rule 11.

I. THE ALLEGATIONS IN THE AMENDED COMPLAINT ARE NOT WELL-GROUNDED IN FACT BECAUSE THE BOSTICS MADE NO REPRESENTATIONS TO PLAINTIFF OR ITS EMPLOYEES REGARDING THE PROJECT OR CONTRACT AND PLAINTIFF DID NOT RELY ON ANY ALLEGED MISREPRESENTATIONS.

To determine whether a complaint is factually sufficient pursuant to Rule 11, the court "must determine: (1) whether the plaintiff undertook a reasonable inquiry into the facts and (2)

whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.” Hill v. Hill, 173 N.C.App. 309, 314, 622 S.E.2d 503, 507 (2005). A party has satisfied the “reasonable inquiry” requirement if “given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law.” Jerry Bayne, Inc. v. Skyland Industries, Inc., 108 N.C.App. 209, 214, 423 S.E.2d 521, 523 (1992), *aff’d*, 333 N.C. 783, 430 S.E.2d 266 (1993).

A. Plaintiff’s allegations of fraud are not well-grounded in fact because the Bostics made no misrepresentations to Plaintiff regarding the Project or the Contract.²

Under North Carolina law, the essential elements of fraud are “(1) 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) resulting in damage to the injured party.” Harrold v. Dowd, 149 N.C.App. 777, 782, 561 S.E.2d 914, 918 (2002) (citing Ragsdale v. Kennedy, 286 N.C. 130, 138-39, 209 S.E.2d 494, 500 (1974)). If any of these elements are factually deficient, the plaintiff is not entitled to bring a claim for fraud.

Plaintiff alleges in the Amended Complaint that the Bostics made material misrepresentations to Plaintiff regarding the Contract and the Project by incorrectly denoting the owner of the Project on the Contract. As evidenced by the Contract itself, the Bostics were not parties to the Contract and did not sign the Contract. Further, the evidence is clear that the Bostics never communicated with Plaintiff or its employees regarding the Project or the Contract and this fact was known by Plaintiff’s Vice-President, Randy Jordan, prior to the filing of the Complaint. Contrary to Plaintiff’s allegations in the Amended Complaint, there were no false

² Absent evidence of any misrepresentations regarding the Contract or the Project by the Bostics, the issue of intent is irrelevant.

representations made directly to Plaintiff or to its employees by either of the Bostics regarding the owner of the Project.

There also were no false representations regarding the owner of the Project made indirectly to Plaintiff by the Bostics through their “alter ego,” Bostic Construction. In North Carolina, the law is clear that a shareholder, officer or director cannot be held liable for fraud and other torts committed by other agents of the corporation, merely based on their positions held in the corporation. See Wolfe v. Wilmington Shipyard, Inc., 135 N.C.App. 661, 552 S.E.2d 306 (1999) (holding that an officer of a corporation is not liable for torts committed by the corporation in which he did not actively participate); Air Traffic Conference of America v. Marina Travel, Inc., 69 N.C.App. 179, 182, 316 S.E.2d 642, 644 (1984) (“Under North Carolina law, an officer cannot be held individually liable for the tortious conversion of property by the corporation or other corporate agents in the absence of her participation therein.”) Lillian Knitting Mills Co. v. Earle, 237 N.C. 97, 104, 74 S.E.2d 351, 356 (“[A] director or officer of a corporation is not liable, merely because of his official character, for the fraud or false representations of the other officers or agents of the corporation or for fraud attributable to the corporation itself, if such director or officer is not personally connected with the wrong and does not participate in it.”).

Despite the undisputable facts and applicable law, Plaintiff alleged that the Bostics fraudulently misrepresented the owner of the Project to Plaintiff and as such engaged in unfair and deceptive trade practices. These allegations are plainly contrary to the incontrovertible facts and this Court should sanction Plaintiff and Plaintiff’s counsel pursuant to Rule 11 of the North Carolina Rules of Civil Procedure for asserting claims that are not well-grounded in fact.

B. Plaintiff's allegations in the Amended Complaint are not well-grounded in fact because Plaintiff never relied on any alleged misrepresentations.

Even if this Court finds that the Bostics, individually or through their corporation, misrepresented a material fact regarding the owner of the Project, which is denied, Plaintiff did not actually rely on such alleged misrepresentations. To the contrary, Plaintiff, by and through its current counsel, filed the Claim of Lien and the Lawsuit naming the correct owner of the Project within the respective 120 and 180 deadlines established by Chapter 44A of the North Carolina General Statutes. Despite this incontrovertible fact, Plaintiff alleged in the Complaint and the Amended Complaint that Plaintiff reasonably relied to its detriment on the alleged misrepresentations regarding the ownership of the Project so as to deprive it of its lien rights.

As the public records show, Plaintiff's Vice President, Randy Jordan, signed the Claim of Lien and verified the complaint in the Lawsuit. Additionally, Plaintiff's counsel signed the complaint filed in the Lawsuit and presumably researched the real property records in preparation of the Claim of Lien. Therefore, knowledge of the correct owner is properly imputed to Plaintiff and Plaintiff's counsel. See Whitten v. Bob King's AMC/Jeep, Inc., 292 N.C. 84, 231 S.E.2d 891 (1977) (holding that any knowledge that a corporate officer acquires in a representative capacity is imputed to the corporation). In light of this knowledge, Plaintiff and Plaintiff's counsel had no factual grounds for alleging that Plaintiff detrimentally relied on the alleged misrepresentations, and its fraud claim must, therefore, fail. Plaintiff also has no factual basis for alleging the unfair and deceptive trade practices ("UDTP") claim since the UDTP claim "springs from the same allegations supporting Plaintiff's fraud claim." June 2, 2009 Order & Opinion of Judge Diaz, p.10. Consequently, this Court should impose sanctions against Plaintiff and Plaintiff's counsel, including striking the fraud and UDTP claims and ordering Plaintiff to pay the Bostics' reasonable attorneys' fees incurred in defending these claims.

II. THE PLAINTIFF'S ALLEGATIONS IN THE AMENDED COMPLAINT ARE NOT LEGALLY SUFFICIENT BECAUSE AN OFFICER OR DIRECTOR OF A CORPORATION GENERALLY IS NOT PERSONALLY LIABLE FOR TORTS COMMITTED BY THE CORPORATION AND THE FRAUD CLAIM WAS PLAINLY BARRED BY THE STATUTE OF LIMITATIONS.

In determining whether a complaint is warranted by existing law, the court must first determine the facial plausibility of the complaint. Bumgardner v. Bumgardner, 113 N.C.App. 314, 322, 438 S.E.2d 471, 476 (1994). In doing so, the North Carolina courts often will examine the factual basis for asserting a legal claim in conjunction with the legal sufficiency determination. See Id. at 323, 438 S.E.2d at 471 (affirming Rule 11 sanctions under the legal sufficiency prong because the defendant knew the motion was not factually plausible in light of his waiver of the asserted defense).

A. The Plaintiff's allegations in the Amended Complaint are not legally sufficient because there is no basis for suing the Bostics in their corporate capacity for purported misrepresentations made by others.

As set forth in Section I(A) above, "a director or officer of a corporation is not liable, merely because of his official character, for the fraud or false representations of the other officers or agents of the corporation or for fraud attributable to the corporation itself, if such director or officer is not personally connected with the wrong and does not participate in it." Lillian Knitting Mills Co. v. Earle, 237 N.C. 97, 104, 74 S.E.2d 351, 356. ³

Since there is no evidence to support a claim for fraud or UDTP against the Bostics in

³ Similarly, N.C. Gen. Stat. § 57C-3-30 of North Carolina's Limited Liability Company Act states that:

(a) A person who is a member, manager, director, executive, or any combination thereof of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member, manager, director, or executive and does not become so by participating, in whatever capacity, in the management or control of the business. A member, manager, director, or executive may, however, become personally liable by reason of that person's own acts or conduct.

(b) A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object of the proceeding is to enforce a member's right against or

their individual capacity, the Bostics likewise cannot be held liable for the purported fraud or false representations of other officers or agents of Bostic Construction in their corporate capacity. As previously stated and outlined in the Affidavits attached hereto, the Bostics did not personally communicate with Plaintiff regarding the Project or the Contract in any capacity whatsoever. In fact, Plaintiff's Vice President conceded in his deposition that the Bostics were included in this action for little more reason than the Bostics happened to be partial owners of Bostic Construction and their last name was included in the company name. Deposition of Randy Jordan, p. 111-118, attached hereto as Exhibit F.

To the extent Plaintiff has a claim for fraud or misrepresentation based on the improper owner designation in the Contract, it should have asserted such claim against either the individual who made the purported misrepresentation⁴ or the corporation which was a party to the Contract, neither of which was done in the instant case.

B. The Plaintiff's fraud claim is not legally sufficient because the statute of limitations has run.

Under North Carolina law, the statute of limitations for fraud is three years from the time the plaintiff discovers or should have discovered the facts constituting the fraud. N.C. Gen. Stat. § 1-52(9); Bennett v. Trust Co., 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965).

Here Plaintiff and Plaintiff's counsel knew or should have known that Plaintiff's fraud claim was barred by the statute of limitations at the time the Complaint was filed on or about January 17, 2008. As the public records show, Plaintiff timely filed the Claim of Lien on or about July 28, 2004 and the Lawsuit on or about August 17, 2004 each correctly denoting the

liability to the limited liability company.

⁴ As noted in the June 2, 2009 Order & Opinion of Judge Diaz, the person who signed the Contract on behalf of Bostic Construction was not named as a defendant in this action.

