STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG	07-CVS-5354
JDH CAPITAL, LLC,)	
)	
Plaintiff,)	
)	**PLAINTIFF'S RESPONSE IN**
vs.)	**OPPOSITION TO DEFENDANTS'**
)	**MOTION FOR SUMMARY**
REBECCA D. FLOWERS, DWF)	**JUDGMENT**
DEVELOPMENT, INC., and FLOWERS)	
PLANTATION FOUNDATION, INC.,)	
)	
Defendants.)	

NOW COMES Plaintiff JDH CAPITAL, LLC ("JDH") and hereby opposes Defendants' Motion for Summary Judgment. In support of its position, JDH incorporates by reference the Affidavits of David P. Hill, the Affidavit of R. David Haggart, and the Affidavit of Roger Henderson (which is being filed contemporaneously with this Brief). Additionally, JDH says the following:

I. Introduction

Defendants' Motion for Summary Judgment should be denied because, among other things, there exist genuine issues of material facts regarding whether Defendant Rebecca D. Flowers ever intended to enter into a joint venture agreement with JDH. JDH has presented evidence supporting all elements of fraud and/or negligent misrepresentation. Specifically, JDH has shown that Ms. Flowers consistently compelled JDH and its employees, representatives and agents to perform tasks in furtherance of the joint venture and to her benefit. Ms. Flowers used JDH's experience and expertise to attract a grocery anchor tenant and discarded JDH once she had a relationship with the grocery anchor tenant—a relationship

which continues through today. Ms. Flowers also frequently told JDH employees that executing the operating agreement memorializing the joint venture was a mere formality. Consequently, Ms. Flowers' denial of the joint venture agreement shows that she never intended to enter into such an agreement and, at best, was merely "auditioning" JDH without telling them the same.

Also, JDH has presented evidence showing that there existed a joint venture agreement through a series of oral statements and written documents. An oral joint venture agreement to develop land is valid and binding in North Carolina. The parties' subsequent conduct indicates that there existed such an agreement, as well. Ms. Flowers expressly breached this joint venture agreement in January 2007 when she informed JDH that she would not be moving forward with the agreement. The language in the Letter Agreement signed by the parties that allegedly disavows any contractual obligations is ambiguous, conflicts with other provisions of the agreement, and is only one piece of evidence. Because additional evidence further explaining the intentions of the parties conflicts with this provision, there is a genuine issue of material fact regarding the Letter Agreement and its binding nature.

If this Court finds that there did not exist a contract between JDH and Ms. Flowers (which JDH disputes), then JDH has presented evidence that Ms. Flowers has been unjustly enriched by JDH's activities, efforts, and intellectual capital that it provided to the retail development project at issue in this lawsuit, and therefore JDH should be allowed to present its claim to a jury.

II. Facts

In analyzing the validity of Defendants' Summary Judgment Motion, the Court "must view all the evidence in the light most favorable to the non-moving party, accepting all its asserted facts as true, and drawing all reasonable inferences in its favor." *Lilley v. Blue Ridge Elec. Membership Corp.*, 133 N.C. App. 256–58, 515 S.E.2d 483, 485 (1989).[1] As an initial matter, JDH notes that Defendants' "Factual Background" described in pages 2 through 14 of their Brief in Support of Motion for Summary Judgment must be wholly disregarded for purposes of their Motion because Defendants failed to review or describe the facts in a light most favorable to JDH. This failure to present the facts in JDH's favor is evident for four main reasons: (1) as the Court will see, the majority of the facts described by JDH in this Response Brief were largely contradicted (thereby highlighting a genuine issue of fact) and/or unmentioned by the Defendants; (2) the Defendants incorporated the same fact recitation into their Response Brief In Opposition to JDH's Motion for Leave to Amend (a Motion in which the Defendants were the nonmovants); (3) Defendants regularly cite their own Affidavits submitted contemporaneously with their Brief and depositions of Ms. Flowers and her employees as support for their facts; and (4) the Defendants fail to mention this obligation anywhere in their 28-page Brief.

The facts of this case presented in a light most favorable to JDH are as follows:

A. Initial Meetings Between the Parties.

Ms. Flowers is a prudent businessperson who owns land in Johnston County North Carolina and has experience with retail developments. (Defs.' Br. in Opp. to Mot. To Amend

Compl. 8.) JDH is a qualified, capable developer that has successfully developed a number of grocery-anchored retail developments throughout the Southeast over the past fifteen (15) years. (See Henderson Aff. ¶¶ 4 & 5; April 22, 2008 Hill Aff. ¶¶ 1 & 2.) In September 2005, representatives from JDH and Rebecca D. Flowers met to discuss a potential retail development project in Clayton, North Carolina (the "Retail Development Project"). (See e-mail from D. Clarke to R. Flowers (Sept. 21, 2005), Bates labeled RDF-00933–00937, attached hereto as Exhibit 1.) While JDH initially inquired about purchasing the real property from Ms. Flowers, she indicated that she did not want to sell the property but instead would work together with JDH to create the Retail Development Project. (Clarke Dep., 21:14–22:1, Feb. 29, 2008.) In an e-mail dated November 11, 2005, Len Woodall (Ms. Flowers' business consultant) specifically expressed both his and Ms. Flowers' "excitement about the potential to establish a long-term relationship in the development of the village center" as well as their hopes that his addressing any concerns they had with JDH would "accelerate the agreement." (E-mail from L. Woodall to D. Hill (Nov. 11, 2005), Bates labeled RDF-00603, attached hereto as Exhibit 2.)

Between November 2005 and March 2006, the parties negotiated and entered into a joint venture agreement. Ms. Flowers told David Hill, a principal at JDH, that they had a deal, that her goal was to get it developed as fast as possible, and that JDH needed to start development activities. (Haggart Dep., 224:8–15, Apr. 3, 2008.) This agreement is also reflected in a number of other documents including, but not limited to, a letter agreement signed by both Ms. Flowers and JDH in March 2006. (See "Letter Agreement," attached hereto as Exhibit 3.) Despite the Defendants' assertions to the contrary (see Defs.' Br. in

[1] The summary judgment standard is discussed in further detail in Section III.A, *infra*.

Support of Sum. Judg. 5 & 6; Woodall Aff. ¶¶ 4 & 6; Flowers Aff. ¶¶ 3 & 6), the Letter Agreement makes **no reference** to any potential future contracts between Ms. Flowers and JDH. (See Letter Agreement, Exhibit 3.) Evidence of the agreement also includes subsequent conduct of both Ms. Flowers and JDH, as discussed below.

B. Activities Performed in Furtherance of the Joint Venture.

Pursuant to the joint venture agreement, the parties agreed to work together to create the Retail Development Project, because JDH has significant experience and expertise in creating similar retail developments and Ms. Flowers has little to no experience with retail developments, but owns the land on which the Retail Development Project would sit. (See e-mail from R. Flowers to D. Hill (Mar. 15, 2006), Bates labeled RDF-00983, attached hereto as Exhibit 4; Flowers Dep., Vol. II, 140:7–12.) Ms. Flowers told JDH that she wanted JDH to take the lead on the Retail Development Project while she focused on the residential portions of her property. (Flowers Dep., Vol. II, 24:2–25:12.)

Flowers Plantation Retail Partners, LLC, the limited liability company encompassing the joint venture, was registered with the North Carolina Secretary of State on July 21, 2006. (See Flowers Plantation Retail Partners, LLC Articles of Incorporation, attached hereto as Exhibit 5.) To inform the public of the joint venture between Ms. Flowers and JDH, Ms. Flowers drafted a press release, which was reviewed and edited by JDH. (See e-mail from R. Flowers to D. Hill, (Jan. 20, 2006), Bates labeled RDF-00623–00625; e-mail from D. Hill to P. Bonder (May 9, 2006), Bates labeled RDF-00690, both attached hereto as Exhibit 6.) The press release then ran in the local newspapers. Further, in a newspaper article entitled "Neo-Urbanism Comes to Johnston County," The Daily Record, a newspaper out of Dunn, North

Carolina reported that "JDH Capital, a Charlotte-based real estate Development Company, will joint venture with Ms. Flowers in the mixed-use, commercial area of the Village." (See e-mail from T. Legge to D. Hill and G. Davies (May 27, 2006), Bates labeled JDH 00031, attached hereto as Exhibit 7.)

Throughout 2006 and the beginning of 2007, JDH actively worked on the development by providing intellectual capital, services, and labor for the Retail Development Project. (See e-mail from D. Hill to R. Flowers (Apr. 11, 2006), Bates labeled JDH 00324–00326; e-mail from D. Clarke to R. Chiles (Apr. 12, 2006), Bates labeled JDH 001585; e-mail from P. Clontz to D. Hill (Apr. 13, 2006), Bates labeled JDH 001505; e-mail from D. Hill to R. Flowers (May 30, 2006), Bates labeled JDH 00804–00807, all attached hereto as Exhibit 8.) JDH employees that performed work on the Retail Development Project include Mark Ball, Phil Blanton, Rhona Chiles, Patsy Clontz, David Clarke, Jude Crayton, Gary Davies, David Hill and Sheri Faulkner. JDH performed this work at the direction and insistence of Ms. Flowers. In fact, Ms. Flowers regularly expressed her frustration that JDH was not moving the Retail Development Project along as quickly as she would like. (See e-mail from R. Flowers to D. Hill (June 11, 2006), Bates labeled RDF-00018–00019; e-mail from R. Flowers to D. Hill (Sept. 19, 2006), Bates labeled RDF-00813–00814, both attached hereto as Exhibit 9.)

At the same time JDH was creating the retail development, the parties were discussing an operating agreement for the limited liability company they had formed to limit the potential liability of the joint venture to third parties. During the meetings between Ms. Flowers, her consultants and JDH employees, the vast majority of the meeting would revolve around the Retail Development Project and tasks JDH needed to do in furtherance of the same. (Ball Dep., 53:5–54:8, Feb. 27, 2008.) Only for the last 20–30 minutes of each meeting would the

parties discuss the operating agreement, which Ms. Flowers would disregard as unimportant and reiterate that she would get around to signing it eventually. (*Id.*)

Ms. Flowers continually requested that JDH perform work consistent with the joint venture and—as is custom and practice in the development industry—the operating agreement was to be signed concurrently with development activities. (See Haggart Dep. 215:8–11, Apr. 3, 2008 (noting that "it is typical in the industry that executing the final documents are going to trail the point in time when you actually have a deal"; *id.* 244:17–245:25 (stating that "it's very customary in our business for the documents to trail the consummation of the deal".) JDH extended considerable amounts of time, money and resources in developing the project. Some of the work performed by JDH on the Retail Development Project includes researching, marketing, negotiating and preparing a lease agreement between the joint venture and a grocery-anchor tenant; researching, marketing, negotiating and preparing leases for numerous outparcel users and shopping space tenants; consulting with design professional about all architecturals for the Retail Development Project's buildings, landscaping and site layout; generating and reviewing a complete budget and pro forma for the Retail Development Project; and consulting with all parties involved regarding development. (Compl. ¶ 21; e-mails previously identified and attached hereto as Exhibit 8.)

At Ms. Flowers' insistence, JDH also undertook the task of bringing a grocery anchor tenant (Lowes Foods) to the Retail Development Project and convinced it that the site would be good for such a grocery store. (Henderson Aff. ¶ 7; Hill Dep., Vol. II, 351:8–13.) Attracting the attention of a grocery anchor tenant was one of the development activities that Ms. Flowers and her consultants recognized they could not do without JDH's help. (E-mail from L. Woodall to R. Flowers (Mar. 18, 2006), Bates labeled RDF-00665–00667, attached

hereto as Exhibit 10.) It is also the biggest part of the entire retail development process, and creates the most value for a project. (Haggart Dep. 240:24–241:10.) And, it was the task that Ms. Flowers' consultants regularly pushed JDH to perform as soon as possible. (See e-mail from L. Woodall to D. Hill (Mar. 15, 2006), Bates labeled JDH 001936–001937, attached hereto as Exhibit 11.) JDH was able to attract Lowes Foods to the Retail Development Project because of its long history of successfully developing projects with Lowes Foods and because "JDH is a competent, qualified, capable developer." (Henderson Aff. ¶¶ 4 & 5.)

Additionally, JDH worked closely with Ms. Flowers' engineer, Paul Smith, on the site plans for the Retail Development Project because Mr. Smith had little to no experience with retail developments. (Smith Dep. 9:19–23, Dec. 5, 2007.) JDH also worked with Ms. Flowers' architect, Colin Blackford, on drawings for the project. (Ball Dep. 49:6–15.) JDH made significant changes to the drawings and plans created by Mr. Smith so that the development could function as a retail project. JDH was not "just making a few little comments on the plan. [JDH was] directing how the plan was to function . . . ." (Ball Dep. 74:8–13.) Some of the changes JDH made to the plans include redesigning the parking lot, moving the driveway entrances, changing the HVAC system plans so that each tenant could control their own temperature, creating a space for the grocery anchor tenant, and adding doors to the side of the buildings that faced the parking lot. (Ball Dep. 34:18–35:5; *id.* 45:1–23; Crayton Dep. 46:14–22.). Mr. Smith also tendered to JDH a proposed contract to be executed by the anticipated joint venture, which was approved by Mark Ball, an employee at JDH. (See e-mail from P. Smith to R. Flowers (Aug. 2, 2006), Bates labeled RDF-01042–01048, attached hereto as Exhibit 12; Ball Dep. 35:6–17.)

Because JDH is regularly involved in large scale retail developments, it agreed to provide financial assurances and guarantees for any construction loans necessary for the Retail Development Project. Ms. Flowers, her consultant, Len S. Woodall, and JDH agreed that JDH would allow Ms. Flowers to perform due diligence on JDH as a partner from a financial perspective. (Hill Dep., Vol. II, 296:2–297:5.) Later on, when Ms. Flowers and her consultant requested additional information, David Hill, a principal of JDH, provided four (4) reference letter from banks, all of which espoused on their long-standing successful relationships with JDH and their willingness to provide substantial loans to projects in which JDH is involved. (E-mail from D. Hill to L. Woodall (Nov. 17, 2007), Bates labeled RDF-00735–00739, attached hereto as Exhibit 13.) For instance, a letter from Robert D. Willingham, Senior Vice President at Wachovia, stated that "Wachovia Bank and its predecessor institutions have worked with JDH for several years, during which we have financed numerous successful real estate developments . . . . Wachovia is actively seeking new opportunities to expand our relationship with JDH through project financing and other financial services." (*Id.*) Also, Mr. Hill asked Ms. Flowers' consultant if these letters were satisfactory, to which Mr. Hill received no response. (*Id.*)

Pursuant to the joint venture agreement, JDH created a budget for the Retail Development Project using an outside consultant, Mark Schutt, to double check JDH's estimations. (Hill Dep., Vol. II, 313:1–4.) JDH asked Mr. Schutt to provide it with construction estimates based on the project as JDH best estimated it. (Ball Dep. 64:14–20.) After JDH received Mr. Schutt's construction estimates, JDH employees reviewed and refined the budget, adding building costs, architectural additions, soft costs, engineering costs, financial costs, site lighting costs and signage costs. (*Id.* 62:23–65:5.) JDH provided this

budget to Ms. Flowers and her consultants for their review. Ms. Flowers apparently took issue with JDH's allocation of the budget as it applied to a clock tower, however, "they were free to comment on or come back to us and suggest different ways of doing things." (Hill Dep. 360:20–36123.) In fact, JDH suggested that it look at alternative designs for the clock tower as a way of helping Ms. Flowers become comfortable with the budget. (*Id.* 361:3–8.) Neither Ms. Flowers nor her consultants discussed their problems with the clock tower and the budget again with JDH.

C. Ms. Flowers Backs Out of the Joint Venture.

In late 2006 Ms. Flowers, for the first time, indicated to JDH that she may not be willing to fulfill her obligations as they relate to the joint venture. Her hesitancy to move forward with the joint venture only came after Roger Henderson, Vice President of Real Estate at Lowes Foods, agreed in principal to be a part of the Retail Development Project. On January 19, 2007, Ms. Flowers finally made it clear that she would not be moving forward with the joint venture. (See e-mail from R. Flowers to D. Hill, Jan. 19, 2007, Bates labeled RDF-00142, attached hereto as Exhibit 14.) Ms. Flowers recognized that JDH had expended a good amount of "effort and time and money" in the Retail Development Project, and, in breaching their joint venture agreement, Ms. Flowers offered JDH the opportunity to manage the Retail Development Project "for a few years as a method to recapture the money you have invested." (*Id.*) JDH did not accept this offer.

At the time that JDH was dealing with Ms. Flowers, it did not know that she had never given up control on any of the projects that have taken place within the 3,000 acres of Johnston County known as Flowers Plantation. (See Benson Dep., May 6, 2008.) This even includes

her controlling real property that she has sold—which was done by her not approving (or conditionally approving) certain architectural styles and plans. (*Id.*) Furthermore, JDH did not know that at the same that Ms. Flowers was pushing JDH to find tenants for the Retail Development Project, Ms. Flowers' intentions were not to allow any tenants other than those that she had personally interviewed and accepted. (*Id.*) Also, Ms. Flowers admits that throughout the entire development process she was "auditioning" JDH but did not tell them the same. (Flowers Dep., Vol. II, 80:15–20; *id.* 81:12–15.) In fact, Ms. Flowers concedes that she thought "whatever [JDH] did, whatever services they provided, [Ms. Flowers] didn't have to pay them unless [Ms. Flowers] signed another document." (*Id.* 81:7–11.)

D. Activities After the Joint Venture Ends.

After the relationship between Ms. Flowers and JDH ended, Ms. Flowers contacted Mr. Henderson from Lowes Foods and asked him to still be a part of the project. (Henderson Aff. ¶¶ 9 & 10; Flowers Dep., Vol. II, 68:25–69:8.) Mr. Henderson would not have known about or considered the Retail Development Project as a potential site for Lowes Foods had JDH not brought it to Lowes Foods' attention and convinced Mr. Henderson to invest in the location. (Henderson Aff. ¶¶ 7 & 8.)

Ms. Flowers never intended to be part of a joint venture with JDH for the Retail Development Project. (See e-mail from L. Woodall to R. Flowers (Mar. 15, 2006), Bates labeled RDF-00661 (stating, "from listening to you, I'm not sure your really want to do something like this"), attached hereto as Exhibit 15.) She led JDH along, siphoning off as much of JDH's experience, expertise, and efforts as she could—including JDH's ability to secure a grocery anchor tenant—without giving JDH anything in return. This is evidenced by

the fact that she has never relinquished control of any of the projects within Flowers Plantation but never told JDH this; that she claims now that she was auditioning JDH but never told JDH this; that she was under the impression that as long as she did not sign anything else she would not owe JDH anything; and that she has actively pursued a relationship with Lowes Foods now that JDH is gone.

III. Legal Argument

A. Summary Judgment Standard

Under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment should only be granted when there is no genuine issue of material fact and the movant shows that she is entitled to judgment as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c); *N.C. Nat'l Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 379 (1976). "Summary judgment should be used cautiously and the burden of clearly establishing lack of a triable issue is on the moving party. The moving party's papers must be carefully scrutinized and those of the opposing party must be regarded with indulgence." *Gillespie*, 291 N.C. at 310, 230 S.E.2d at 379; *see Hillman v. United States Liab. Ins. Co.*, 59 N.C. App. 145, 148, 296 S.E.2d 302, 304–05 (1982). A genuine issue is be present (and therefore a motion for summary judgment must be denied) "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The evidence can be found in the pleadings, depositions, affidavits, admissions, or other testimony or evidence, and the motion should be denied if such evidence indicates that there is a genuine issue of material fact. *See Northwestern Bank v. Roseman*, 81 N.C. App. 228, 231, 344 S.E.2d 120, 123 (1986). The evidence is to be considered in the light most favorable to the nonmoving party and the burden is

on the movant to show an absence of evidence to support the nonmovant's case. *Lilley v. Blue Ridge Elec. Membership Corp.*, 133 N.C. App. 256–58, 515 S.E.2d 483, 485 (1989); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the court must consider the credibility and weight of the evidence, the Motion for Summary Judgment should be denied. *See Burrow v. Westinghouse Elec. Corp.*, 88 N.C. App. 347, 363 S.E.2d 215 (1988). In this case, the Defendants' Motion for Summary Judgment should be denied, since there are genuine issues of material fact to be considered by a jury.

B. There Exists Evidence That Ms. Flowers Defrauded JDH and/or Negligently Misrepresented Material Facts to JDH.

> The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract; that there must be a reliance on the integrity of man [and woman] or else trade and commerce could not prosper.

Roberson v. Williams, 240 N.C. 696, 702, 83 S.E.2d 811, 815 (1954) (*quoting Gray v. Jenkins*, 151 N.C. 80, 83–84, 65 S.E. 644, 645 (1909)). A promise is an actionable false representation of fact if it is made merely to induce the promisee to act to its disadvantage. *Vincent v. Corbett*, 244 N.C. 469, 471, 94 S.E.2d 329, 331 (1956). If the person making the promise has no intention of carrying it out, then it constitutes a misrepresentation. *Britt v. Britt*, 320 N.C. 573, 579, 359 S.E.2d 467, 471 (1987), *overruled on other grounds by Myers & Chapman, Inc.*, 323 N.C. 559, 569, 374 S.E.2d 385, 392 (1988).

Negligent misrepresentation closely resembles fraud, but with a lower level of culpability. Instead of requiring evidence that the defendant intentionally misled the plaintiff, a defendant is liable for negligent misrepresentation upon a finding that she failed to exercise reasonable care or

competence in communicating information to other persons, when the defendant is supplying information in any transaction in which she has a pecuniary interest. *Howell v. Fisher*, 49 N.C. App. 488, 497, 272 S.E. 2d 19, 25 (1980).

Defendants claim in their Motion for Summary Judgment that JDH "could not have justifiably relied on" any of Ms. Flowers' misstatements, misrepresentations and/or concealments. (Defs.' Mot. Sum. Judg. ¶ 6.) However, such a test of reasonableness is almost always a question for the jury. *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007); *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 225, 513 S.E.2d 320, 327 (1999); *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965) (noting that "[j]ust where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine."). Similarly, "[i]ssues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the applicable standard of care is generally for the jury." *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979).

Ms. Flowers misrepresented to JDH that she wanted to enter into a joint venture agreement with it. She also misrepresented to JDH that she wanted JDH to take charge of the commercial/retail portion of the Village at Flowers Plantation, while she focused solely on the residential portion of it. These statements were not and are not true, however JDH relied upon them to its detriment—JDH relied on the integrity of Ms. Flowers in the hopes that trade and commerce would prosper. The evidence indicates that Ms. Flowers did not, in fact, want to be a part of a joint venture agreement with JDH, nor did she want JDH to be in charge of the Retail Development Project. Mr. Woodall's e-mails (attached hereto as Exhibits 10 & 15) show that Ms. Flowers had no desire to enter into the joint venture with JDH and that they felt they only

needed JDH because it could secure the anchor tenant. She was merely using JDH's experience and reputation in the industry to secure a grocery anchor tenant and obtain other intellectual capital and resources from JDH. (See Hill Affs.; Henderson Aff.)

Despite her statements to JDH, Ms. Flowers insists (and has always insisted) on controlling all aspects of Flowers Plantation, including the retail portion—therefore, her representations to JDH that she wanted it in charge of the Retail Development Project must have been false. Also, she regularly instructed JDH to speed up the project's development and make more progress on the leases, however Ms. Benson confirmed in her deposition that Ms. Flowers would insist (and has previously insisted) on interviewing every potential tenant before allowing them to lease space at the project. Had JDH known this information was false, it would never have acted in furtherance of the agreement. (Hill Aff. May 8, 2008.) Consequently, these are all material misrepresentations that Ms. Flowers made to JDH in order to induce it to perform development activities on the Retail Development Project.

Ms. Flowers' material misrepresentations were fraudulent—or at the very least negligent in nature. JDH relied upon them and performed significant and valuable development activities on the Retail Development Project. JDH has been damaged as a result of Ms. Flowers' statements and actions. Therefore, Defendants' motion for summary judgment should be denied.

C. JDH Has Presented Evidence That Ms. Flowers Breached the Joint Venture Agreement.

It is one of the most basic tenets of our legal system that formation of a binding agreement requires offer, acceptance, consideration and mutuality of assent to the contract's essential terms. *Kinesis Adv., Inc. v. Hill*, ___ N.C. App. ___, 652 S.E.2d 284, 292 (2007)

(quoting *Cap Care Group, Inc. v. McDonald*, 149 N.C. App. 817, 822, 561 S.E.2d 578, 582 (2002)). When an instrument is ambiguous, the court must determine the parties' intention by looking not only to the language of the instrument, but also the nature of the transaction, the situation of the parties to the contract, and the circumstances surrounding their transaction. *Runyon v. Paley,* 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992). A contract is the basis upon which a joint venture and/or partnership is formed. *Eggleston v. Eggleston*, 228 N.C. 668, 674, 47 S.E.2d 243, 247 (1948).

A joint venture may be formed by an oral agreement. *Campbell v. Miller*, 274 N.C. 143, 149, 161 S.E.2d 546, 550 (1968). In fact, even without evidence of an express partnership agreement, a voluntary association of partners may be shown by their conduct, express or implied. *Eggleston*, 228 N.C. at 674, 47 S.E.2d at 247. A finding that a partnership exists 'may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such.' " *Potter v. Homestead Preservation Ass'n*, 330 N.C. 569, 576, 412 S.E.2d 1, 5 (1992) (*quoting Eggleston*, 228 N.C. at 674, 47 S.E.2d at 247).

The elements of a breach of contract claim are: (1) the existence of a valid contract, and (2) a breach of the terms of the contract. *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003); *see also Parker v. Glosson*, 182 N.C. App. 229, 232, 641 S.E.2d 735, 737 (2007); *Burgin v. Owen*, 181 N.C. App. 511, 515, 640 S.E.2d 427, 430 (2007). A breach of contract is actionable when there is a "material breach . . . that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform" *Long*, 160 N.C. App. at 668, 588 S.E.2d at 4.

In the case at hand, JDH has offered ample evidence that there was a joint venture agreement. JDH offered to develop the retail project in exchange for a 50% ownership interest in the joint venture, and Ms. Flowers offered to direct the development of all architecturals and provide the land on which the project would be developed in exchange for the remaining 50% ownership interest in the joint venture. Additionally, Ms. Flowers contributed to the development the previous work product of which she directed the creation, which included the site plans and drawings by Mr. Smith. They both accepted each other's offers, thereby creating a binding agreement. Consequently, Ms. Flowers represented to JDH that they had a joint venture agreement. Other evidence supporting the existence of a joint venture agreement includes the numerous e-mails and communications from Ms. Flowers to JDH employees, imploring them to perform development activities for the Retail Development Project; the press release created by Ms. Flowers about the joint venture and Retail Development Project; the newspaper article covering the joint venture; that Ms. Flowers' engineer submitted his proposal to the joint venture and performed work on behalf of the joint venture; the creation of the joint venture limited liability company; that JDH employees and principals have testified they thought there was a joint venture agreement; and the Letter Agreement signed by both Ms. Flowers and JDH.

Furthermore, the Letter Agreement contains all material terms to the agreement: the price at which Ms. Flowers' land will be valued when it is contributed to the joint venture, the specific duties of JDH to develop the property; what type of development they will be creating; construction and permanent loans and related guarantees; development fees; and exit provisions. Notably, the Letter Agreement **does not** include any open terms, call for any future approvals, or expressly contemplate future preparation and execution of additional contract

documents related to the joint venture agreement.[2] Also, it is not captioned as a "letter of intent."

The fact that the parties had not yet signed an operating agreement for the Limited Liability Company is not evidence that an agreement did not exist—limited liability companies in North Carolina regularly exist and function without operating agreements. In fact, one of the main purposes of the North Carolina Limited Liability Company Act is to provide default rules governing limited liability companies that do not have operating agreements. Cyrus M. Johnson, Jr., 2 *North Carolina Limited Liability Company Forms and Practice Manual* § 3.1 (3d ed. 2007); *see also* N.C. Gen. Stat. § 57C-1-01, *et seq.*

Despite Defendants' arguments to the contrary, in North Carolina joint venture agreements for the development of land **do not** need to be in writing. In *Potter v. Homestead Preservation Ass'n*, 330 N.C. 569, 412 S.E.2d 1 (1992), the North Carolina Supreme Court expressly validated an oral agreement for the development of land. In that case, the plaintiff had been excluded from receiving proceeds relating to the sale of real property, and sued, claiming that the parties had an oral partnership agreement for the development of two tracts of land. *Id.* at 572, 412 S.E.2d at 2. The plaintiff had expended efforts to market the land, but had received no compensation for it. *Id.* at 572, 412 S.E.2d at 3. There was no written agreement regarding the partnership or how the plaintiff was connected to the land, however. *Id.* The court held that the plaintiff had offered sufficient evidence of an oral partnership (and breach thereof) through testimony that the parties acted in accordance with such an agreement, and reversed the trial court's entry of directed verdict. In doing so, the court noted that the general rule in North Carolina is that a parol joint venture agreement or partnership entered

[2] The Letter Agreement does discuss a separate Development and Management Agreement between the joint venture

into by at least two parties for the purpose of developing land "is not within the statute of frauds relating to the sale of land or an interest in lands. In other words, such an agreement may be entered into, become effectual, and be enforced although not in writing." *Id.* at 577, 412 S.E.2d at 6 (*quoting* 72 Am. Jur. 2d *Statute of Frauds* § 73).[3]

Similar to *Potter*, in the case at hand, Ms. Flowers and JDH entered into a joint venture agreement for the development of real property. Their agreement is reflected in oral communications, e-mail correspondence, letters, their acts and acts by third parties, and the Letter Agreement. Also, just as in *Potter*, Plaintiff JDH is not suing to recover an interest in the land that was to be developed. JDH is seeking damages for Ms. Flowers' breach of the joint venture agreement. Therefore, JDH has offered evidence that the oral agreement is valid and was undisputedly breached in January 2007 when Ms. Flowers told JDH that she would not go forward with the joint venture agreement.

Our case differs from *Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co.*, 2003 N.C.B.C. 3 (Durham County, Apr. 28, 2003), in a number of respects. *Durham Coca-Cola Bottling Co.* was decided on cross-motions for summary judgment and "[r]ealizing that there are no material facts in dispute, all parties [] moved for summary judgment." *Id.* ¶ 4. Also, the plaintiff in *Durham Coca-Cola Bottling Co.* was suing for specific performance of a letter of intent. *Id.* ¶ 10. Because the letter of intent was allegedly an agreement to sell a company, and because the company had already been sold to a third party, enforcing the plaintiff's letter of intent by specific performance would have involved undoing a separate transaction. *Id.*

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and JDH, but this is not related to the formation of the joint venture in any way.

[3] While the North Carolina Supreme Court has also held that when land is owned by an individual entering a partnership, that land cannot become a partnership asset upon oral agreement only, *Ludwig v. Walter*, 75 N.C. App. 584, 586, 331 S.E.2d 177, 179 (1985), this holding came in the context of a plaintiff attempting to gain a one-half interest in the real property in dispute. *Id.* In our case, JDH is **not** claiming an interest in the real property owned by

The dispute at issue in *Durham Coca-Cola Bottling Co.* involved valuable and unique rights that the plaintiff attempted to take away from the defendant purchaser who was not part of the letter of intent. *Id.* ¶ 7.

In analyzing the rules governing contract law in North Carolina, this Court noted that "[i]n addition to the language chosen by the parties, a court may examine the subsequent behavior of the parties to determine whether a contract was made." *Id.* ¶ 33. This Court ultimately found that the contract was not a valid and enforceable contract because, *inter alia*, the letter of intent expressly stated that the parties would enter into a future final definitive agreement, it contained a no-shop provision, and it required the plaintiff to put down an amount in escrow pending complete execution of the definite agreement. *Id.* ¶ 42.

In our case, first and foremost, JDH has not moved for summary judgment on its own claims because there are outstanding issues of material facts. Consequently, the procedural position upon which this Court will be ruling is different than *Durham Coca-Cola Bottling*. Also, JDH does not contend that the Letter Agreement, in and of itself, represents the partnership agreement. Like this Court pointed out in *Durham Coca-Cola Bottling* (and in contrast to the facts of *Durham Coca-Cola Bottling*), it is relevant that the subsequent behavior of Ms. Flowers and JDH after the agreement was created was consistent with a joint venture to develop property—Ms. Flowers regularly required JDH to perform development activities, and JDH complied with her requests. Additionally, the Letter Agreement does not make any reference to a future final definitive agreement between Ms. Flowers and JDH, it does not contain a no-shop provision, and it does not require JDH to put down any amount in escrow pending the complete execution of other documents. Finally, JDH is not seeking specific

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Ms. Flowers (or her legal entities), and therefore this case is not on point.

performance of the joint venture agreement, nor is it doing so at the detriment of a third party who was not involved in the agreement. JDH is seeking damages caused by Ms. Flowers' breach of the agreement—it is not claiming any ownership interest in the real property underlying the development.

D. In the Alternative, Ms. Flowers Was Unjustly Enriched.

If this Court or the trier of fact finds that JDH did not have an agreement with Ms. Flowers (a position which JDH disputes), then Ms. Flowers was unjustly enriched by JDH's development activities performed on the project. A valid claim for unjust enrichment exists when a party confers a benefit on the other party. "The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances." *Britt v. Britt*, 320 N.C. 573, 577, 359 S.E.2d 467, 469 (1987), *overruled on other grounds by Myers & Chapman, Inc.*, 323 N.C. 559, 569, 374 S.E.2d 385, 392 (1988). Also, the benefit must have not been gratuitous, and it must be measurable. *Id.* The measure of recovery under unjust enrichment is the reasonable value of material and services rendered by the plaintiff. *Thormer v. Lexington Mail Order Co.*, 241 N.C. 249, 252, 85 S.E.2d 140, 143 (1954).

In our case, JDH undoubtedly conveyed a number of benefits on Ms. Flowers, for which one expects and normally receives compensation. JDH completely redesigned the plans and drawings that Ms. Flowers had for the Retail Development Project so that the space would attract tenants and so that customers could use it. JDH performed extensive researching, marketing and negotiating leases of outparcel users and shop space tenants. JDH maintained and organized the financial records for the Retail Development Project. JDH coordinated the

design professionals. JDH consulted regularly with the design professionals about all architecturals for the Retail Development Project's buildings, landscaping and site layout. And JDH generated and reviewed a complete budget and pro forma for the Retail Development Project.

Also, JDH brought Lowes Foods to the Retail Development Project—something that Ms. Flowers could not have done on her own. Lowes Foods has expressed an interest in signing a lease for space in the Retail Development Project, and continues to show an interest today. (Henderson Aff. ¶¶ 3, 7, 10 & 11.) Ms. Flowers obviously considers this a benefit and of value, given that she has continued negotiations with Lowes Foods after JDH ceased being involved in the project. (*Id.* ¶¶ 10 & 11.) This benefit is valuable and measurable, as well. The average present value of a build-to-suit lease signed by Lowes Foods for a location this size is $6,452,851.18.[4] Ms. Flowers has received this benefit from JDH unjustly.

The benefits conferred upon Ms. Flowers by JDH have been further measured by the calculations JDH performed documenting the profits JDH lost from not being able to complete the Retail Development Project. These calculations have been previously produced in this litigation, are Bates labeled JDH 002085, and are attached hereto as Exhibit 16. These figures are based on JDH's extensive experience in the retail development industry. And JDH's expert, David Haggart, confirmed that the methodology JDH used to determine how much the retail development project was worth was appropriate. (Haggart Dep. 243:11–12.)

[4] The value of a lease for $14.00 per square foot per year for a 38,000 square foot space over a 20-year period is $10,640.000. Discounted to present value at a 5.5% interest rate reduces this amount to $6,452,851.18. The formula for the present value of an annuity due is: PVoa = PMT [(1 - (1 / (1 + i)^n)) / i], where "PMT" is annual

IV. Conclusion

Because JDH has offered evidence in support of each of its claims, and because there exist genuine issues of material facts, JDH Capital, LLC respectfully requests that this Court deny the Defendants' Motion for Summary Judgment, and that JDH be allowed to present evidence before a jury at a trial on this matter in support of each of its claims.

JDH Capital, LLC hereby certifies unto the Court that this Response Brief complies with Rule 15.8 of the Amended General Rules of Practice and Procedure for the North Carolina Business Court with respect to length limitation.

This the 15th day of May, 2008.

JOHNSTON, ALLISON & HORD, P.A.

/s/ Robert L. Burchette
Robert L. Burchette, N.C. Bar No. 7035
Martin L. White, N.C. Bar No. 23330
Daniel A. Merlin, N.C. Bar No. 35829

JOHNSTON, ALLISON & HORD, P.A.
Post Office Box 36469
Charlotte, North Carolina 28236
Telephone: 704/332-1181
Attorneys for JDH Capital, LLC

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payment, "i" is interest rate, and "n" is number of years.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached **Response Brief in Opposition to Defendants' Motion for Summary Judgment** on all of the parties to this case by electronic mail and by facsimile, addressed to the party or attorney for each said party as follows:

William S. Cherry, III
Manning, Fulton & Skinner, P.A.
Post Office Box 20389
Raleigh, NC 27619
Facsimile: (919) 787-8902
cherry@manningfulton.com
Attorneys for Defendants

This the 15th day of May, 2008.

JOHNSTON, ALLISON & HORD, P.A.

/s/ Robert L. Burchette
Robert L. Burchette, N.C. Bar No. 7035
Martin L. White, N.C. Bar No. 23330
Daniel A. Merlin, N.C. Bar No. 35829

JOHNSTON, ALLISON & HORD, P.A.
P.O. Box 36469
Charlotte, NC 28236
Telephone: (704) 332-1181
Facsimile: (704) 376-1628
Attorneys for JDH Capital, LLC