

STATE OF NORTH CAROLINA  
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
07 CVS 1760

**BEFORE THE NORTH CAROLINA BUSINESS COURT**

MILLER & LONG CO., INC.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	<b>REVISED RESPONSE</b>
	)	<b>TO EMERGENCY MOTION</b>
	)	<b>TO DISMISS CLAIM AND</b>
	)	<b>MOTION TO CANCEL LIS</b>
INTRACOASTAL LIVING, LLC,	)	<b>PENDENS</b>
SUPERIOR CONSTRUCTION	)	
CORPORATION, WESTERN SURETY	)	
COMPANY, et al.,	)	
	)	
Defendants.	)	
	)	

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NOW COMES the Plaintiff, Miller & Long Co., Inc. (hereinafter, "Miller & Long"), acting through its undersigned counsel, and pursuant to the revised Scheduling Order dated 18 November 2008 and Rule 15.6 of the General Rules of Practice and Procedure for the N.C. Business Court and responds to the Motion to Dismiss Plaintiff's Fifth Claim for Relief and to Cancel Lis Pendens filed by Preserve Holdings, LLC.

**QUESTION PRESENTED, FACTUAL ALLEGATIONS  
AND STANDARD OF REVIEW**

The question presented is whether a subcontractor who is owed substantial sums of money on a construction project can assert a claim for the imposition of a constructive trust against property owned by Preserve Holdings, LLC, an entity owned by James and Bridget Chirico, based on the following alleged facts (all of which are taken as true for the purposes of Preserve Holdings, LLC's Motion to Dismiss):

- Preserve Holdings, LLC is a North Carolina limited liability company formed by James M. Chirico, Jr. in the fall of 2007 for the purpose of buying the Preserve condominium project out of foreclosure [Miller & Long Amended Complaint, ¶4]
- On or about 16 January 2008 Buildings 4 and 5 (and certain Units in Buildings 2 & 3) were sold at foreclosure. On or about 28 January 2008, Preserve Holdings, LLC submitted an upset bid for Buildings 4 and 5 in the amount of \$17,500,000 [Miller & Long Amended Complaint, ¶26]
- James M. Chirico, Jr. breached his fiduciary duties to Intracoastal Living, LLC, usurped an opportunity of Intracoastal Living, LLC and otherwise violated duties to the LLC and the members of Intracoastal Living, LLC in forming a new LLC to purchase the Preserve project out of foreclosure for his own personal benefit [Miller & Long Amended Complaint, ¶89]
- Preserve Holdings, LLC was not an innocent third party purchaser at foreclosure inasmuch as the same members that are affiliated with Preserve Holdings, LLC are some of the same members of Intracoastal Living, LLC that defaulted on the Note to Wachovia Bank, N.A. and caused foreclosure of Buildings 4 and 5 wiping out substantial lien claims on these Buildings [Miller & Long Amended Complaint, ¶97]
- The Chiricos stand to profit from the sale of Units in the Preserve [Miller & Long Amended Complaint, ¶¶36,38,42,78,99]

- Intracoastal Living, LLC is insolvent and cannot satisfy any judgment by Superior Construction or any judgment in favor of Miller & Long on its Notice of Claim of Lien on Funds [Miller & Long Amended Complaint, ¶34]
- Superior cannot satisfy all of the claims and judgments of its subcontractors on this project due to a substantial debt from Intracoastal Living, LLC to Superior [Miller & Long Amended Complaint, ¶35]
- There are various claims of mismanagement of Intracoastal Living, LLC between the Hysons and the Chiricos in the *Cape Fear Realty, LLC v. Cape Fear Trading group, LLC et al*, 07 CVS 1310, Brunswick County litigation [Miller & Long Amended Complaint, ¶96]

In the *Cape Fear Realty, LLC v. Cape Fear Trading group, LLC et al*, 07 CVS 1310, Brunswick County litigation, which Miller & Long references in its Amended Complaint, the following allegations are lodged against the Chiricos:

- The Chiricos orchestrated the failure of the Preserve project [proposed Amended Complaint, ¶30]
- By the time the Chiricos orchestrated the foreclosure of the Preserve project, it was well on its way to completion [proposed Amended Complaint, ¶30]
- The Chiricos used the opportunity of forced business failures and foreclosures to negotiate with friendly lenders and purchase LLC assets out of foreclosure for their own personal profit and benefit [proposed Amended Complaint, ¶31]
- The Chiricos breached their duties by purposefully orchestrating the business failures of the various LLCs; withholding financial commitments to the LLCs;

engaging in negotiations with lending institutions to acquire financing for the purchase of these LLC assets out of foreclosure; and diversion of business opportunities away from the LLCs they were members of originally [proposed Amended Complaint, ¶35]

For purposes of Preserve Holdings, LLC's Motion to Dismiss, these allegations are deemed admitted. *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C.App. 390, 537 S.E.2d 248, (N.C.App., 2000) The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief. *Copper ex rel. Copper v. Denlinger*, 667 S.E.2d 470, 495 (N.C.App.,2008) If matters outside the pleadings are considered by the court on the motion, the motion can be treated as a motion for summary judgment. *North Carolina R. Co. v. Ferguson Builders Supply, Inc.*, 103 N.C.App. 768, 407 S.E.2d 296 (N.C.App.,1991)

### **PROCEDURAL HISTORY**

On or about 13 August 2007 Miller & Long filed its Verified Complaint in the above matter. The Verified Complaint contained, *inter alia*, a claim for breach of contract against Superior Construction for work done on the Preserve Condominium Project in Brunswick County, North Carolina, including without limitation, claims for work on Buildings 2,3,4 and 5 exceeding two million dollars (\$2,000,000) in value (collectively, "Project"). Among other claims, the Verified Complaint contained a claim to enforce a lien on Building 5 of the Project and a claim for enforcement of lien on funds against Intracoastal Living, LLC, the then owner of the Project, under N.C.G.S. §44A-19 *et seq.*

On 23 April 2008 Cape Fear Realty filed its Motion for Leave of Court to Amend Complaint in the cases of *Cape Fear Realty in Chirico v. Hyson*, 07 CVS 289, Chatham County and *Cape Fear Realty v. Cape Fear Trading Group, LLC*, 07 CVS 1310, Brunswick County alleging various breaches of fiduciary duty, unfair and deceptive trade practices, punitive damages and misconduct against the Chiricos pertaining to, *inter alia*, the Preserve project.<sup>1</sup> Miller & Long specifically cites to these claims of mismanagement in its Amended Complaint. (Miller & Long Amended Compl., ¶¶96, 98]

On 5 August 2008, Miller & Long filed its Motion for Leave to file Amended Complaint to include a claim for unjust enrichment and the imposition of a construction trust on the Project. In its proposed Amended Complaint, the allegations of mismanagement of Intracoastal Living, LLC mentioned in *Cape Fear Realty v. Cape Fear Trading Group, LLC*, 07 CVS 1310, Brunswick County are alleged by Miller & Long.

On 27 October 2008, Miller & Long filed its Amended Complaint. Currently, Miller & Long is owed \$1,668,741.00 for its work on the Project, which work includes without limitation, all concrete, post tensioning materials and accessories, reinforcing steel and accessories for Buildings 4 and 5 of the Project.

### ARGUMENT

1. **Miller & Long Has Alleged A Valid Recognizable Claim for Relief Under the Circumstances and Therefore Preserve Holdings, LLC's Motion to Dismiss Should be Denied**

The standard for a constructive trust is simple and such claims have been recognized by courts in a variety of circumstances, including without limitation, situations where the

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<sup>1</sup> Superior Construction ("Superior") also has a Complaint pending in Brunswick County Superior Court in the case of *Superior Construction v. Intracoastal Living, LLC*, 07 CVS 2806, Brunswick County ("Superior case") in which Superior alleges, among other things, claims for the imposition of a constructive trust on the Preserve project; a claim for unjust enrichment against Preserve Holdings, LLC; and wrongful

owner of property acquired property through the foreclosure process. A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. See e.g., *Rhue v. Rhue*, 658 S.E.2d 52, 58 (N.C.App.,2008) citing, *Wilson v. Development Co.*, 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970); *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C.App. 390, 537 S.E.2d 248, (N.C.App., 2000); *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (N.C.,1999); *Roper v. Edwards*, 323 N.C. 461, 465, 373 S.E.2d 423, 425 (N.C.,1988); *Embree v. Rafcor*, 330 N.C. 487, 411 S.E.2d 916 (N.C. 1992); *Gee v. Eberle*, 279 Pa. Super. 101, 420 A.2d 1050 (Pa. 1980); *Lukens Construction Company v. Shar-Mich*, 20 Pa. D & C.3d 327 (Pa. Com. Pl. 1981); *Irwin Concrete v. Sun Coast Properties*, 33 Wash App. 190, 653 P.2d 1331 (Wash App. 1982); *Emerald Designs, Inc. v. Citibank*, 626 So.2d 1084 Fla. App. 1993); *Spring Construction v. Harris*, 562 F.2d 933 (4<sup>th</sup> Cir. 1977); *Pearson v. Pearson*, 27 N.C. 31, 40 S.E.2d 477 (1946)

In this case, based on the foregoing allegations, Miller & Long has sufficiently pled a claim for a constructive trust to be imposed on the property.

**2. Preserve Holdings, LLC's Main Argument that It Did Not Acquire Property by Fraud, Breach of Duty or Inequitable Circumstances Ignores Reality**

Preserve Holdings, LLC cites the correct standard for the imposition of a constructive trust, however, applies the standard to an incomplete set of alleged facts in Miller & Long's Amended Complaint. Preserve Holdings, LLC suggests this was an "arms

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disbursement of monies from Intracoastal Living, LLC to the Chiricos [Superior Amended Compl. ¶¶112-165]

length” foreclosure in which an investor simply saw a good investment and purchased the Project at a substantial discount. Preserve Holdings, LLC states “nor did Preserve acquire title through some other inequitable circumstance...” [Revised Memorandum, Preserve Holdings, LLC, p. 4] The facts alleged, however, tell a different story. In essence, the allegations against the sole principals of Preserve Holdings, LLC, is that they deliberately caused the default by Intracoastal Living, LLC and sale of the Project by Wachovia to an entity they created for their own benefit, taking the Project away from Intracoastal Living, LLC – the entity through whom Miller & Long asserts its lien on funds under N.C.G.S. §44A-19 *et seq.* In other words, there are allegations of intentional wrongdoing against the Chiricos that have had serious financial repercussions beyond simply the members of Intracoastal Living, LLC, which includes, of course, Miller & Long, the largest subcontractor to Superior on the Project.

Miller & Long specifically contends that Preserve Holdings, LLC was not an “innocent third party” purchaser of the Project at the foreclosure sale. [Miller & Long Amended Compl. ¶97] At the hearing on Intracoastal Living, LLC’s Motion for Leave to file for Chapter 11 Bankruptcy Protection, it was revealed that there were a number of reasons for the reduction in Intracoastal Living, LLC’s former account balance of \$1,200,000 to \$496,000 – one of which was a distribution to the Chiricos for \$255,000 [Hearing on Intracoastal Living, LLC’s Motion for Leave of Court to File Chapter 11 Bankruptcy, 10/16/08, p. 23]

As indicated by our Supreme Court, there “is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing by the holder of the

property, or by one under whom he claims, the holder, himself, not being a bona fide purchaser for value.” *Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 212, 171 S.E.2d 873, 882 (N.C. 1970) The fact that the Chiricos “acquired” the property by using the foreclosure process does not cleanse their actions or prevent a court of equity from preventing manifest injustice to Miller & Long and others who constructed the Project and can trace their own funds directly into the Project. To be sure, there are examples of cases where a court of equity imposed a constructive trust on real property acquired by someone through the foreclosure process. *See e.g., Pearson v. Pearson*, 27 N.C. 31, 40 S.E.2d 477 (1946); *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964)

In *Embree v. Rafcor*, 330 N.C. 487, 411 S.E.2d 916 (N.C. 1992), the Supreme Court held that a contractor had an equitable lien on construction loan funds held by a lender who had foreclosed despite no fiduciary relationship existing between the contractor and the lender necessarily. In *Embree*, the Supreme Court noted, “a person entitled to restitution is entitled in an appropriate case, to a remedy to a proceeding in equity....such remedies include decrees establishing and enforcing a constructive trust on upon property.” *Embree* at 496 (emphasis added)

In *Roper v. Edwards*, 323 N.C. 461, 373 S.E.2d 423 (1988) the Supreme Court held that defendant owners of property who had acquired property in the absence of fraud, but with a deed that referenced an invalid restraint on alienation, had a legal duty to convey a one acre tract despite no fiduciary duty existing between the plaintiffs and the defendants. The standard articulated in *Wilson* by the Supreme Court, and cited by its progeny, uses a disjunctive “or” when listing the circumstances under which a constructive trust may be appropriate:

“...a constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. It is an obligation or relationship imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations...”

*Wilson* at, 211-212, 882 In short, the fact that the Project was acquired by a foreclosure from Preserve Holdings, LLC should not necessarily prevent a court of equity from imposing a constructive trust on the Project if the facts otherwise justify the imposition of such to prevent unjust enrichment.

**3. Miller & Long Has No Adequate Remedy At Law Unless a Court of Equity Imposes a Constructive Trust on the Property to Prevent Unjust Enrichment**

Miller & Long contends that Superior will not be able to satisfy Miller & Long’s seven figure contract claim against Superior. [Miller & Long Amended Complaint, ¶35] As this Court already knows, Superior has indicated to the Court that if the foreclosure was not enjoined that Superior would be forced into bankruptcy and approximately one hundred (100) people may lose their jobs. [See, Brief in Support of Motion to Enjoin Foreclosure, Superior v. Wachovia, 07 CVS 2529, Brunswick County, p. 11] As a conduit for the work Miller & Long did on the Project, Superior, as a solvent entity through which Miller & Long may recover, is non-existent or questionable at best.

Miller & Long also contends its lien on funds against Intracoastal Living, LLC is, in all likelihood, worthless. [Miller & Long Amended Complaint, ¶39.] It is widely known, that the claims against the remaining \$496,000 in Intracoastal Living, LLC’s account are far exceeded by the millions of dollars in claims against it, and in fact, Miller & Long’s claim alone is triple the remaining account balance for Intracoastal Living, LLC. [Intracoastal

Living, LLC Motion for Leave to File Chapter 11 Bankruptcy Protection] Also, given the history of distributions to the Chiricos from Intracoastal Living, LLC, which distributions plainly contributed Intracoastal Living, LLC's insolvency in the first place, it is not realistic for Miller & Long to simply rely on its claim for unjust enrichment against Preserve Holdings, LLC without some equitable intervention from this Court that prevents the profits from the Project from being paid out to the Chiricos.

As a result of all the foregoing, Miller & Long is without an adequate remedy at law and the imposition of a constructive trust on the Project is proper.

**4. Miller & Long Is Entitled To A Lis Pendens On The Property Since It Alleges A Valid Claim Affecting Title To Real Property**

N.C.G.S. §1-116 (a) states, "any person desiring the benefit of constructive notice of pending litigation must file a separate independent notice thereof, which notice shall be cross-indexed in a accordance with G.S. 1-117, in the following cases...(1) actions affecting title to real property;..." Miller & Long's Amended Complaint filed on 27 October 2008 seeks to have a constructive trust imposed on the property. This claim by its very nature "affects title to real property." The North Carolina Supreme Court and the Court of Appeals for North Carolina have both held that a *lis pendens* is appropriate where a plaintiff: (1) can trace his funds into the property; and (2) alleges either an express or implied trust. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965); *Pegram v. Tomrich Corp.*, 4 N.C.App. 413, 166 S.E.2d 849 (1969); *Cap Care Group, Inc. v. McDonald*, 149 N.C.App. 817, 824, 561 S.E.2d 578, 583 (N.C.App., 2002)

Preserve Holdings, LLC basically argues that the nature of Miller & Long's action is one for monetary damage and not an action to affect title to real property. [Revised Memorandum, Preserve Holdings, LLC, p. 6] The argument that the *lis pendens* is

improper because Miller & Long seeks only a monetary judgment belies the allegations in Miller & Long's Amended Complaint that specifically avers, "Miller & Long is entitled to a ruling from this Court declaring their status as beneficiaries to the constructive trust that should be imposed on Buildings 4 and 5 and which Preserve Holdings, LLC now holds in trust for the benefit of Miller & Long." [Miller & Long Amended Compl., ¶100] Miller & Long has referenced in the body of its Amended Complaint, *inter alia*, the mismanagement of Intracoastal by the Chiricos and the serious allegations of mismanagement in *Cape Fear Realty, LLC v. Cape Fear Trading group, LLC et al*, 07 CVS 1310, Brunswick County litigation and requested that a constructive trust be imposed on the property for the benefit of creditors such as Miller & Long. [Miller & Long Amended Compl., ¶100]

The statement from Preserve Holdings, LLC that Miller & Longs claims for "equitable recovery" should "be directed elsewhere" is disingenuous. It is clear that without equitable intervention from this Court, Miller & Long's Sixth Claim for Relief for a Lien on Funds owed from Intracoastal Living, LLC to Superior Construction is virtually worthless in light of Intracoastal Living, LLC's insolvency. Nor is it realistic for Superior Construction, as a conduit to all unpaid subcontractors, to absorb millions of dollars in subcontractor claims without reaching insolvency itself, effectively eliminating all of Miller & Long potential avenues for recovery.

In short, "the circumstances of this case are not among those for which Chapter 44A supplies a remedy" for Miller & Long and, as such, equitable relief in the form of a constructive trust is proper. *See Embree* at 491 Without such equitable intervention, such creditors will be, to a great extent, left with an insolvent Intracoastal Living, LLC whose insolvency was caused, in large part, by the current owners of the Preserve.

As a result of all the foregoing, Miller & Long respectfully requests that this Court deny Preserve Holdings, LLC's Motion to Dismiss and Motion to Cancel Lis Pendens.

This the 3<sup>rd</sup> day of December, 2008.

JORDAN PRICE WALL GRAY JONES & CARLTON

By: /s/ Brian S. Edlin  
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## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Response to Motion to Dismiss and Motion to Cancel Lis Pendens was served on all parties to this action by FedEx Overnight Mail, addressed as follows:

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This the 3<sup>rd</sup> day of December, 2008.

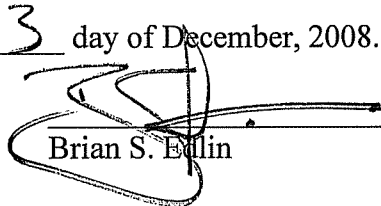
JORDAN PRICE WALL GRAY JONES & CARLTON

By: /s/ Brian S. Edlin

**CERTIFICATION OF COUNSEL PURSUANT TO RULE 15.8 OF THE  
GENERAL RULES OF PRACTICE AND PROCEDURE FOR THE NORTH  
CAROLINA BUSINESS COURT**

This is to certify that I, Brian S. Edlin, do certify that I have reviewed the above brief and believe it to be in compliance with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

This the 3 day of December, 2008.

  
\_\_\_\_\_  
Brian S. Edlin

Sworn to and subscribed before me

this 3 day of December, 2008.

Vicki L. Mastroianni

Notary Public

My Commission Expires: October 22, 2013

