

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF
JUSTICE
SUPERIOR COURT DIVISION
07-CVS-21932

COVENANT EQUIPMENT
CORPORATION, D/B/A WHOLESALE
FORK LIFTS,

Plaintiff,

vs.

FORKLIFT PRO, INC., BUCKY W.
CALDWELL, TIMOTHY SMITH and
WILLIAM CARNIE

Defendants.

**DEFENDANT WILLIAM CARNIE'S
MEMORANDUM IN
SUPPORT OF MOTIONS TO
DISMISS**

Defendant William Carnie, (“Carnie”), by and through its undersigned counsel, files this memorandum in support of its Motions to Dismiss for Insufficient Process, Insufficiency of Service of Process, Lack of Personal Jurisdiction and failure to State a Claim filed contemporaneously herewith. In support of its claims, Carnie states as follows:

INTRODUCTION

Plaintiff filed this action against Defendants Forklift Pro, Inc., Bucky W. Caldwell, Timothy Smith and William Carnie on or about November 1, 2007. A Summons was issued that same day against a William Currie, residing at the same address as Mr. Carnie. Defendant William Carnie was purportedly served by the York County, South Carolina Sheriff’s department as indicated on Plaintiff’s Affidavit of Service filed with the Court on December 20, 2007. Attached to the Affidavit of Service

was a Return of Service from the York County Sheriff's Department. It indicated that Mr. Carnie was personally served at 10:14 a.m. on December 14, 2007 at his home address.

Defendant Carnie denies that he was personally served or otherwise as set out in the Affidavit of Service and attached Return of Service. Defendant Carnie was at work on the time and date set forth in the Affidavit and Return and could not have been served. Defendant Carnie sets out the facts with respect to his service in his Affidavit. His version of the facts, and the fact that he was at work on this time and this date is supported by the Affidavits of Tim Smith and Janet Caldwell. These affidavits set forth that Mr. Carnie was at work on that date and at that time, and show that he could not have been at home as indicated. The Affidavit of Ms. Caldwell further shows that Mr. Carnie and she processed a sales order and shipment the morning of December 14, 2007 that would have required him to be at work proving that service could not have been accomplished as indicated in the Affidavit and Return.

ARGUMENT

Defendant Carnie moves to dismiss the action filed against him pursuant to North Carolina Rules of Civil Procedure 12(b)(4), (b)(5) and (b)(2) for Plaintiff's failure to properly serve Defendant. Specifically, the Summons issued and purportedly served in this matter was issued against William Currie which is substantially and significantly different from William Carnie. Furthermore, the sheriff did not properly accomplish service pursuant to N.C. Gen. Stat. 1-75.10 inasmuch as Defendant Carnie did not personally receive a copy of the Summons and of the Complaint from the sheriff's office, nor was it left with a person of suitable age and discretion at his residence. Accordingly,

the service purportedly accomplished by the sheriff was inadequate. Because the service was improperly issued naming an individual other than Defendant Carnie and the service was improperly accomplished by the York County South Carolina Sheriff's Department, the Court has not obtained jurisdiction over Mr. Carnie and the lawsuit must be dismissed pursuant to Rule 12(b) 2 of the North Carolina Rules of Civil Procedure. Finally, should the Court determine that service was proper, Defendant Carnie seeks to dismiss the Tenth Cause of Action, Breach of Contract as to the Defendant Carnie, on the grounds that Plaintiff's Complaint fails to state a claim against Defendant Carnie and therefore the Cause of Action must be dismissed.

A. **The Court should dismiss the Complaint filed against Defendant Carnie for insufficiency of process.**

Defendant Carnie challenges the Summons issued against him on the grounds that it is issued against William Currie rather than William Carnie. A copy of the Summons is attached hereto as **Exhibit A**. The North Carolina Rules of Civil Procedure 4(b) states that a Summons "shall be directed to the Defendant or Defendants." N.C. Gen. Stat. § 1A-1, Rule 4(b). The North Carolina Supreme Court has made clear that "the purpose of a service of Summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him." *Harris v. Maready*, 311 N.C. 536, 541, 319 S.E. 2d 912, 916 (1984). The Supreme Court has further noted that a defect in the Summons itself will generally make the process be held to be either voidable or void. *Harris*, 311 N.C. at 542, 319 S. E. 2d at 916. Furthermore the law is clear that "process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid even though a

Defendant had actual notice of the lawsuit.” *Roshelli v. Sperry*, 57 N.C. 305, 307, 291 S.E. 2d 355, 356 (1982).

In this case, Plaintiff has not complied with the requirements of Rule 4 or the North Carolina Courts with respect to the issuance of a proper Summons. As noted, Rule 4(b) requires that the Summons “be directed to the Defendant or Defendants” and in this case the Summons is instead directed to William Currie rather than William Carnie. In this case, the failure to issue the Summons in the proper name is a fatal defect and one for which the Court must dismiss the case pursuant to Rule 12(b)(4) of the North Carolina Rules of Civil Procedure for insufficiency of process. *See Roshelli v. Sperry*, 67 N.C. at 307, 291 S.E. 2d at 356; *but see Jones v. Whitaker*, 59 N.C. at 223, 225, 296 S.E. 2d 27, 29 (1982)(finding service proper where a Summons and Complaint served on Defendant Shirley Sapp Whitaker named Sherrie Sapp Whitaker was valid). Because the Summons identifies a different last name and thus a different person, rather than a different first name, and because the Summons was improperly served as shown below, the process issued in this matter was incorrect and did not identify the proper party upon whom it was to be served. Accordingly, the Court must dismiss this case for insufficiency of service of process.

B. The Court should dismiss this action for insufficiency of service of process where the York County Sheriff’s Department did not properly serve Defendant William Carnie.

Defendant Carnie was improperly served because the sheriff did not personally serve him as stated in the return of service attached to the Affidavit of Service filed by Plaintiff on December 20, 2007. North Carolina law has long held that where there is a statutory method provided for service of a Summons by certain persons or by certain

methods, statutory requirements for service must be met or there is no valid service. *Guthrie v. Ray*, 293 N.C. 67, 69, 235 S.E. 2d 146, 148 (1977) In this case the North Carolina statutory requirements for service are that service may be made on a natural person “by delivering a copy of the Summons and of the Complaint to him or by leaving copies thereof at the Defendant’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.” N.C. Gen. Stat. § 1A-1, Rule 4 (j)(1)(a)(2007). However, North Carolina law has consistently held that “when the return shows legal service by an authorized officer, nothing else appearing the law presumes service.” *Saliby v. Conners*, 171 N.C. App, 435, 437, 614 S.E. 2d 416, 417(2005)(citations omitted). Furthermore, North Carolina law is clear that a sheriff’s return of service may not be set aside unless the evidence consists of more than a single contradictory affidavit and is clear and unequivocal. *Guthrie* 293 N.C. at 71, 235 S.E. 2d at 149.

In this case, Defendant Carnie presents three different Affidavits - from Defendant Carnie, from Timothy Smith and from Janet Caldwell - all in support of Defendant Carnie’s contention that he was not personally served as required by Rule 4(j) of the North Carolina Rules of Civil Procedure. In this case, the Affidavits are clear and unequivocal that Mr. Carnie was not at home at the time that the sheriff’s return indicates that he was served. Furthermore, the Affidavit of Timothy Smith and Janet Caldwell conclusively established that Mr. Carnie was at work on the time and date in question and could not have been served by the sheriff as indicated on his return. Furthermore, the work order sent by Mr. Carnie to Ms. Caldwell is unequivocal proof that Mr. Carnie was at work on the date and time in question. Accordingly, this evidence is adequate to

overcome the presumption of service, and based on this evidence the Court should dismiss this action against Mr. Carnie on grounds of insufficiency of service of process.

C. The Court should dismiss Defendant Carnie where it does not have jurisdiction over him.

North Carolina law holds that absent valid service of process, a Court does not acquire personal jurisdiction over a Defendant and the action must be dismissed. *Glover v. Farmer*, 127 N.C. App 488 (1997), *Cert. denied*, 347 N.C. 575 (1998). In this case, Plaintiff has failed to issue proper service against Defendant Carnie and has failed to properly serve Defendant Carnie as shown above. Because the process and the service of process were invalid as shown above, the Court has not acquired personal jurisdiction over Defendant Carnie and he must be dismissed from the action.

D. The Trial Court should dismiss the Tenth Cause of Action against Defendant William Carnie for failure to state a claim where the covenant not to compete asserted by the Plaintiff was purportedly included in an Asset Purchase Agreement between Covenant Equipment and Wholesale Forklift, Inc.

The essential question on Rule 12(b)(6) Motion is whether the complaint states a claim upon which relief can be granted. A complaint “may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, sufficient facts to make a claim are absent, or facts are disclosed which will necessarily defeat the claim.” *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App 52, 61 544 S.E. 2d 840, 848 (2001) Further with respect to the Asset Purchase Agreement, while the Court may not consider material outside of the complaint, the Court may consider documents the moving party attaches to its Motion to Dismiss which are the subject of the complaint and specifically referred to in the complaint. See *Oberlin Capital*, 147 N.C. App at 60, 554 S.E. 2d at 847.

Plaintiff attaches as an exhibit to its Complaint an Employment, Confidentiality, and Non-Competition Agreement entered into on February 11, 2002 between Wholesale Forklifts, Inc. and William R. Carnie. As part of the terms of this Agreement, for a period of two years after the termination of Carnie's employment, he would not directly or indirectly call upon or contact any company clients and/or customers for the purpose of furnishing same or similar services, equipment, goods and products provided or offered by the company or to solicit or divert company clients and/or customers from purchasing, leasing, or using the company's services, equipment, goods and products or sell or attempt to lease to company clients and/or customers the same or similar services, goods, equipment, products provided or offered by Wholesale Forklifts, Inc. Defendant Carnie did not contract with Plaintiff, Covenant Equipment Corporation in this matter, and accordingly it is not a party to this Agreement.

Plaintiff contends that the Employment, Confidentiality and Non-Competition Agreement attached to the Complaint was transferred to the Plaintiff by the Asset Purchase Agreement. The Asset Purchase Agreement, paragraph 1(d), identifies the contract rights seller conveyed to the Plaintiff but as noted in Schedule 1(d) the Defendant Carnie's contract is not included. Plaintiff's only real argument that the contract would be signed to it is based on paragraph 1(m) wherein all other assets tangible or intangible used in connection with the operation of the business except those excluded in Schedule 1(m). Defendant Carnie does not believe that the Asset Purchase Agreement covers this contract and that it was not conveyed to Plaintiff. Nevertheless, pursuant to this Court's decision in *Better Bus. Forms & Prods., Inc. v. Craver*, 2007 N.C.B.C. 34 a restrictive covenant cannot be assigned as part of an Asset Purchase

Agreement. Because the covenant-not-to-compete would become more restrictive, with potentially a wider area and/or different market than initially agreed upon, unless the covenant Not to Compete was renegotiated. *See Craver* at ¶ 33. If this Agreement was enforced, it might put Defendant Carnie in a situation of being under a restrictive covenant he did not agree to and one that could impose restrictions he would never have agreed to in his initial Employment Agreement. *Id.* Accordingly, because Carnie did not contract with Plaintiff and did not renegotiate the contract after commencing work for Plaintiff, the contract and covenant is not binding on him.

Plaintiff should also not be allowed to enforce the Contract and covenant-not-to-compete where there is no consideration for the agreement between Plaintiff and Defendant Carnie. North Carolina law has long held that a covenant not to compete is valid and enforceable where it is (1) in writing; (2) made a part of the Employment Contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) designed to protect a legitimate business of the employer.” *Okuma America Corp. v. Bowers* ___N.C. App. ___, 638 S.E. 2d 617, 620 (2007). In this case, there is no valid consideration for the covenant-not-to-compete between Plaintiff and Defendant Carnie, although the original restrictive covenant was supported by consideration. The contract was between Wholesale Fork Lift Inc and Defendant Carnie, and because there is a change in ownership and title of the company there had to be a new covenant-not-to-compete between Plaintiff and Defendant Carnie. Because Plaintiff cannot show that there was adequate consideration for the covenant-not-to-compete it cannot be enforced and the claim must be dismissed for failure to state a claim.

Finally, even if the covenant-not-to-compete was valid upon completion of the asset purchase agreement, based on the Asset Purchase Agreement attached to Defendant's Motion to Dismiss and the facts as set forth in the Plaintiff's Complaint, the Asset Purchase Agreement became effective on June 3, 2004. *See Complaint* ¶ 6. After that time, as alleged in Paragraph 15 of Plaintiff's Complaint, Defendant Carnie was an employee of Plaintiff, Covenant Equipment Corporation rather than Wholesale Fork Lift, Inc. with whom he had a contract. Accordingly, even if the covenant not to compete is valid, it began to run on June 3, 2004 and would have expired on June 3, 2006, more than a year prior to the filing of the complaint. Thus, even if the contract and covenant not to compete are found valid, the contract and covenant are not for the benefit of the Plaintiff and the covenant not to compete contained in the contract has expired. Accordingly, the Court must dismiss Plaintiff's Tenth Cause of Action for Breach of Contract against Defendant Carnie on the grounds that Plaintiff has failed to state a claim against him.

CONCLUSION

For the foregoing reasons, Defendant William Carnie, requests the Court to Dismiss the Complaint against Defendant William Carnie pursuant to Rule 12(b)(4), 12(b)(5), and 12(b)(2) for insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction. Should the Court not dismiss the action on the above grounds, Defendant Carnie respectfully requests the Court to dismiss Plaintiff's Tenth Cause of Action for breach of contract, specifically breach of a covenant not to compete, on the grounds that the Complaint fails to state a claim for relief against Defendant Carnie as shown herein.

Respectfully submitted,

This the 13th Day of February, 2008.

HORACK, TALLEY, PHARR, & LOWNDES, P.A.

By: /s/ John W. Bowers

John W. Bowers, NC Bar No. 24133

301 South College Street

2600 One Wachovia Center

Charlotte, NC 28202-6038

Telephone: (704) 377-2500

Facsimile: (704) 372-2619

jbowers@horacktalley.com

CERTIFICATE OF COMPLIANCE

I do hereby certify that the foregoing **DEFENDANT WILLIAM CARNIE'S MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS** complies with Rule 15.8 of the General Rules of Practice for the North Carolina Business Court.

This the 13th day of February, 2008.

HORACK, TALLEY, PHARR, & LOWNDES, P.A.

By: /s/ John W. Bowers
John W. Bowers, NC Bar No. 24133
301 South College Street
2600 One Wachovia Center
Charlotte, NC 28202-6038
Telephone: (704) 377-2500
Facsimile: (704) 372-2619
jbowers@horacktalley.com

CERTIFICATE OF SERVICE

I do hereby certify that service of the foregoing **DEFENDANT WILLIAM CARNIE'S MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS** was this date served on the parties and counsel of record by electronically filing with the Business Court and was also served on the parties and counsel of record by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Rex Morgan
Baucom Claytor Benter Morgan & Wood, P.A.
P.O. Box 35246
Charlotte, NC 28235
Fax: 704-376-6207

Daryl L. Hollnagel
The Business Law Advisors
1900 South Boulevard, Suite 304
Charlotte, NC 28203

Stephen Dunn
Van Hoy, Reutlinger, Adams & Dunn
737 East Boulevard
Charlotte, NC 28203
Fax: 704-375-6024

C. Grainger Pierce, Jr.
Nexsen Pruet, PLLC
201 S. Tryon Street, Suite 1200
Charlotte, NC 28202

This the 13th day of February, 2008.

HORACK, TALLEY, PHARR, & LOWNDES, P.A.

By: /s/ John W. Bowers
John W. Bowers, NC Bar No. 24133
301 South College Street
2600 One Wachovia Center
Charlotte, NC 28202-6038
Telephone: (704) 377-2500
Facsimile: (704) 372-2619
jbowers@horacktalley.com

STATE OF NORTH CAROLINA

File No. 07-CVS-21930

MECKLENBURG County

In The General Court Of Justice
District Superior Court Division

Name Of Plaintiff: COVENANT EQUIPMENT CORPORATION, d/b/a
Address: WHOLESale FORK LIFTS
City, State, Zip

CIVIL SUMMONS

VERSUS
Name Of Defendant(s): FORKLIFT PRO, INC., BUCKY W. CALDWELL, TIMOTHY SMITH and WILLIAM CARNIE

G.S. 1A-1, Rules 1

Alias and Pluries Summons

Date Last Summons Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1: Timothy Smith, 12896 Hamilton Place Drive, Fort Mill, SC 29708

Name And Address Of Defendant 2: William Currie, 181 Neelys Creek Road, Rock Hill, SC 29730

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

- 1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served.
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff): Rex C. Morgan, POBox 35246, Charlotte, NC 28235
Daryl L. Hollnagel, 1900 S. Boulevard, Charlotte, NC 28203

Date Issued: 11-1-02, Time: 3:14, Signature: [Handwritten Signature]

Deputy CSC, Assistant CSC, Clerk Of Superior Court

ENDORSEMENT: This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended thirty (30) days.

Date Of Endorsement, Time, Signature, Deputy CSC, Assistant CSC, Clerk Of Superior Court

NOTE TO PARTIES: Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is \$15,000 or less are heard by an arbitrator before a trial.

