

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF PITT

FILE NO. 16 CVS 2743

CAROLINA HOME SOLUTIONS, I, INC.,)

Plaintiffs/Third Party Defendants)

v.)

PLAINTIFF AND THIRD PARTY

)

DEFENDANT, CAROLINA HOME

CRYSTAL COAST HOME)

SOLUTIONS I, INC.'S BRIEF UNDER

SOLUTIONS, INC.,)

RULE 12.12

Defendant/Third Party Plaintiff)

v.)

)

)

CHARLES BOUDREAU,)

Third Party Defendant.)

BRIEF PURSUANT TO RULE 12.12

NOW COMES, the Plaintiff and Third Party Defendant and offers this brief prior to trial based upon personal knowledge, stipulated facts agreed to by both parties set forth in the proposed pre-trial orders and exhibits offered in pleadings filed to date.

FACTUAL BASIS

Plaintiff and Third Party Defendant Carolina Home Solutions, I, Inc. is a North Carolina corporation owned by Third Party Defendant Charles Boudreau. The company and Boudreau operate a franchise of the Aerus Corporation, which is the maker and seller of Electrolux branded vacuums and other home appliances. Mr. Boudreau became the franchisee for Greenville and New Bern locations in 2007, purchasing those locations from Khaled Hammoudeh.

Defendant/Third Party Plaintiff Crystal Coast Home Solutions, Inc. is a North Carolina corporation owned primarily, if not entirely, by Elbert Herring. Mr. Herring was an employee of the Plaintiff, and after some period of employment expressed an interest in becoming the franchisee for the location in New Bern, North Carolina. To such end, Mr. Boudreau and Mr. Herring entered an agreement dated August 29, 2012. Stipulated copies of that agreement are attached to several pleadings, most recently as Exhibit 3 under Defendant/Third Party Plaintiff's proposed pre-trial order.

Pursuant to that agreement, the New Bern location at the time occupied two leased locations. One was used as a management and training office, while the other was used for a service department and showroom. The service department was later relocated to a leased facility next door to the management office. Designated witness Chuck Tyson was the landlord for the Trent Road location.

Paragraph 1 of the agreement sets a total purchase price for the "franchise rights, fixtures, furnishings and equipment" at \$69,894.00. The payment of the purchase price required a down payment of \$5,000.00 and owner financing of the balance at seven percent per annum, for a period of thirty-six months, with monthly payments of \$1,941.50 beginning October 15, 2012. Further, Mr. Herring could prepay the owner financing without penalty.

Paragraph 2 of the agreement clearly states that "[a]t the completion of this sales agreement," Mr. Herring would "be qualified to be an Associate Franchise, or Franchise of Aerus Electrolux." Similarly, paragraph 8 states that the leases, utilities and other services will remain in Boudreau's name until the sale is complete.

As a part of the Aerus company, parts and equipment had to be purchased from Aerus corporate. Paragraph 10 provides that Mr. Herring would be responsible for purchasing his parts from Aerus subject to a 7% royalty. Similarly, as set forth in paragraph 11 and in Aerus' corporate documents, including the Franchise documentation attached as Exhibit 4 to the Defendant/Third Party Plaintiff's proposed pre-trial order, each location must submit weekly Franchise Sales Reports. Based upon that sales report, Aerus would directly deduct the cost of machines and parts ordered by the location. Paragraph 11 then provides that the difference between "the amount paid to Aerus for each unit, and the agreed upon transfer cost of each unit will be invoiced by the Seller each Tuesday (or 2nd business day of each week), and will be due and payable on Wednesday (or 3rd business day of each week)." This "difference" incorporates the tiered franchise payment schedule set forth in the franchise documents, whereby the cost of each machine to the franchisee is based upon the franchisee's sales history. Paragraph 11 provides as such in that Herring would owe Boudreau the "difference" in price on each sale from Boudreau's cost as a upper tier franchisee, and Herring's cost as a lower tier franchisee. This payment set forth in paragraph 11 is separate and apart from the purchase price in paragraph 1.

Paragraph 13 sets the quota of sales that Herring was required to meet. This paragraph also sets forth the penalty that Herring would have to pay for falling short of that quota. As set forth in paragraphs 11 and 13, failure to sell any units would result in a payment due from Herring to Boudreau of at least \$2,500.00 or \$3,000.00 per month, depending on the "Aerus sales month."

Mr. Herring performed well initially under the August 29, 2012 agreement. So much so, that he began inquiring as to becoming a full franchisee ahead of the schedule contemplated by the August 29, 2012 agreement. To this end, with Mr. Boudreau's agreement, Aerus corporate

sent Mr. Herring the Franchise Disclosure Document, as shown by the transmittal letter and documentation attached as Exhibit 4 to the Defendant/Third Party Plaintiff's proposed pre-trial order. The second paragraph of that letter clearly states:

Your signature does not bind you to an agreement with Aerus, it simply acknowledges that you have received the FDD. After reviewing the FDD and should you desire to purchase a franchise, this document will aid in listing fees associated with such franchise and can be referenced in the future if you have any questions regarding the Aerus opportunity.

The franchise documentation also informs the potential franchisee that ongoing fees are paid by Aerus corporate to the original franchisee who has sponsored the new franchisee. Therefore, as Mr. Herring well understood from his time with Mr. Boudreau, in place of any "difference" payments Boudreau would have received under the August 29, 2012 agreement, as a Sponsor, Boudreau would receive payments from Aerus for as long as Herring operated. Those fees are set forth on page 8 of the FDD. Mr. Herring acknowledged receipt as a "Prospective Franchisee" on June 20, of 2013.

Defendant/Third Party Plaintiff's Exhibit 6 to their proposed pre-trial order is an email from Jason Johnson of Aerus corporate office to Mr Boudreau indicating that the franchise documents had been sent to Mr. Herring. Exhibit 7 is an email chain commencing with a September 6, 2012 email from Khal Hammoudeh to Aerus corporate, giving a report on the franchisees that he has responsibility for, including a statement that the Greenville franchisee has improved his corporate level and that they had just finalized promoting his "GM in Newbern to an owner." Other emails in the chain express encouragement to Herring to make a lot of sales.

However, when Herring decided that he wanted to become a full franchisee, rather than an associate, a new agreement was entered, which agreement attached as an exhibit to Plaintiff/Third Party Defendants' proposed pretrial order. Herring has denied entering that agreement and

deemed his signature page a forgery. However, Herrings Exhibit 10 to the proposed pretrial order is an email chain where Boudreau informs Aerus corporate on May 28, 2013, that he is selling "one of my franchises and was needing a draft of a franchise agreement." The Aerus Franchise Administration Coordinator, Jon Lutrell, writes back on May 28, 2013 including a sample Bill of Sale to use. Also, Jason Johnson writes on May 29, 2013 asking whether the buyer is an existing franchisee or needs to be approved by corporate as such.

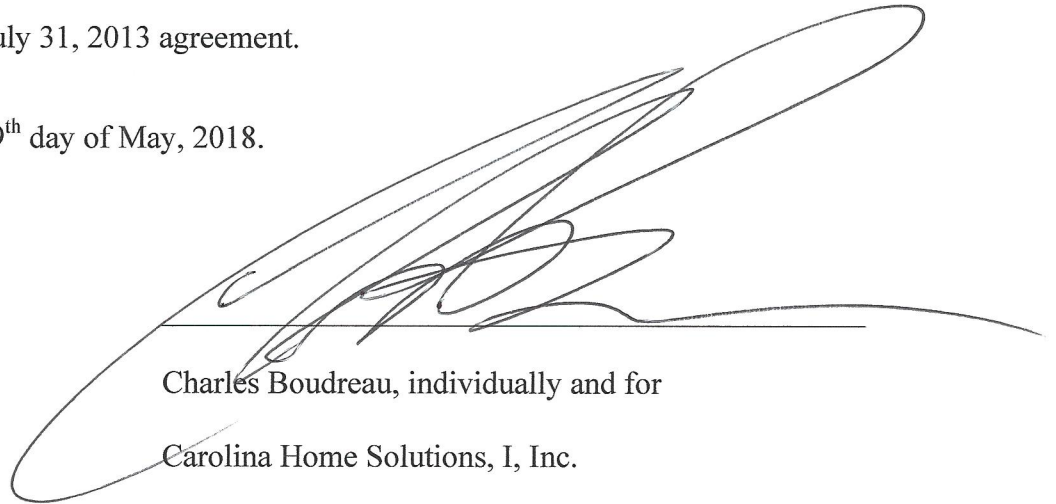
The Bill of Sale form provided by corporate was utilized by Boudreau and Herring in executing a July 31, 2013 agreement whereby Herring would no longer have to pay up charges on equipment ordered or penalties for not reaching sales quotas. Instead, Herring would simply pay the value placed upon the business of \$240,000.00 in 48 installments of \$5,000.00. Herring began performing under this agreement, making payments to Boudreau over the ensuing years, as shown in Exhibits attached to the pretrial order.

Finally, Herring acknowledged to Boudreau, in an email dated July 21, 2015, and attached as an Exhibit to Plaintiff/Third Party Defendants' proposed pretrial order, that Herring remained indebted to Boudreau under their agreement. Mr. Herring recites various mental conditions he suffers, but throughout the long email states that he knows that he owes Mr. Boudreau money and that he is attempting to pay what is owed. As an example, "please know that my not paying had nothing to do with you or how i felt towards you. only money. thanks for letting me slide as long as you did especially since you have been in the dark about what is going on."

The position of the Plaintiff/Third Party Defendants is simply that Mr. Boudreau tried in numerous ways to assist Mr. Herring in becoming a franchisee. These efforts are alluded to in

Mr. Herring's email. When Mr. Herring's mental condition finally had detrimental effect on the business of the New Bern location so that he was unable to meet his payment obligations, Mr. Boudreau finally brought legal action. The failings of the New Bern franchise under Mr. Herring have also finally brought about the termination of his franchise by Aerus and assignment of that franchise to Mr. Boudreau. The Plaintiff and Third Party Defendants maintain that the evidence will show that Mr. Herring and his company failed to complete the terms of either the August 29, 2012 agreement or the July 31, 2013 agreement.

Submitted this 29th day of May, 2018.

A large, stylized handwritten signature in black ink, appearing to read 'Charles Boudreau', is written over a horizontal line.

Charles Boudreau, individually and for
Carolina Home Solutions, I, Inc.

800 SE Greenville Blvd., Suite 105

Greenville, NC 27858

(252) 412-9180