

STATE OF NORTH CAROLINA  
COUNTY OF UNION

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 07-CVS-3186

A-1 PAVEMENT MARKING, )  
LLC, )  
 )  
Plaintiff, )  
Vs. )  
 )  
APMI CORPORATION, )  
LINDA BLOUNT and )  
GARY BLOUNT, )  
 )  
Defendants. )

**DEFENDANTS' BRIEF  
IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Defendants submit the following Brief in Opposition to the Plaintiff's Motion seeking Summary Judgment dismissing the Sixth Cause of Action wherein Defendant Gary Blount asserts that Plaintiff has breached the North Carolina Wage and Hour Act in failing to pay bonus wages that he had earned.

**FACTS**

It is undisputed that Gary Blount worked as the General Manager for the Plaintiff ("A-1") from April 21, 2006 through early May 2007. As part of his compensation, he was to be paid a bonus calculated pursuant to the formula set forth on Exhibit "1" to his affidavit filed contemporaneously with this Brief. The bonus formula established the base amount of gross profits for 2005 at \$556,900. The bonus calculation for the period ending December, 31, 2006 was tied to certain percentage increases in A-1's gross profits which were calculated by subtracting contract costs for direct materials, direct labor and overhead from the revenues of A-1 for 2006.

A-1 is owned by Carolyn and Lenny Langevin. Mr. Langevin is also the sole owner of Traffic Markings, Inc. When it was purchased by the Langevins on April 21, 2006, A-1 was made part of the Traffic Markings Consolidated Group (Lenny Langevin Depo, pp. 141-141, and Gary Blount affidavit, Exhibit 4, p.8). Subsequently, a Consolidated Financial Statement was prepared Cullen, Murphy & Co., P.C., the accountants for Traffic Markings and A-1. A copy of the Consolidated Financial Statement for the Traffic Markings Financial Group for February 28, 2007 and February 28, 2006 that was produced by the Plaintiff in discovery, is attached to Gary Blount's Affidavit as Exhibit 4, filed under seal. That document shows on page 29 that \$113,993 in contract receivables owed by Traffic Markings to A-1 for 2006 were eliminated in the consolidation of Traffic Markings, Inc.

Gary Blount's primary responsibilities as the general manager for A-1 included handling road crews and making sure that there was sufficient manpower, equipment and material at job sites. In his deposition, he described to Plaintiff's counsel how A-1 paid for materials that were not used on A-1 jobs (G.Blount depo, p 229). He also described how A-1 purchased equipment that was sold without A-1 receiving payment (G.Blount depo, pp. 233-236). Additionally, A-1's overhead was increased by the company's payment of interest on non-A-1 loans and personal items (G.Blount depo p. 241).

A-1 paid Gary Blount only a \$5,000 bonus at the end of April 2007 based upon the one page Summary Statement of Operations attached to his affidavit as Exhibit "3". This was the only document ever given to Gary Blount in response to his requests for the documentation used to calculate his bonus (Gary Blount affidavit, Exs. 2 and 3, G.Blount Depo, p.213). This is also the only document containing any bonus

calculations provided by the Plaintiff in discovery in connection with Defendants' request for all "documents and computations utilized by the Plaintiff relating to the calculation and payment of any bonus to Defendant Gary Blount." (Defendant's First Request For Production of Documents, No.9). Based upon his knowledge of the work performed, revenues and QuickBook entries, Gary Blount estimated that gross profits for A-1 would increase 15% for 2006 (Gary Blount depo, p 209). Under the bonus formula, this would have entitled him to a \$20,000 bonus (G. Blount Affidavit, Ex. 1.). Had Traffic Markings paid to A-1 the \$113,993 owed for aged contract receivables for 2006, the gross profits of A-1 would have increased 24%, resulting in a bonus of \$40,000. Instead, the accountant for both companies eliminated these receivables entirely according to the Consolidated Financial Statement (Gary Blount Affidavit Ex. 4). Contemporaneously, the accountant for both A-1 and Traffic Markings was sending emails to Lenny Langevin referencing his "management fee to move income between the to(sic) companies..." (Gary Blount Affidavit Ex. 5).

## **ARGUMENT**

### **I. STANDARD**

The standard for entry of Summary Judgment in North Carolina is well known. "The party moving for Summary Judgment has the burden of establishing the lack of any triable issue of fact. His papers are carefully scrutinized and all inferences are resolved against him." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E. 2d 392, 399 (1976). If the movant supports the motion with affidavits, they must meet the requirements set forth in Rule 56(e) of the North Carolina Rules of Civil Procedure which requires that:

(e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

NCGS 1A-1, Rule 56(e).

The moving party's substantive burden may be carried by proving that an essential element of the opposing party's claim is non-existent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. "If the moving party meets this burden, the party who opposes the Motion for Summary Judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not doing so." *Moore v. Hillcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419, 421-22 (1979). However, Summary Judgment is an extremely drastic remedy that should be awarded only where the truth is quite clear. "Even the slightest doubt should be resolved in favor of the non-movant." *Volkman v. D.P. Associates*, 48 N.C. App. 155, 157, 268 S.E. 2d 265, 267 (N.C. App. 1980).

## **II. ANALYSIS**

### **A. PLAINTIFF HAS FAILED TO PROPERLY SUPPORT ITS MOTION AND THE AFFIDAVIT OF PAUL DIGIROLAMO SHOULD BE STRICKEN AS INCOMPETENT AND FOR LACKING SUPPORTING DOCUMENTATION.**

Plaintiff has submitted the affidavit of Paul Digirolamo as the principal supporting document for its motion. Defendants object to this affidavit and move that it be stricken as not being in compliance with the requirements of Rule 56(e) because no supporting documentation was supplied and it contains inadmissible opinion testimony.

The affidavit states that Mr. Digirolamo calculated the gross profits for the Plaintiff for the 2005 and 2006 calendar years using generally accepted accounting principles ("GAAP"). He then goes on to state his calculation of Gary Blount's bonus and opine that there were no improper inter or intra company transfers between A-1 and Traffic Markings (P.Digirolamo affidavit, paras 3-9).

Although the affidavit clearly refers to financial records of the Plaintiff for 2005 and 2006, no supporting documentation was supplied with the affidavit. Consequently, neither the Defendants nor this Court can review anything to verify or contest the calculations or figures put forth by Mr. Digirolamo. Furthermore, the affidavit contains conclusory statements concerning his calculations of gross profits and the propriety of inter and intra company transfers between A-1 and Traffic Markings. See First Citizens Bank & Trust Co. v. Northwestern Ins. Co., 44 N.C. App. 414, 419-420 (N.C. Ct. App. 1980)(portion of affidavit based on manufacturer's certificate of origin as well as the conclusions of law contained therein should have been disregarded in considering the propriety of summary judgment); see also, Singleton v. Stewart, 280 N.C. 460, 467, 186 S.E.2d 400,405 (N.C. 1972)(striking affiant's legal conclusions that a contract required the seller to give notice of termination). Finally, Mr. Digirolamo's conclusions and opinions concerning the financial transactions of the Plaintiff should not be considered as he has not been designated as an expert and no information has been supplied concerning his qualifications. Peace v. Peace Broadcasting Corp., 22 N.C. App. 631, 633, 207 S.E.2d 288, 290 (1974)(affidavit containing opinions on Virginia law should have been stricken where there was no finding or stipulation that affiant was an expert).

**B. PLAINTIFF HAS FAILED TO MEET ITS BURDEN EVEN IF THE AFFIDAVIT OF PAUL DIGIROLAMO IS CONSIDERED**

Plaintiff bases its Motion for Summary Judgment solely on its contention that Gary Blount cannot show that the Plaintiff improperly calculated his 2006 bonus. However, the Plaintiff has failed to supply any documentation supporting its contention other than a Summary Affidavit from its accountant with no supporting documentation, along with excerpts from depositions of Gary Blount and Lenny Langevin. Nevertheless, the Affidavit of Gary Blount, along with deposition testimony as set forth herein, and more importantly, Plaintiff's own financial documents provide ample evidence supporting Gary Blount's claim.

**1. PLAINTIFF HAS PROVIDED NO DOCUMENTATION TO SUPPORT ITS BONUS CALCULATION.**

The Parties agreement called for the Plaintiff's accounting firm of Cullen, Murphy & Co., P.C. to calculate the Gross Profits for a base year of performance ending December 31,2005. Subsequent Gross Profit performance was to be compared to the base year in order to calculate Gary Blount's bonus. (Gary Blount affidavit Ex1).

Plaintiff has submitted only the affidavit of Paul Digirolamo without any supporting documentation in connection with the calculation of the Plaintiff's Gross Profits for 2006. The only document ever provided to Gary Blount in response to his requests for documentation in connection with his bonus was the one page Summary Statement of Operations attached to his affidavit as Exhibit "3". (Gary Blount affidavit Ex.3, and G. Blount Depo, p.213). This was also the only document containing any

information relevant to the bonus calculation provided by Plaintiff in Response to the Defendants' First Request for Production of Documents, No. 9, which sought production of all "statements, letters, financial documents and computations utilized by Plaintiff relating to the calculation and payment of any bonus to Gary Blount". Essentially, Plaintiff has come forward with nothing to back up its contention regarding the bonus owed to Gary Blount other than the unsupported Affidavit of Mr. Digirolamo.

**2. THE PLAINTIFF'S OWN FINANCIAL DOCUMENTS SHOW THAT GARY BLOUNT IS ENTITLED TO AT LEAST \$40,000 FOR HIS 2006 BONUS**

Review of the financial documentation that has been provided by Plaintiff in discovery supports the Defendant's contention that Plaintiff's Gross Profits for 2006 were understated by at least \$113,993 due to receivables owed from Traffic Markings that were eliminated entirely in the consolidation of Traffic Markings Inc (see page 29 Exhibit 4 to Gary Blount Affidavit). Page 29 of Exhibit 4 shows the Aged Contracts Receivable for A-1 as of February 28, 2007. Focusing on those that were due in 2006, receivables owed by Traffic Markings over 90 days old total \$34,961 and receivables over 60 days old total \$79,032. These aged contract receivables totaling \$113,993 were completely eliminated due to the consolidation of Traffic Markings. Had they been paid, the gross profit would have increased by 24% to \$693,902 from the figure of \$579,909 contained on the Statement of Operations given to Gary Blount (G.Blount Affidavit, Ex. 3). This would have entitled Gary Blount to a bonus of \$40,000 according to the bonus formula on agreed on by the parties (Gary Blount affidavit, Ex.1).

Mr. Blount explained the basis for his claim from his personal knowledge at length in his Deposition ( G. Blount depo pp. 227-231: A-1 paying for materials used by Traffic Markings; pp. 233-240: A-1 purchasing and refurbishing trucks without compensation; pp: 241-244: A-1 paying interest for \$100,000 advanced to Lenny Langevin from line of credit and purchasing personal items). Additionally, he testified to the discrepancy shown in the Consolidated Financial Statements (Exhibit 4 to his affidavit) by pointing out that Traffic Markings had written off \$154,000 that it owed to A-1 (G.Blount depo p. 278) (this figure came from rote memory as the document was not in front of him at the time).

Plaintiff erroneously maintains that Gary Blount admitted that “he lacks the finance and accounting know-how to testify about the facts necessary to make out such a [bonus] claim.” Mr. Blount was not presented with any financial documents prepared by A-1 or Traffic Markings or their accountants during his deposition. Although questioned extensively on twenty four different exhibits, no documents showing the figures utilized to calculate his bonus were presented. From pages 203 through 214 of his deposition he explained his contentions concerning the miscalculation of his bonus. He described the basis for his estimate of a 15% increase in gross profit as coming from the QuickBooks information of A-1, which he reviewed at the time (G. Blount depo, p 209). He also described how his review of the Consolidated Financial statements showed that \$154,000 owed to A-1 from Traffic Markings had been written off (G. Blount depo p. 278).

Plaintiff cites no authority for its contention that the bonus claim must fail because Gary Blount has not identified a financial expert. No case has been located requiring that a witness have specific expertise to review and testify concerning the



contents of a financial statement. In *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 378, 542 S.E.2d 689, 694 (2001), the Court noted that Rule 701 of the N.C. Rules of Evidence allowed a lay witness to testify as to the percentage of profits realized on plaintiff's gross revenues where his opinion testimony was based on his recollection of the revenues realized by plaintiff on the contracts and his knowledge, based on experience, of plaintiff's percentage of profit on gross sales. Mr. Blount has given testimony from his personal experience concerning materials and equipment paid for but not used by A-1. The information regarding \$113,993 in written off contract receivables from Traffic Markings comes straight from the Plaintiff's own financial documents provided in discovery and requires no specialized expertise to comprehend.

Nothing in the Bonus Agreement authorized the elimination of legitimate receivables owed to A-1 from Traffic Markings. The elimination was inconsistent with the Bonus Agreement in that it artificially reduced the revenues of A-1 especially since the consolidation was not referenced in the Bonus Agreement. The elimination allowed A-1 and the Langevin's to avoid at least \$35,000 in bonus payments due Gary Blount, breaching at minimum the implied covenant of good faith, if not the express terms of the contract.

[A] contract contains all terms that are necessarily implied "to effect the intention of the parties" and which are not in conflict with the express terms. Among these implied terms is the basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement. All parties to a contract must act upon principles of good faith and fair dealing to accomplish the purpose of an agreement, and therefore each has a duty to adhere to the presuppositions of the contract for meeting this purpose.

Maglione v. Aegis Family Health Ctrs., 168 N.C. App. 49, 56, 607 S.E.2d 286, 291  
(2005)(citations omitted).

### **Conclusion**

Plaintiff has failed to meet its burden to show that there is no genuine issue of material fact. The affidavit of Paul Digirolamo should be stricken, but even if it is considered, the lack of documentation concerning the calculation of Gary Blount's bonus along with the written off receivables from a company controlled by the owners of A-1 referenced in the Plaintiff's own financial documents warrants denial of the Plaintiff's motion.

This 11 day of May, 2009.

s/Rex C. Morgan  
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**CERTIFICATE OF COMPLIANCE**

I do hereby certify that the foregoing DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT complies with Rule 15.8 of the General Rules of Practice for the North Carolina Business Court.

This 11 day of May, 2009.

s/Rex C. Morgan  
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**CERTIFICATE OF SERVICE**

I, Rex C. Morgan, do hereby certify that a copy of the foregoing document was served upon the parties entitled thereto by electronic transmission and by placing same in the United States mail, postage prepaid and addressed as follows:

Ms. Amy Worley  
McGuireWoods,LLP  
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This the 11 day of May, 2009.

s/Rex C. Morgan  
Rex C. Morgan