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.

A-1 PAVEMENT MARKING, LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Defendant Gary Blount ("Defendant")'s response to Plaintiff's Motion for Partial Summary Judgment attempts to obscure the issue before the Court – whether Defendant forecast evidence of a genuine issue of material fact on his bonus claim. Rather than provide the Court with a roadmap of his evidence establishing a genuine issue of material fact, Defendant instead attempts to shift the burden of proof to A-1 to **disprove** his claims. Such a tactic is contrary to the law and fails on the record before the Court.

A-1 Pavement Marking, LLC ("A-1")'s Motion and supporting affidavits establish that there is no genuine dispute regarding the $5,000 bonus payment Defendant received. Defendant has not met his Rule 56 burden to come forward with material evidence, other than his own unsupported and inconsistent allegations, to the contrary. In fact, Defendant has produced no evidence other than his own mere speculation that he is entitled to any additional bonus money, and therefore his claim should be dismissed.

STANDARD

Defendant misstates the legal and evidentiary burden for surviving summary judgment by erroneously arguing that A-1 must disprove his unsupported speculation that

he is entitled to additional bonus money. (Def . Br. at 7). To the contrary, because A-1 presented an adequately supported motion and affidavit pursuant to N.C. Rule Civ. Pro. 56, the burden is on Defendant to come forward with "specific facts (not mere allegations or speculation)" that controverted A-1's evidentiary forecast. *Johnson v. Scott*, 137 N.C. App. 534, 537, 528 S.E.2d 402, 404 (N.C. Ct. App. 2000).[1]

Summary judgment is proper here because Defendant has not raised a genuine issue of material fact and A-1 is entitled to a judgment as a matter of law. *Wilkins v. Safran*, 185 N.C. App. 668, 671, 649 S.E.2d 658, 661(citation omitted). An issue of fact is genuine only "***if it is supported by substantial evidence*,**" and is material when the issue's resolution would prevent recovery. *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002)(citations omitted)(emphasis added). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id*. Defendant's reply rests solely on his speculation and contains no specific relevant facts. This evidence cannot support his claim and, as such, it should be dismissed. *Id.*; *Wilkins*, 185 N.C. App. at 671, 649 S.E.2d at 661 (citation omitted); *Johnson*, 137 N.C. App. at 537, 528 S.E.2d at 404.

[1] "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." N.C. Rule Civ. Pro 56(e).

ARGUMENT

A. Defendant Has Produced No Credible Material Evidence That A-1 Violated the North Carolina Wage and Hour Act

Defendant has failed to produce any material evidence in support of his claim and, as such, it should be dismissed. Under the North Carolina Wage and Hour Act ("NCWHA"), Defendant must prove that he accrued a bonus he was not timely paid. N.C. Gen. Stat. § 95-25.6; *Murphy v. First Union Capital Mkts. Corp.*, 152 N.C. App. 205, 209-210, 567 S.E.2d 189, 192 (2002). Because both parties concede the bonus plan governs, his claim follows the same paradigm as a breach of contract. *See, e.g., Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 145, 605 S.E.2d 254, 262 (2004). "The elements of breach of contract are (1) the existence of a valid contract and (2) breach of the terms of the contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Defendant cannot prove breach of the bonus plan and his claim must therefore fail.[2]

Defendant cannot point to any erroneous accounting in Plaintiff's computation of Defendant's bonus. For example, Defendant's reliance on A-1's elimination of aged receivables in Traffic Markings Financial Group's consolidated financial statements as support for his claim is misplaced. (Def. Br. at 2, 3, 7-9.) The Traffic Markings Financial Group's consolidated statements were prepared to summarize the overall profitability of the Traffic Markings Financial Group for federal income tax purposes, and did not impact the gross profitability of subsidiaries like A-1. (Pl. Mat. in Supp. Ex.

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[2] Defendant's brief misstates the measurement in the bonus plan. Defendant states that his bonus "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." (Def. Br. at 1). Rather, the plan used gross profits "as calculated by Cullen, Murphy & Co., P.C. ["Cullen Murphy"], and ***in a comparable format to the Buyer's financial statements***[.]" Nevertheless, no deductions outside of those listed by Defendant were taken from the gross profits calculation used to compute Gary Blount's bonus. (Pl. Mat. in Supp. Ex. 5, ¶¶5, 8-10.)

5, ¶¶4-6.) Therefore, the $113,993 elimination which Defendant attempts to rest his claim on is wholly irrelevant to his bonus calculation.

Plaintiff's accountant at Cullen Murphy, Paul Digirolamo, calculated Defendant's bonus ***prior to and separate from*** the consolidated statements. *Id*. No eliminations were undertaken as a part of computing Defendant's bonus. *Id*. Mr. Digirolamo separately calculated A-1's 2006 gross profits to compute Defendant's bonus by combining New A-1's 2006 statements with A-1 Pavement Marking, Inc. ("Old A-1")'s statement for the first part of 2006, prior to the sale. (Pl. Mat. in Supp. Ex. 5, ¶6.) Because New A-1 purchased Old A-1 in April of 2006, Mr. Digirolamo could not summarize the full calendar year's financials, as required in the bonus plan, without combining the two entities' books. *Id*.

Defendant cited documents evidencing these calculations in his affidavit, but he apparently misunderstood the meaning of those documents.[3] For example, the April 27, 2007, email between Mr. Digirolamo and Mr. Langevin discussing a "management fee to move income between the to (sic) companies," referred to combining Old A-1 and New A-1's books to give Defendant credit for the profits for all of 2006. (Pl. Mat. in Supp. Ex. 5, ¶7.) Hence, the "moving income" was done for Defendant's benefit, not the nefarious purpose he suggests. *Id*. Also, Traffic Markings, Inc., also never charged A-1 the management fee referenced in that email. (Pl. Supp. Mat. in Ex. 5, ¶15.)[4] Accordingly, Defendant was given every possible credit toward his bonus.

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[3] Contrary to Defendant's assertion that Plaintiff did not produce responsive documents during discovery, A-1 produced Mr. Digirolamo's email early in discovery along with all its attachments. By citing that Bates stamped email in their response, Defendant belies his argument that Plaintiff failed to produce documents supporting its bonus calculation. (Def. Br. at 3.)

[4] Had Defendant deposed Mr. Digirolamo or retained an expert to analyze the documents Plaintiff produced instead of relying on Gary Blount's speculation, he would know exactly how Mr. Digirolamo calculated the bonus.

Specifically, as set forth in his affidavit, Mr. Digirolamo calculated Old A-1's 2006 gross profit by taking its contract revenue, rounded to the nearest dollar as $252,284, and deducting $61,067 for direct materials, $104,492 for direct labor, and $102,758 in overhead. (Pl. Mat. in Supp. Ex. 5, ¶9.) Applying those deductions yielded a gross profit loss of $16,033. *Id.*

Similarly, Mr. Digirolamo calculated New A-1's gross profit by taking its contract revenue of $2,445,130 and deducting $893,181 for materials, $500,413 for direct labor, and $455,594 for overhead. (Pl. Mat. in Supp. Ex. 5, ¶11.) Applying those deductions yielded a gross profit of $595,942.

Mr. Digirolamo then combined Old A-1's $16,033 loss with New A-1's $595,942 profit, for a 2006 calendar year gross profit of $579,909. (Pl. Mat. in Supp. Ex. 5, ¶12.) The ***only*** deductions from either entity's contract revenue were direct materials, direct labor, and overhead. (Pl. Mat. in Supp. Ex. 5, ¶¶5, 10, 12.) No intercompany eliminations were made and Mr. Digirolamo is unaware of any improper or fraudulent accounting. (Pl. Mat. in Supp. Ex. 5, ¶¶5-6, 16.) Therefore, the evidence is undisputed that Defendant's bonus was calculated by Cullen Murphy in a comparable format to the plan's base year. Accordingly, Defendant's claim should be dismissed.

B. Defendant's Affidavit Contradicts Prior Testimony and Cannot Support His Claim

Moreover, Defendant's claim should be dismissed because he provided contradictory statements regarding his damages in a futile attempt to create an issue of fact. In Defendant's response, his bonus calculation estimate varies from $20,000 to $40,000. (Def. Br. at 3,7.) This variation is consistent with Defendant's pattern of changing the amount he claims he is owed depending on when and how he is asked. On

April 27, 2007, Defendant originally estimated his damages at $30,000, less than half the $60,000 alleged in the counterclaim. (G. Blount Dep. 201:10-202:2.) When deposed about the $60,000 counterclaim, Defendant stated, "We think it's in excess of that. We – I think that we would probably have to bring additional CPA's in and do some additional investigation into the –" (G. Blount Dep. 256:12-17.) Now, Defendant contradicts that testimony, stating, "it is clear from the documents and my experience with A-1 that its gross profit for 2006 should have been at least $693,902, which entitled me to a minimum bonus of $40,000…." (Def. Br., G. Blount Aff., ¶9.)

These contradictory estimates cannot support his claim. *Pinczkowski v. Norfolk S. Sy. Co.*, 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002)("a party opposing summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony")(citations omitted); *28 Strong's N.C. Index 4th Trial § 104* (2009)("A party opposing a motion for summary judgment will not be allowed to create an issue of fact by filing an affidavit contradicting his or her prior sworn testimony in a deposition."), *citing Wachovia Mortg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E.2d 727 (1978)).

Defendant is changing his "personal knowledge" to comport with whatever numbers he believes the documents can support.[5] These contradictions cannot be used to create a material issue of fact and Defendant's bonus claim should be dismissed. *Pinczkowski*, 153 N.C. App. at 440, 571 S.E.2d at 7.

[5] Defendant's most recent affidavit simply combines Mr. Digirolamo's $579,909 gross profit calculation with the irrelevant $113,993 elimination on the consolidated financial statements for an estimate of $693,902. Obviously this number is not based on "personal knowledge."

C. Paul Digirolamo's Affidavit is Adequately Supported By Personal Knowledge.

Mr. Digirolamo's affidavit is proper. Pursuant to N.C. Rule Civ. Pro. 56(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. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

Mr. Digirolamo's affidavit meets all of these requirements. First, Mr. Digirolamo's affidavit did not contain inadmissible opinion evidence. Mr. Digirolamo is a qualified witness with knowledge of the facts in his affidavit. As *Byrd's*, 142 N.C. App. 371, 542 S.E.2d 689, a case cited in Defendant's reply states, "Rule 701 permits a lay witness to testify as to opinions based on the witness' own perception." Mr. Digirolamo is the witness who did all of the calculations at issue. (Pl. Mat. in Supp. Ex. 2, ¶¶3-6.) As such, any opinions he is giving are narrowly drawn toward the facts and perceptions he experienced as A-1's accountant and are therefore admissible. *Byrd's*, 142 N.C. App. 371, 542 S.E.2d 689.

Mr. Digirolamo's affidavit also required no supporting documentation. His statements relied solely on his personal knowledge as Plaintiff's accountant and referenced no documents. (Pl. Mat in Supp. Ex. 2.) Moreover, as *First Citizens Bank & Trust Co. v. Northwestern Ins. Co.*, 44 N.C. App. 414, 420, 261 S.E.2d 242, 245-46 (1980)(citation omitted), another case in Defendant's reply states, "Rule 56(e) grants to the trial court wide discretion to permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Since all documentation

arguably referenced in Mr. Digirolamo's first affidavit is attached to his supplemental affidavit, Defendant's lack of documentation argument is moot.

Finally, Defendant relies on *Peace v. Peace Broadcasting Corp.*, 22 N.C. App 631, 633, 207 S.E.2d 288, 290 (1974), to claim that Mr. Digirolamo's affidavit should be stricken because he is not designated as an expert and no information has been supplied concerning his qualifications. However, *Peace* is not controlling because Mr. Digirolamo is not serving as an expert witness and not offering a legal conclusion. *Id.* Mr. Digirolamo is simply an accountant explaining the calculations he did in this case. He calculated A-1's gross profits for 2005, 2006, and Blount's 2006 bonus. (Pl. Mat. in Supp, Ex. 2, ¶¶3-6). His affidavit recited facts such as what he calculated each of those figures to be and that he is not aware of any improper or fraudulent accounting. For all the above reasons, Mr. Digirolamo's affidavit and supplemental affidavit comport with N.C. Rule Civ. Pro 56(e), and should be considered by the Court.

CONCLUSION

For the reasons stated above, Defendant's Counterclaim for an employment-based bonus under the NCWHA fails as a matter of law and should be dismissed as a matter of law.

This the 21st day of May 2009

McGUIREWOODS LLP

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<u>CERTIFICATE OF COMPLIANCE WITH N.C. BUS. CT. RULE 15.8</u>

The undersigned hereby certifies that the foregoing document **A-1 PAVEMENT MARKING, LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** has a word count of less than 3, 750 words which complies with North Carolina Business Court, Rule 15.8.

This the 21st day of May 2009.

_/s/ Amy R. Worley
Bradley R. Kutrow
Amy R. Worley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **A-1 PAVEMENT MARKING, LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** was served upon each of the parties or, when represented, upon their attorney of record, electronically and by mailing a copy thereof, postage prepaid, addressed as follows:

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This the 21st day of May 2009.

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