

STATE OF NORTH CAROLINA
COUNTY OF GRAHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE No. 08 CVS 07

PHILLIPS AND JORDAN, INC.,
Plaintiff,

v.

BRIEF IN RESPONSE TO THE
MOTION FOR RULE 11 SANCTIONS
FILED BY THE DEFENDANTS
JOSEPH AND JEFFREY BOSTIC

JOSEPH E. BOSTIC, JR.,
JEFFREY L. BOSTIC, MELVIN MORRIS,
JAMES BOWMAN, TYLER MORRIS,
BOSTIC DEVELOPMENT, LLC, and
BOSTIC DEVELOPMENT AT ASHEVILLE, LLC.

NOW COMES the Plaintiff, Phillips and Jordan, Inc., pursuant to Rule 15.6 of the General Rules of Practice and Procedure for the North Carolina Business Court and offers to the Court this Brief in Response to the Motion for Sanctions filed by the Defendants, Joseph Bostic Jr. and Jeffrey Bostic. The Plaintiff respectfully shows the Court that:

STATEMENT OF THE CASE

The Plaintiff will not reiterate all prior matters already resolved in this action as the Plaintiff is confident that the Court is aware of the current procedural posture of this action and the route by which the parties have reached our current status. However, Plaintiff does inform the Court that the Bostics subpoenaed Randy Jordan, Dale Irons, Dudley Orr, and Janet Crisp for deposition under oath on the dates of June 15, 16, and 17, 2009.

The attorneys for the Plaintiff had previously, in answering the Bostics' Second Interrogatories, identified these individuals as only **four** of **seventy-seven** individuals

with **personal knowledge** relevant to the facts and circumstances under the Amended Complaint. The Plaintiff was not asked by the Defendants to specify what **personal knowledge** they possessed or the Plaintiff possessed. The depositions were solely to determine what the deponents personally knew.

Upon request of the Bostics, the Plaintiff agreed to request that the above mentioned persons make themselves available for the taking of their depositions in their individual capacity, and only to determine their **personal knowledge**. Bostics counsel agreed to these stipulations prior to the taking of any depositions. Based upon these stipulations the individuals agreed to be present for the taking of their deposition.

The Bostics, and their counsel, have never requested the designation of a corporate representative under Rule 30(b)(6) to testify as to any matter involved in this action. There has been no request to depose the Plaintiff, or its agents/employees in this action. There has not been any statement provided describing with reasonable particularity the subject matter upon which the Bostics wished to examine a designated representative the Plaintiff. The only depositions taken at this time were of persons in their individual capacity and not designated or acting as agents or employees of the Plaintiff. The Bostics use of portions of the deposition of Randy Jordan to attempt to mislead this Court that the testimony of Randy Jordan evidences the knowledge of the Plaintiff is substantial misrepresentations to this Court.

The Bostics' counsel is fully aware that objections and stipulations were made prior to and during the depositions to indicate that the witnesses were not testifying as to what the Plaintiff knew, but only testified as to their own personal knowledge. The attempt by the Bostic's counsel to misrepresent the nature and basis of the testimony of

Randy Jordan as testimony by or on behalf of the Plaintiff is an attempt to commit fraud upon this Court.

Randy Jordan appeared individually and not as a representative of Phillips and Jordan, Inc. He did not testify as vice president of the Plaintiff or as to any information he had been privy to on behalf of the Plaintiff from its counsel. He has not personally performed all the inquiries into the facts of this case. He was specifically advised not to testify as a representative of the Plaintiff or as to what discoveries had been relayed to him from counsel as an agent of the Plaintiff. The deposition testimony of Randy Jordan has little, or no relevance, as to what knowledge Phillips and Jordan, Inc. has ever possessed.

STANDARD OF REVIEW

The Courts of this State have clearly delineated the ability of one Superior Court Judge to modify or overrule the order of another Judge previously made in the same action. The Supreme Court stated the established law in *North Carolina v. Woolridge*, 357 N.C. 544, (N.C. 2003).

In *Woolridge*, the Supreme Court held,

“The power of one judge of the superior court is equal to and coordinate with that of another. (citation omitted). Accordingly, *it is well established* in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another’s errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. (Citation omitted). When the above noted situation arises, the second judge may reconsider the order of the first judge “*only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter. (emphasis added).*”¹

¹ *Id.* at 549, 550.

The *Woolridge* Court also stated,

“The reason one superior court judge is prohibited from reconsidering the decision of another has remained consistent for over one hundred years. When one party “waits for another judge to come around and takes its chances with him and the second judge overrules the first, an “unseemly conflict” is created. (Citations omitted). Given this Court’s intolerance for the impropriety referred to as “judge shopping” and its promotion of collegiality between judges of concurrent jurisdiction, this “unseemly conflict” ... will not be tolerated. (Citations omitted).”²

Rule 11 of the North Carolina Rules of Civil Procedure, in relevant part, states:

(a)*Signing by Attorney*- Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney or record in his individual name, whose address shall be stated... Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

In interpreting Rule 11(a) the Court of Appeals stated the analysis in determining whether the rule has been violated in *Kohler Co. v. McIver*, 177 N.C. App. 396 (N.C. App. 2006). The Court of Appeals held,

Pursuant Rule 11, a signer must certify that “the pleadings are (1) well grounded in fact, (2) warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law, and (3) not interposed for any improper purpose (citation omitted). A breach of the certification as to any one of these three prongs is a violation of the Rule (citation omitted).”³

² *Id.* at 550

³ *Id.* at 401.

The *Kohler* Court clarified the analysis for determining whether a pleading was well grounded in fact by stating,

In analyzing whether a complaint meets the first certification requirement [well grounded in fact], we must determine:“(1) whether the plaintiff undertook a reasonable inquiry in the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.” (citation omitted) “In determining compliance with Rule 11, courts should avoid hindsight and resolve all doubts in favor of the signer. (citation omitted).⁴

As to the analysis for determining whether the pleading was legally sufficient the *Kohler* Court held,

In analyzing whether a complaint meets the second certification requirement, we consider the legal sufficiency of the complaint. The two step analysis required under the legal sufficiency prong of the rule requires the following: “The court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged at the time the paper was signed. If the court answers either prong of this second issue negatively, then Rule 11 sanctions are appropriate.”(citation omitted). “Reference should be made to the document itself, and the reasonableness of the belief that it is warranted by existing law should be judged at the time the document was signed. (citation omitted).⁵

As to this second certification requirement, that the paper be legally sufficient, the Court of Appeals further clarified the proper analysis in *Johns v. Johns*, 672 S.E.2d 34 (2009). The Court stated,

“Rule 11 sanctions are appropriate where the offending party either failed to conduct a reasonable inquiry into the law or did not reasonably believe that the paper was warranted by existing law... Whether the attorney who signed... “gleaned a belief” that the paper was legally sufficient goes to her subjective belief and does not address whether that belief was

⁴ *Id.* at 402.

⁵ *Id.* at 403, 404.

objectively reasonable. (citation omitted). (“Assuming a reasonable inquiry, the dispositive question is whether a reasonable person in plaintiff’s position... after having read and studied the applicable law, would have concluded the paper was warranted by existing law.”)⁶

As to the third certification requirement, the improper purpose prong, the Court of Appeals stated the standard of analysis in *Kohler*. The Court of Appeals held,

Our Courts “have held that the improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements”.(citation omitted). “Even if a paper is well grounded in fact and law, it may still violate Rule 11 if it is served or filed for an improper purpose.” (citation omitted). [A]n objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the Movant to prove such improper purpose. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender’s objective behavior. An improper purpose is any purpose other than one to vindicate rights... or to put claims of right to a proper test. (citation omitted). “There must be a strong inference of improper purpose to support imposition of sanctions.” (citation omitted). “The Rule 11 movant’s subjective belief that a paper has been filed for an improper purpose is immaterial in determining whether an alleged offender’s conduct is sanctionable.” (citation omitted).⁷

RESPONSE TO THE ARGUMENTS OF THE DEFENDANTS

The Plaintiff, and its counsel, have not violated the provisions of Rule 11. The Bostics are asking the Court to rely solely upon what they contend are the “facts” of this case, without analyzing the reasonableness of Plaintiff’s factual inquiry, belief and interpretation of the existing law, or allowing Plaintiff opportunity to produce evidence in support of its allegations at a proper hearing on the merits. The Bostics’ arguments simply do not apply the proper standard for determining a violation of Rule 11 and allege purported facts that the Plaintiff has specific evidence to dispute and disprove.

⁶ *Id.* at 40.

⁷ See *Kohler supra* at 404, 405.

The Bostics' arguments do not address the Plaintiff's position as to the law and the facts at the time the Plaintiff filed the Amended Complaint. The Bostics, through their Motion, are asking the Court to make findings of fact based upon the facts in dispute between the parties and such is the province of the jury.

The Court has previously denied the Bostics' Rule 12(b)(6) and 9(b) Motions to Dismiss the claims that are alleged to violate Rule 11. Such a ruling establishes that the Plaintiff's claims are reasonable under the understanding of the law and facts possessed by the Plaintiff when it filed the pleading. While the Bostics argue that such a ruling does not prevent the Court from imposing sanctions under Rule 11, which the Plaintiff disputes, their argument fails to take into consideration that a judge has considered the legal sufficiency of the claims and the factual support thereof. This Court concluded that the Plaintiff has stated reasonable and viable claims.

The Defendants cite *Perkins v. Helathmarkets, Inc.*, 2007 WL 2570242, '6 (N.C. Super. 2007) and *Hill v. Hill*, 173 N.C. App. 309 (2005), however these cases are not applicable. In *Hill*, sanctions were allowed only after the Plaintiff was unable to produce any evidence in support of claims that were allowed under Rules 12 and 9, not upon the factual qualifications of the pleading at the time it was filed. It does not hold that a pleading approved under Rule 12(b)(6) or Rule 9(b) by one judge can be sanctioned by another judge in the same action. There is no precedent or authority for the Bostics' proposition when the legal and factual sufficiency of the pleading itself has already been tested and approved. For a Court to hold otherwise would lead to the "unseemly conflict" which was condemned in *Woolridge*.⁸

⁸ See *Id. Woolridge supra*.

**PLAINTIFF’S CLAIMS WERE WELL GROUNDED IN FACT AND
LEGALLY SUFFICIENT**

The Plaintiffs allegations of fraud, unfair and deceptive trade practices, and alter ego are based upon reasonable beliefs from facts discovered after the Plaintiff has performed an extensive inquiry. The Plaintiff bases its claims upon its interpretation of the applicable law after a reasonable inquiry into the facts and law. The standard stated under *Kohler* has been satisfied.

Pursuant to the case law interpreting Rule 11, sanctions are not appropriate because the Plaintiff, through counsel, has made a reasonable inquiry and has a reasonable belief in the facts and law. At the time of the filing of the Amended Complaint, and continuously since, the Plaintiff, through counsel, has sought to discover and establish an accurate factual portrait of the actions taken by the Defendants.

Under the standard stated in *Kohler*⁹ the Court must first consider “whether the Plaintiff undertook a reasonable inquiry into the facts and whether the plaintiff after reviewing the results of his inquiry, reasonably believed that his position was well grounded.”¹⁰ The Plaintiff, through counsel, has gone above and beyond what is required to establish that its inquiry was reasonable.

On or about July 28, 2004, the Plaintiff discovered that Bostic Development at Asheville, LLC, and not Bostic Development, Inc., owned the property under the Westmont Commons Project. However, the Plaintiff did not discover, and had no reason to suspect, at that time the nature of the fraud that had been committed by the Defendants.

In fact, it was not until the Plaintiff’s counsel had communications with Joseph Moss, former attorney of Defendants James Bowman and Bostic Development at

⁹ See *Kohler supra* at 402.

¹⁰ *Id.*

Asheville, LLC. (hereinafter BDA), on October 24, 2005 that the Plaintiff had any reasonable grounds to believe that a fraud had been perpetrated against it. It was Joseph Moss who informed the Plaintiff of the web of “sham” entities that had been created by the Morris and Bostic Defendants to misappropriate the monies obtained to finance the construction activities engaged in by the Plaintiff.

Joseph Moss also informed the Plaintiff’s counsel that the money borrowed to finance the Westmont Commons job had been paid out to Bostic Construction and distributed through out its “affiliates” in such a manner as to be un-liable. Mr. Moss indicated that once BDA received the money it was almost instantaneously transferred to Bostic Construction, or advanced to one of the other “affiliates” and commingled into all other monies of the Bostic entities. The money was then used to finance projects and other businesses that the Morris and Bostic Defendants also owned.

Mr. Moss also informed the Plaintiff’s counsel of a pending lawsuit that had been filed by Southstar Capital against the individual Bostics and Morris defendants alleging fraud and unfair and deceptive trade practices based upon almost identical allegations as those now asserted by the Plaintiff. Mr. Moss informed Plaintiff’s counsel that Southstar was represented by attorneys Michael Utley and Steven Cox. The Plaintiff’s counsel has contacted these individuals.

Prior to being informed by Joseph Moss, the Plaintiff, or its counsel, did not have any basis for forming a belief that the Individual Defendants had engaged in wrongful acts. The Plaintiff simply had no knowledge or reason to suspect that the misrepresentation in the contract was fraudulent. The Plaintiff had no reason to allege, or believe that the Defendants had acted with the intent to deceive the Plaintiff, that the

misrepresentation was calculated to deceive the Plaintiff, or that the individuals had exercised complete dominion and control over such a vast network of sham entities.

This is evidenced by the fact that the Plaintiff initially sought to sue only the businesses and not the individuals. If the Plaintiff had been privy to this type of information at that time it would have filed the immediate action then. The Plaintiff simply had no knowledge, and no reasonable way to have known, of the facts it has since discovered and upon which it filed the pleadings in this action.

Once informed, the Plaintiff dismissed the action against the companies and began its inquiries into the activities of the individual Defendants. In its inquiry the Plaintiff, through counsel, began to confirm the suspicions raised by Joseph Moss. In doing so the Plaintiff has exercised all reasonable avenues available to obtain the facts under which it filed its action. The Plaintiff has either contacted, or attempted to contact, numerous individuals involved in business with and/or litigation against the Defendants.

First, the Plaintiff began to contact other companies and individuals involved in business with the Defendants. The Plaintiff, through counsel, also began to contact and meet with individuals involved with the bankruptcy proceedings initiated against Bostic Construction, Inc. The Plaintiff, through counsel, also contacted various former employees of the Bostics. The Plaintiff also contacted numerous other legal professionals who had reviewed documentation and corporate files of the various corporate entities they called the “Bostic” empire.

From the employees of the Defendants the Plaintiff confirmed that the Defendants maintained control and dominion over the corporate entities. The Plaintiff discovered that any and all aspect of the business was under the complete control and scrutiny of the

Morris and Bostics. This included the terms of the contract, obtaining property and investors, who signed the contracts, and who was placed in supervision over the projects under such contracts. The Plaintiff's counsel also learned that it was common knowledge among the employees of Bostic Construction, Inc. and the other entities that the Defendants used the construction loan funds to finance numerous other businesses and projects owned by the Defendants.

The Plaintiff's counsel learned that the Defendants financed numerous other housing projects and businesses and that they used the loan money to pay preferential payments to investors with the money obtained through the construction loan to Bostic Construction. The Plaintiff's counsel learned that the corporate records of Bostic Construction and the various "affiliates" indicated that the construction money financed everything and provided evidence in support of Plaintiff's claims, which has proven to be true.

The Plaintiff, through counsel, also performed extensive corporate records research and discovered that the Individual Defendants in fact held substantial interests in numerous companies that were financed from the money obtained by Bostic Construction, Inc. and that was owed to the Plaintiff. The Plaintiff, through counsel, also searched public land records and discovered that despite the bankruptcy of Bostic Construction, Inc. the individuals and their "companies" still owned various properties, started new construction companies, and had sold multiple projects, including the subject matter property, under the "sham" companies for a major profit outside of the bankruptcy proceeding.

The Plaintiff also performed various record searches that indicated that the Individual Defendants had used the monies obtained from the construction loan to satisfy debts owed on projects in other states where the material and serviceman's lien laws were far more ridged than those in North Carolina. For instance, the Plaintiff, based upon its research, was informed and believes that the Individual Defendants specifically used the money borrowed for the Westmont Commons project to satisfy debts on projects in Florida, South Carolina, and Alabama where the lien statutes allow subcontractors who had not been paid to execute against the property where the work was performed by the subcontractors, even if the landowner had previously paid all monies owed to the general contractor.

The Plaintiff, based upon its research, was also reasonably convinced at the time the pleading was filed that the Individual Defendants used all of these other companies as their alter egos. All individuals with whom the Plaintiff's counsel communicated specifically stated that there was no division between these entities and the individual Bostics and Morris Defendants. The persons with whom the Plaintiffs communicated, especially those who had been creditors of, or engaged in business with, Bostic Construction, Inc., all indicated that this whole network of companies and properties was simply "Bostic" and that the Bostics and Morris Defendants individually dominated and controlled "Bostic".

The information provided to the Plaintiff also indicated that the Individual Defendants used these "affiliate" companies to maximize their profit out of the construction loan for the Asheville project into their other companies without paying the Plaintiff. The Bostics and Morris Defendants would always possess a controlling interest,

if not all interest, in each of these “affiliates”. A few examples of these “affiliates” would be Carolina Apartment Products, Carolina Apartment Interiors, and Plymouth Nursery.

Through these “affiliates” the Bostics and Morris Defendants mandated their subcontractors obtain all essential items, such as doors, plumbing fixtures, and other necessary items, from these companies. The Bostics and Morris Defendants would then charge above the fair market value of such items and skim a lucrative profit out of the construction loan by making such payments to their own companies. These companies were paid in full during the project, but the Plaintiff was, and still is, owed over a half of a million dollars for its services.

The Plaintiff was also informed that the Bostics and Morris Defendants controlled all aspects of each and every activity taken by any of their businesses. This included everything from the specific terminology of construction contracts to the type and color of carpet that was placed in the apartments. The Plaintiff was also informed that all of these allegations would be evidenced by the records of the “Bostic” companies that were reviewed by the bankruptcy trustee.

This inquiry created a valid factual basis from which the Plaintiff has stated its legal claims in its pleadings. The Plaintiff used all avenues available to it at the time of the filing of the pleading at issue to inquire into the factual basis for its claims. The Plaintiff contacted employees of the Defendants, the trustee in bankruptcy and his co-counsel, other individuals who had sued under the same or similar type claims, others who had engaged in business activities with the Defendants, and performed expansive research on the public records in multiple states. All of these individuals indicated that

their investigations supported Plaintiff's beliefs. This reasonable inquiry led the Plaintiff to a reasonable factual belief that its claims were justified.

The Plaintiff's claim for fraud is well grounded in fact and is legally sufficient to comply with the requirements of Rule 11(a) of the North Carolina Rules of Civil Procedure. The Court of Appeals, in *Hunter v. Guardian Life Ins. Co.*, 162 N.C. App. 477, 481, (N.C. App. 2004) stated,

"The elements of fraud are (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which in fact does deceive, (5) resulting in damage to the injured party... While the facts constituting fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used... Fraudulent intent need not be specifically alleged if there are facts alleged from which fraudulent intent can be reasonably inferred."

In its pleadings the Plaintiff specifically alleged the requirements to establish the elements of fraud. One example is the allegation that a material misrepresentation was made. Under paragraphs twelve, thirteen, fourteen, and fifteen of the Amended Complaint, the Plaintiff alleged that the Defendants, using their alter ego, made a false representation to the Plaintiff that their alter ego had entered into a contract for construction on property owned by a fictitious entity, Bostic Brother's Development, Inc. The remaining paragraphs of the Amended Complaint state the other elements. The claims are well grounded in fact and have been alleged pursuant to a legally sufficient statement of the law.

From its factual discoveries the Plaintiff reasonably concluded that the Individual Defendants, using their dominion and control of their alter ego, stated or caused to be stated in the contract that someone other than the true owner held title to the property. This is a logical and reasonable determination based upon the facts that existed at the

time and that has been substantially supported by the facts and documents that the Plaintiff has been able to discover since the date it filed the pleading.

The Bostics argue that the Plaintiff and its counsel should be subjected to Rule 11 sanctions because the “Bostics” allegedly never made misrepresentations to the Plaintiff. This argument does not take into consideration the Plaintiff’s position based upon the facts that it had available to it at the time of the pleading and that it has available to it now. The Bostics simply fail to grasp that the facts prove that they used their alter ego to make the misrepresentations, and therefore they themselves made the misrepresentations.

While this Court and the Court held by the Honorable James U. Downs differentiate as to whether the Plaintiff has met the pleading requirements under Rule 9(b), however, it does not negate that the Plaintiff can, and could at the time, validate that the Bostics, along with the other individual Defendants, maintained such control over Bostic Construction and the “affiliates” that the actions taken by Bostic Construction were in fact the same as actions taken by the Bostics themselves.

The facts available to the Plaintiff indicate, and prove, that each and every aspect, including the wording of contracts, was controlled by the Individual Defendants. Therefore, the reasonable conclusion was that these Individual Defendants had intentionally misstated the true identity of the owner of the property to gain a fraudulent advantage against the Plaintiff. Whether or not Plaintiff pled with enough particularity its allegations does not rise to the level of conduct sought to be sanctioned under Rule 11. The fact that two Superior Court Judges can differentiate on such standard also indicates that the Plaintiff has at least attempted to meet the proper standard.

There has been contentions made that the Plaintiff failed to state the identity of those who made the false representations. While the Plaintiff understands this Court has reached a different position in its Order dismissing the claims of James Bowman, the Plaintiff still contends that it has properly stated the true identities of the persons who made the false representations and that being all of the Individual Defendants. They were the persons in control of the process and who governed what statements were made in the contract.

While it is true that Aaron Akers signed the contract, the Plaintiff's inquiry into his involvement indicates that he was simply an agent and employee of the Individual Defendants. According to those who knew his position with the Defendants it seems that Mr. Akers is simply a person who only did what he was told and did nothing without the express consent and approval of the Bostics and Morris Defendants. He simply had no control over what was stated in the contract, no financial motivation to defraud the Plaintiff, and more than likely did not even know that the contract contained the misrepresentation.

The Plaintiff has no proof to indicate that Aaron Akers himself placed the misrepresentation in the contract or had any control over what went into the contract. The Plaintiff is informed and believes that this is why the individual Defendants directed him to sign the contract, because it provided them a means by which to deny their fraud and an argument to shield them from liability.

The Bostics also allege that the Plaintiff did not rely on the misrepresentations involved in the fraud claim. This argument lacks merit. The Plaintiff relied on the misrepresentation and assumed that the money would be paid out according to the

construction schedule. The Plaintiff also relied on the representation to support its belief that if the money was not paid out appropriately it would have lien rights against the property and that Bostic Brothers Development Inc. could be held accountable for any improper payment. The Defendants, however, intentionally depleted the money by their absolute control of the Bostic Development at Asheville, LLC. The Plaintiff did not even know the entity existed while it was doing its work, and was prevented from seeking an execution of a lien against the land because all money had been paid out without the Plaintiff's knowledge. They also dispersed and commingled the money from Asheville Development and Bostic Construction, Inc. with various other business accounts and paid creditors of all their businesses so that the money was no longer held by Bostic Construction, Inc. and was not lienable once the Plaintiff discovered it was not going to be paid.

If the Plaintiff had not relied upon having lien rights under the contract, then it would not have provided services worth over a half of a million dollars for which it still has not been paid. If the Plaintiff had not relied upon the misrepresentation it would have taken action against the companies before the money could have been dispersed and used without it having been paid.

The Plaintiff's claim for fraud was factually and legally sufficient. Each of the elements required under *Hunter* are present and were supported by facts that provided a reasonable belief to the Plaintiff that it was, and is, entitled to compensation for the individual acts of the Bostics. Despite this Court's interpretation of the standard of Rule 9(b) and the particularity that must be met thereunder, the Plaintiff had a reasonable belief that was based upon its extensive inquiry that the facts existed to prove the

Individual Defendants, including the Bostics, committed a fraud against it. The Plaintiff has pled what it has at all time believed are factually and legally sufficient claims against the Defendants.

While the Plaintiff understands that this Court may not be in agreement with its legal theory wherein it has alleged that the individual Defendants made the false misrepresentation, it believes that such satisfies the Rule 11 requirements. As stated in the facts above, the Plaintiff reasonably concluded the factual basis of its claims, it applied those factual beliefs to the applicable law and stated what it reasonably believes is a valid legal claim. This is evidenced by two different conclusions reached by two Supreme Court Judges as to the Plaintiff's allegations. Judge Down's denial of the Bostics' previous motion, whether controlling or not, indicates that the Plaintiff's beliefs and legal theories are reasonable and plausible. Therefore, Rule 11 sanctions are not applicable here.

The Plaintiff's claims for unfair and deceptive trade practices are also factually and legally sufficient. N.C.G.S. Chapter 75 specifically declares unfair or deceptive acts "in or affecting commerce" to be unlawful.¹¹ The Court of Appeals stated the elements for a violation of N.C.G.S. Chapter 75 in *S.N.R. Management Corp. v. Danube Partners 141, LLC.*, 659 S.E.2d 442, (N.C. App. 2008).

Under *S.N.R.* the Court of Appeals held that, "[i]n order to establish a claim for unfair and deceptive trade acts or practices, a plaintiff must allege sufficient facts tending to show: "(1) defendant committed an unfair or deceptive act or practice; (2) the action in

¹¹ N.C. Gen. Stat. §§75-1.1 and 75-1.16

question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff.”¹²

In *United Virginia Bank v. Air-Lift Associates, Inc., et al.*, 79 N.C. App. 315, 319, 320, (N.C. App. 1986), the North Carolina Court of Appeals held that,

The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce. *Buie v. Daniel International*, 56 N.C. App. 445, 448, 289 S.E.2d 188, 199, cert. denied, 305 N.C. 759, 292 S.E.2d 574 (N.C. 1982). G.S. 75, et seq., was enacted because other legal remedies were inadequate or ineffective. *Id.* **Thus, an action for unfair and deceptive trade practices is a distinct action separate from fraud...**(emphasis added).

During its investigation of the facts, Plaintiff discovered that the activities of the Defendants violated the provisions of Chapter 75. While the Court, in its Order dismissing the claims against Defendant Bowman, believed that the claim of unfair and deceptive acts “springs from” the same allegations sought to plead fraud, the Plaintiff contends that such is not the case and that the allegations for unfair and deceptive are intended to cover the overall acts of the Defendants, and not just the fraud.

Through its investigation the Plaintiff discovered that the Defendants used the money owed to it to pay for other projects, pay investors, and other personal ventures. The Plaintiff discovered that the Defendants used such money to furnish housing projects they owned, to pay other debt, to protect their investments from the legal claims of the Plaintiff, and to increase their personal financial gains received through the ownership of their “affiliates”. These encompass much more than the misrepresentation related to the

¹² *Id.* at 444.

ownership of the property. As stated in *S.N.R.*, a claim for unfair and deceptive trade practices is “*a distinct action separate from fraud.*”¹³

The Plaintiff knew when it filed its complaint that the Defendants used the money borrowed by BDA to make advances to other limited liability companies they owned, pay interest payments to certain investors, and to pay their other companies instead of paying the Plaintiff. It seems that it would be a reasonable assumption that money obtained as a construction loan should be used to pay for the actual construction, the facts here establish the Defendants did not do so with the money owed to the Plaintiff. These facts show that the defendants engaged in acts that “deceive” and that are “unfair” methods of business. Therefore, the Plaintiff reached a logical conclusion, as required under *Kohler*, that facts existed, as they do, to show the Defendants engaged in unfair and deceptive acts. Rule 11 sanctions are not warranted against the Plaintiff in this action.

The Plaintiff’s claims that the Defendants used Bostic Construction, BDA, and their other “affiliates” as their alter egos are also factually and legally supported based upon the Plaintiff’s inquiry. The public records indicate that the Defendants exercised dominion and control over Bostic Construction, BDA, and the “affiliates” by holding all or a substantial majority interest in such companies. All individuals contacted by the Plaintiff, including employees of the Defendants, indicated that the overall scheme was “Bostic”, and that there were no distinguishing factors between the construction company, the development companies, the marketing companies, the advertising companies, the product companies, or any other of the affiliates and Joseph Bostic, Jeffrey Bostic, Melvin Morris, and Tyler Morris.

¹³ *Id.* at 320.

The Supreme Court of North Carolina recently stated the law regarding corporate entities and looking behind the corporate form to pierce the “corporate veil” under *State of North Carolina ex rel. Roy Cooper, Atty. Gen., v. Ridgeway Brands Manufacturing, LLC., et al.*, 666 S.E.2d 107 (N.C. App. 2008). Under *Ridgeway*, the Supreme Court held that,

“The general rule is that in the ordinary course of business, a corporation is treated as distinct from its shareholders. (citation omitted) We have recently affirmed that the two entities-- the corporation and the shareholder-- are discrete and separate even if the shareholder, in turn, is another business entity rather than a natural person. (citation omitted). However, since attributes of the corporate entity impact the rights of other parties, our inquiry does not stop there. As one treatise explains it, “[T]he critical point in countless cases has been whether corporateness has been achieved and, in so, whether it should be recognized for purposes of the matter at issue.” (citation omitted). Therefore, while “[a] corporation’s separate and independent existence is not to be disregarded lightly,” it may be theoretically permissible to look behind the corporate form. (citation omitted). Judge Easterbrook has noted that proceeding beyond the corporate form is a strong step: “Like lightning, it is rare [and] severe.” (citation omitted). Nevertheless, in a few instances, exceptions to the general rule of corporate insularity may be made when applying a corporate fiction would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim. To this end, courts will disregard the corporate form or “pierce the corporate veil” when necessary to prevent fraud or achieve equity... In an earlier case this Court explained that the instrumentality rule allows for the corporate form to be disregarded if “the corporation is so operated as a mere instrumentality, or *alter ego* of the sole or dominant shareholder[s] as a shield for [their] activities in violation of the declared public policy or statute of the State.”¹⁴

The Supreme Court further held that,

“In order to prevail under the instrumentality rule, a party must prove three elements: (1) stockholders’ control of the corporation amounting to “complete dominion” with respect to the transaction at issue; (2) stockholder’s use of this control to commit a wrong, or to violate a statutory or other duty in contravention of the other party’s rights; and (3)

¹⁴ *Id.* at 112, 113.

this wrong or breach of duty must be the proximate cause of the injury to the other party. (citation omitted).”¹⁵

The Plaintiff’s searches of the public records, communications with individuals specifically involved with the Bostic companies, and in litigation concerning such companies or individuals indicated to the Plaintiff that the Defendants used the “Bostic” companies as their alter egos. The facts available to the Plaintiff indicated that the Defendants used their alter egos to commit a wrong, and that action proximately caused the Plaintiff to lose five hundred and forty thousand dollars.

The Plaintiff is not suing the Bostics under its claims for fraud, or unfair and deceptive trade practices in their business capacities or for torts committed by Bostic Construction, Inc. The Plaintiff has sued them for their individual acts based upon their complete dominion and control of Bostic Construction, Inc.

The law upon which the Plaintiff has applied its facts was stated by the Supreme Court in *State ex rel Roy Cooper v. Ridgeway Brands*, 666 S.E.2d 107 (2008). In *Ridgeway* the Supreme Court held,

Even though the rule was formally adopted in *Glenn*, the use of instrumentality analysis in our jurisprudence pre-dates *Glenn*. In an earlier case, this Court explained that the instrumentality rule allows for the corporate form to be disregarded if "the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder[s] and a shield for his activities in violation of the declared public policy or statute of the State[.]" *Henderson v. Sec. Mortgage & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). In that event, we held that "the corporate entity will be disregarded and the corporation and the shareholder *treated as one and the same person*." *Id.* (emphasis added).

Under the instrumentality test, if the plaintiff is able to pierce the corporate veil, the shareholder and the corporation are shown to be, to quote our holding in *Henderson*, "one and the same." *Id.* Consequently,

¹⁵ *Id.* at 114.

the addition of the shareholder would not be the addition of a "new party."¹⁶

As to the third and final certification requirement, that the pleading not be for an improper purpose, the Plaintiff has also satisfied the requirements of the applicable law. The Bostics have only made a speculative assertion that the Plaintiff's purpose must be improper in this action because they feel we have not properly inquired into the facts and law. As stated by the Court in *Kohler* "[a]n objective standard is used to determine a paper has been interposed for an improper purpose, with the burden on the Movant to prove such improper purpose".¹⁷ The Defendants have not offered any evidence of such purpose here. In fact, the Bostics assertion that the Plaintiff has asserted its claims to induce a settlement is negated by the fact that the Plaintiff's counsel has, on two occasions, requested that Christine Myatt and the Bostics consent to waiver of mediation in this action and proceed directly to trial.

The totality of the circumstances indicate that the Plaintiff is only seeking to vindicate what it reasonable believes are its valid rights at law. The Plaintiff has not taken any action to hinder, delay, or impede the forward motion of this action in any way. The Defendants simply cannot produce any evidence that the Plaintiff, or its counsel, has any other purpose than prosecuting its claims in good faith.

When considering how a plaintiff is entitled to pursue its actions the Supreme Court, in *Jarrett v. Green*, 230 N.C. 104 (1949), has stated, "*We are entitled to pursue the hunt so long as we can track the fox; and not until we lose the trail are we obligated to abandon the chase, call our dogs and go home.*"¹⁸ When the Plaintiff filed

¹⁶ *Id.* at 113.

¹⁷ *See Kohler supra* at 405.

¹⁸ *Id.* at 108.

its pleading it was “on the track of the fox” and the track has been made increasingly clear through the discovery and inquiries by the Plaintiff since that time.

Therefore, the Plaintiff is entitled to pursue the hunt as the facts indicates that the Plaintiff’s initial beliefs are justified; it simply is not time for the Plaintiff “to call its dogs and go home”. There is no improper purpose behind the Plaintiff’s actions, and there are simply no violations of Rule 11 by the Plaintiff or its counsel.

PLAINTIFF’S FRAUD CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS

As previously stated, the Plaintiff did not become aware of the facts and circumstances giving rise to its claim for fraud until October 24, 2005. Therefore, such claim is within the statute of limitations and is legally sufficient. The Court of Appeals, in *Piles v. Allstate Ins. Co.*, 653 S.E.2d 181, (N.C. App. 2007), held that,

“...[W]ith respect to a claim for fraud, we have defined “discovery” within N.C. Gen. Stat. §1-52(9) as “actual discovery or the time when the fraud should have been discovered in the exercise of due diligence”(citation omitted) Our Supreme Court recently reiterated that accrual begins “at the time of discovery regardless of the length of time between the fraudulent act ... and plaintiff’s discovery of it.”(citation omitted). Most significantly, “[o]rordinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances.”¹⁹

The Plaintiff has acted with reasonable diligence and brought its claims within the time allowed by the law of this state. As a result, the Bostics’ argument is without merit and must be denied.

CONCLUSION

The Plaintiff’s claims for fraud were based upon a reasonable belief after an extensive inquiry to the facts of this action. The Bostics have not sought out what the

¹⁹ *Id. at 185.*

Plaintiff has knowledge of and is attempting to manipulate individual testimony into what knowledge the Plaintiff possesses. The Plaintiff's legal positions are based upon a good faith interpretation and belief of the existing law. The Court has previously tested the legal sufficiency of the pleadings and found them to be worthy of pursuit. The Defendants cannot meet their burden of showing that the Plaintiff or its counsel has acted with an improper purpose. As a result, its Motion for Rule 11 sanctions and dismissal of the Plaintiff's claims must be denied. The Bostics, through their motion, are simply asking the Court to make findings of fact without the benefit of a hearing on the merits; such is not the purpose of Rule 11. The Plaintiff is entitled to continue the hunt and put its claims if right to a proper test.

This the 29th day of August 2009.

McKinney and Tallant, P.A.

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CERTIFICATION

The undersigned certifies that this brief complies with Rule 15.8 of the Business Court Rules.

This the 30th day of August 2009.

McKINNEY AND TALLANT, P.A.

S/Eric W. Stiles
Eric W. Stiles
Attorney for the Plaintiff

CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing

BRIEF IN RESPONSE TO BOSTIC MOTION FOR SANCTIONS

upon all other parties to this action by:

(X) depositing a copy of it in the U. S. Mail in a properly addressed envelope with adequate first class postage addressed to the opposing party or to the opposing party's counsel of record addressed as follows:

J. Patrick Haywood
235 North Edgewood Street
Greensboro, NC 27401

Christine Myatt
P.O. Box 3463
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Edwin Gatton
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() hand delivering a copy of it to the attorney of record for the opposing party

() sending it to the attorney of record for the opposing party at his or her office by a confirmed telefacsimile transmittal for receipt by 5:00 P. M. Eastern time on a regular business day, as evidenced by a telefacsimile confirmation by sending such telefacsimile transmission to the following number:

Dated: 30th day of August 2009.

MCKINNEY & TALLANT, P. A.

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