

NORTH CAROLINA
GRAHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 7

PHILLIPS AND JORDAN, INC.)

Plaintiff,)

vs.)

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

Defendants.)

**BRIEF IN SUPPORT OF
MOTION FOR RULE 11
SANCTIONS**

NOW COME Defendants Jeffrey L. Bostic and Joe E. Bostic, Jr. (collectively referred to as the “Bostics”), by and through their undersigned counsel, pursuant to Rule 11 of the North Carolina Rules of Civil Procedure, and respectfully submits this Brief in support of their Motion for Rule 11 Sanctions against Phillips and Jordan, Inc. (“Plaintiff”) and Plaintiff’s counsel, which Motion for Rule 11 Sanctions was filed with this Court contemporaneously herewith.

STATEMENT OF THE FACTS

Joe E. Bostic, Jr. (“Joe Bostic”) formed Bostic Brothers Construction Company in 1991 with his brother, Jeffrey L. Bostic (“Jeff Bostic”) for the purpose of constructing multi-family complexes. The company later expanded its operations to include the construction of student housing projects throughout the Southeast. On or about January 1, 2003, Joe Bostic sold his interest in the company and its affiliated entities to Melvin E. Morris (“Mel Morris”) and the company’s name was changed from “Bostic Brothers Construction” to “Bostic Construction, Inc.” to reflect Joe Bostic’s departure. After the sale, Mel Morris became a 66% owner and President of Bostic Construction, and Jeff Bostic became a Vice President and retained his 33%

ownership in the company. From and after January 1, 2003, Joe Bostic had no direct or indirect involvement with Bostic Construction or its related entities other than as a minority member in certain LLCs which owned projects being constructed by Bostic Construction. In those projects in which either Joe Bostic, Jeff Bostic or an affiliated entity held a membership interest, they guaranteed, with others, the construction loans for these projects.

During 2003 and 2004, Bostic Construction continued to build multi-family and student housing projects. Jeff Bostic was a citizen and resident of Duluth, Georgia and had no involvement with the daily operations of the construction company during that time.

In or about 2002, Bostic Development at Asheville, LLC (“BDA”) entered into a construction contract with Bostic Construction for the construction of a multi-family apartment complex located in Asheville, Buncombe County, North Carolina known as “Westmont Commons” (the “Project”). Bostic Construction subsequently entered into a subcontract dated August 28, 2002 with Plaintiff to provide materials, labor and supplies to the Project (the “Contract”). A copy of the Contract is attached to the Complaint as Exhibit 1. The Contract incorrectly denotes the property owner as Bostic Brothers Development, Inc. when in fact the correct owner of the Project was BDA. The Contract is signed by Aaron Akers, the project manager for Bostic Construction; it is not signed by either Jeff Bostic or Joe Bostic.

Prior and subsequent to the execution of the Contract there were no personal communications, whether orally or in writing, by and between Jeff Bostic or Joe Bostic and anyone employed by Plaintiff regarding either the Contract or the Project. As set forth in the deposition testimony of Randy Jordan, Joe Bostic was briefly introduced by Mel Morris to Randy Jordan during one of Randy Jordan’s visits to the Bostic Brothers Construction offices in McLeansville, North Carolina. However, Joe Bostic has no recollection of such meeting and in

any event, neither the Project nor the Contract was discussed. The only conversation with one of Plaintiff's employees or agents that Joe Bostic does recall occurred sometime in 2006 with Plaintiff's Project Manager, Dale Irons. Joe Bostic and Dale Irons happened to be at the same diner in Cullowhee, NC and were introduced to each other by acquaintances. Again, neither the Project nor the Contract was discussed. See Affidavit of Jeffrey L. Bostic attached hereto as Exhibit A; Affidavit of Joe E. Bostic, Jr. attached hereto as Exhibit B; Deposition of Randy Jordan, p. 35- 36, attached hereto as Exhibit C.

In or about 2002, BDA obtained a construction loan in the original sum of \$8.6 million for the purpose of paying draw requests submitted to it by Bostic Construction for services and work being performed in connection with the Project.

On or about September 7, 2002 and pursuant to the Contract, Plaintiff first furnished materials, labor and supplies to the Project. On or about April 2, 2004, Plaintiff last furnished materials, labor and supplies to the Project. During the time that materials, labor and supplies were furnished by Plaintiff to the Project, Plaintiff received certain payments from Bostic Construction for its services and the work performed.

According to the public records in Buncombe County, N.C., Plaintiff filed a Claim of Lien on July 28, 2004 against the Project contending that additional amounts were owed to Plaintiff under the Contract (the "Claim of Lien"). A copy of the Claim of Lien is attached hereto as Exhibit D. Contrary to the Plaintiff's allegations in the Amended Complaint, the Claim of Lien correctly denotes the owner of the Project as BDA. Plaintiff, by and through the same counsel in this case, subsequently filed a timely¹ lawsuit on August 17, 2004 to enforce its Claim

¹ The Bostics concede that the Claim of Lien and the Lawsuit were timely filed but take no position at this time whether the Claim of Lien and the Lawsuit were properly asserted. As a first tier subcontractor, Plaintiff could have filed, but did not file, a Notice of Lien against funds purportedly owed by BDA to Bostic Construction.

of Lien (the "Lawsuit"), again correctly denoting the Project owner as BDA. A copy of complaint filed in the Lawsuit (excluding exhibits) is attached hereto as Exhibit E.

In January, 2005, an involuntary bankruptcy petition under Chapter 7 of the Bankruptcy Code was filed against Bostic Construction in the United States Bankruptcy Court for the Eastern District of Tennessee (the "Bankruptcy Case"). The case subsequently was transferred to the United States Bankruptcy Court for the Middle District of North Carolina where it is proceeding under Chapter 7.

On or about November 14, 2005, Plaintiff, by and through its counsel, took a voluntarily dismissal of the Lawsuit. On or about January 5, 2006, Plaintiff, by and through its counsel, gave notice of its cancellation of the Claim of Lien against the Project.

Plaintiff filed the instant action on January 17, 2008 asserting fraud and unfair and deceptive claims against BDA, Bostic Development, LLC ("BD"), and certain individuals some of whom, but not all, are associated with either BDA, BD or Bostic Construction. The Bostics filed an answer denying the allegations and sought to dismiss the Complaint. On January 26, 2009, the Plaintiff filed an Amended Complaint alleging constructive fraud against the Bostics and other individual defendants.

ISSUES

1. Whether the Plaintiff's claims in the Amended Complaint for fraud and unfair and deceptive trade practices are well-grounded in fact?
2. Whether the Plaintiff's claims in the Amended Complaint for fraud and unfair and deceptive trade practices are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law?
3. Whether the previous denial of the Bostics' motion to dismiss under Rule 12(b)(6) precludes sanctions under Rule 11?

ARGUMENT

Under Rule 11 of the North Carolina Rules of Civil Procedure, the signature of an attorney or party on a pleading constitutes a certificate that “to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and 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.” N.C.R.Civ.P. 11(a). If a pleading is signed in violation of this Rule, the Court “shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading . . . , including a reasonable attorney’s fee.” Id. Thus, under Rule 11, “the signer certifies that three distinct things are true: the pleading is (1) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); (2) well grounded in fact; and (3) not interposed for any improper purpose.” Bumgardner v. Bumgardner, 113 N.C.App. 314, 322, 438 S.E.2d 471, 476 (1994). “A violation of *any* one of these requirements mandates the imposition of sanctions under Rule 11.” Johns v. Johns, ___ N.C.App. ___, 672 S.E.2d 34 (2009) (quoting Dodd v. Steele, 114 N.C.App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E. 521 (1994) (emphasis added).

Plaintiff alleges in its Complaint and Amended Complaint that the Bostics committed fraud and unfair and deceptive trade practices by misrepresenting the owner of the Project in the Contract so as to deprive Plaintiff of its lien rights. These allegations are both factually and legal insufficient. First, the Bostics were not parties to the Contract, did not sign the Contract, never discussed the Contract or the Project with Plaintiff’s employees, and had no knowledge of the Contract or the contents thereof at the time it was executed. Second and more importantly,

Plaintiff was not deprived of its lien rights as it timely asserted the Claim of Lien against the correct owner of the Project and timely filed the Lawsuit to enforce its Claim of Lien against the correct owner of the Project. Third, the Bostics, as directors or officers of Bostic Construction are not liable, merely because of their official designation, for the purported fraud or false representation by other officers or agents of the corporation regarding the owner of the Project as set forth in the Contract, absent their active and direct involvement with the Contract. Fourth, the statute of limitations for assertion of the fraud claim based on the incorrect owner designation expired prior to the filing of the initial Complaint as the Plaintiff knew or should have known that the ownership designation was incorrect in 2004 when it filed its Claim of Lien.

Absent any legal or factual basis, the claims in the Amended Complaint for fraud and unfair and deceptive trade practices appear to have been interposed for the improper purpose of harassing the Bostics and trying to extract a settlement from the Bostics in this case. See Perkins v. Healthmarkets, Inc., 2007 WL 2570242, *6 (N.C. Super. 2007) (citing Teachers' Ret. Sys. v. Hunter, 477 F.3d 162, 172 (4th Cir. 2007); Terry v. Terry, 302 N.C. 77, 85, 273 S.E. 2d 674, 678(1981) (both expressing views of courts and commentators that fraud claims are often advanced only for their nuisance of settlement value and with little hope of success on the merits.) Therefore, this Court should impose sanctions against Plaintiff and Plaintiff's counsel pursuant to the mandates of Rule 11.

I. THE ALLEGATIONS IN THE AMENDED COMPLAINT ARE NOT WELL-GROUNDED IN FACT BECAUSE THE BOSTICS MADE NO REPRESENTATIONS TO PLAINTIFF OR ITS EMPLOYEES REGARDING THE PROJECT OR CONTRACT AND PLAINTIFF DID NOT RELY ON ANY ALLEGED MISREPRESENTATIONS.

To determine whether a complaint is factually sufficient pursuant to Rule 11, the court "must determine: (1) whether the plaintiff undertook a reasonable inquiry into the facts and (2)

whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.” Hill v. Hill, 173 N.C.App. 309, 314, 622 S.E.2d 503, 507 (2005). A party has satisfied the “reasonable inquiry” requirement if “given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law.” Jerry Bayne, Inc. v. Skyland Industries, Inc., 108 N.C.App. 209, 214, 423 S.E.2d 521, 523 (1992), *aff’d*, 333 N.C. 783, 430 S.E.2d 266 (1993).

A. Plaintiff’s allegations of fraud are not well-grounded in fact because the Bostics made no misrepresentations to Plaintiff regarding the Project or the Contract.²

Under North Carolina law, the essential elements of fraud are “(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party.” Harrold v. Dowd, 149 N.C.App. 777, 782, 561 S.E.2d 914, 918 (2002) (citing Ragsdale v. Kennedy, 286 N.C. 130, 138-39, 209 S.E.2d 494, 500 (1974)). If any of these elements are factually deficient, the plaintiff is not entitled to bring a claim for fraud.

Plaintiff alleges in the Amended Complaint that the Bostics made material misrepresentations to Plaintiff regarding the Contract and the Project by incorrectly denoting the owner of the Project on the Contract. As evidenced by the Contract itself, the Bostics were not parties to the Contract and did not sign the Contract. Further, the evidence is clear that the Bostics never communicated with Plaintiff or its employees regarding the Project or the Contract and this fact was known by Plaintiff’s Vice-President, Randy Jordan, prior to the filing of the Complaint. Contrary to Plaintiff’s allegations in the Amended Complaint, there were no false

² Absent evidence of any misrepresentations regarding the Contract or the Project by the Bostics, the issue of intent is irrelevant.

representations made directly to Plaintiff or to its employees by either of the Bostics regarding the owner of the Project.

There also were no false representations regarding the owner of the Project made indirectly to Plaintiff by the Bostics through their “alter ego,” Bostic Construction. In North Carolina, the law is clear that a shareholder, officer or director cannot be held liable for fraud and other torts committed by other agents of the corporation, merely based on their positions held in the corporation. See Wolfe v. Wilmington Shipyard, Inc., 135 N.C.App. 661, 552 S.E.2d 306 (1999) (holding that an officer of a corporation is not liable for torts committed by the corporation in which he did not actively participate); Air Traffic Conference of America v. Marina Travel, Inc., 69 N.C.App. 179, 182, 316 S.E.2d 642, 644 (1984) (“Under North Carolina law, an officer cannot be held individually liable for the tortious conversion of property by the corporation or other corporate agents in the absence of her participation therein.”) Lillian Knitting Mills Co. v. Earle, 237 N.C. 97, 104, 74 S.E.2d 351, 356 (“[A] director or officer of a corporation is not liable, merely because of his official character, for the fraud or false representations of the other officers or agents of the corporation or for fraud attributable to the corporation itself, if such director or officer is not personally connected with the wrong and does not participate in it.”).

Despite the undisputable facts and applicable law, Plaintiff alleged that the Bostics fraudulently misrepresented the owner of the Project to Plaintiff and as such engaged in unfair and deceptive trade practices. These allegations are plainly contrary to the incontrovertible facts and this Court should sanction Plaintiff and Plaintiff’s counsel pursuant to Rule 11 of the North Carolina Rules of Civil Procedure for asserting claims that are not well-grounded in fact.

B. Plaintiff's allegations in the Amended Complaint are not well-grounded in fact because Plaintiff never relied on any alleged misrepresentations.

Even if this Court finds that the Bostics, individually or through their corporation, misrepresented a material fact regarding the owner of the Project, which is denied, Plaintiff did not actually rely on such alleged misrepresentations. To the contrary, Plaintiff, by and through its current counsel, filed the Claim of Lien and the Lawsuit naming the correct owner of the Project within the respective 120 and 180 deadlines established by Chapter 44A of the North Carolina General Statutes. Despite this incontrovertible fact, Plaintiff alleged in the Complaint and the Amended Complaint that Plaintiff reasonably relied to its detriment on the alleged misrepresentations regarding the ownership of the Project so as to deprive it of its lien rights.

As the public records show, Plaintiff's Vice President, Randy Jordan, signed the Claim of Lien and verified the complaint in the Lawsuit. Additionally, Plaintiff's counsel signed the complaint filed in the Lawsuit and presumably researched the real property records in preparation of the Claim of Lien. Therefore, knowledge of the correct owner is properly imputed to Plaintiff and Plaintiff's counsel. See Whitten v. Bob King's AMC/Jeep, Inc., 292 N.C. 84, 231 S.E.2d 891 (1977) (holding that any knowledge that a corporate officer acquires in a representative capacity is imputed to the corporation). In light of this knowledge, Plaintiff and Plaintiff's counsel had no factual grounds for alleging that Plaintiff detrimentally relied on the alleged misrepresentations, and its fraud claim must, therefore, fail. Plaintiff also has no factual basis for alleging the unfair and deceptive trade practices ("UDTP") claim since the UDTP claim "springs from the same allegations supporting Plaintiff's fraud claim." June 2, 2009 Order & Opinion of Judge Diaz, p.10. Consequently, this Court should impose sanctions against Plaintiff and Plaintiff's counsel, including striking the fraud and UDTP claims and ordering Plaintiff to pay the Bostics' reasonable attorneys' fees incurred in defending these claims.

II. THE PLAINTIFF'S ALLEGATIONS IN THE AMENDED COMPLAINT ARE NOT LEGALLY SUFFICIENT BECAUSE AN OFFICER OR DIRECTOR OF A CORPORATION GENERALLY IS NOT PERSONALLY LIABLE FOR TORTS COMMITTED BY THE CORPORATION AND THE FRAUD CLAIM WAS PLAINLY BARRED BY THE STATUTE OF LIMITATIONS.

In determining whether a complaint is warranted by existing law, the court must first determine the facial plausibility of the complaint. Bumgardner v. Bumgardner, 113 N.C.App. 314, 322, 438 S.E.2d 471, 476 (1994). In doing so, the North Carolina courts often will examine the factual basis for asserting a legal claim in conjunction with the legal sufficiency determination. See Id. at 323, 438 S.E.2d at 471 (affirming Rule 11 sanctions under the legal sufficiency prong because the defendant knew the motion was not factually plausible in light of his waiver of the asserted defense).

A. The Plaintiff's allegations in the Amended Complaint are not legally sufficient because there is no basis for suing the Bostics in their corporate capacity for purported misrepresentations made by others.

As set forth in Section I(A) above, “a director or officer of a corporation is not liable, merely because of his official character, for the fraud or false representations of the other officers or agents of the corporation or for fraud attributable to the corporation itself, if such director or officer is not personally connected with the wrong and does not participate in it.” Lillian Knitting Mills Co. v. Earle, 237 N.C. 97, 104, 74 S.E.2d 351, 356. ³

Since there is no evidence to support a claim for fraud or UDTP against the Bostics in

³ Similarly, N.C. Gen. Stat. § 57C-3-30 of North Carolina's Limited Liability Company Act states that:

(a) A person who is a member, manager, director, executive, or any combination thereof of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member, manager, director, or executive and does not become so by participating, in whatever capacity, in the management or control of the business. A member, manager, director, or executive may, however, become personally liable by reason of that person's own acts or conduct.

(b) A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object of the proceeding is to enforce a member's right against or

their individual capacity, the Bostics likewise cannot be held liable for the purported fraud or false representations of other officers or agents of Bostic Construction in their corporate capacity. As previously stated and outlined in the Affidavits attached hereto, the Bostics did not personally communicate with Plaintiff regarding the Project or the Contract in any capacity whatsoever. In fact, Plaintiff's Vice President conceded in his deposition that the Bostics were included in this action for little more reason than the Bostics happened to be partial owners of Bostic Construction and their last name was included in the company name. Deposition of Randy Jordan, p. 111-118, attached hereto as Exhibit F.

To the extent Plaintiff has a claim for fraud or misrepresentation based on the improper owner designation in the Contract, it should have asserted such claim against either the individual who made the purported misrepresentation⁴ or the corporation which was a party to the Contract, neither of which was done in the instant case.

B. The Plaintiff's fraud claim is not legally sufficient because the statute of limitations has run.

Under North Carolina law, the statute of limitations for fraud is three years from the time the plaintiff discovers or should have discovered the facts constituting the fraud. N.C. Gen. Stat. § 1-52(9); Bennett v. Trust Co., 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965).

Here Plaintiff and Plaintiff's counsel knew or should have known that Plaintiff's fraud claim was barred by the statute of limitations at the time the Complaint was filed on or about January 17, 2008. As the public records show, Plaintiff timely filed the Claim of Lien on or about July 28, 2004 and the Lawsuit on or about August 17, 2004 each correctly denoting the

liability to the limited liability company.

⁴ As noted in the June 2, 2009 Order & Opinion of Judge Diaz, the person who signed the Contract on behalf of Bostic Construction was not named as a defendant in this action.

owner of the Project as BDA. Since Plaintiff's Vice President signed the Claim of Lien and verified the complaint in the Lawsuit, Plaintiff knew that BDA was the Project's owner no later than the date the Claim of Lien was filed, which was July 28, 2004. Contrary to the allegations set forth in Paragraph 28 of the Amended Complaint, there was no factual basis for Plaintiff to claim that it first discovered the alleged fraud regarding the correct owner of the Project in 2005 and this Court should sanction Plaintiff and Plaintiff's counsel accordingly. Since Plaintiff presumably included this allegation in the Amended Complaint to circumvent the statute of limitations, this Court should, at a minimum, strike Plaintiff's fraud claim to prevent Plaintiff and Plaintiff's counsel from asserting similar misleading allegations in the future.

III. SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL ARE APPROPRIATE IN THIS ACTION DESPITE THE EARLIER DENIAL OF THE BOSTICS' 12(B)(6) MOTION TO DISMISS.

Sanctions against Plaintiff and Plaintiff's counsel are both appropriate and necessary in this case for the reasons set forth in Sections I and II above pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. Under Rule 11 of the North Carolina Rules of Civil Procedure, the court is required to impose sanctions against the offending party and/or that party's counsel if the rule is violated. See N.C.R.Civ.P. 11(a) ("If a pleading, motion or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . "); see also Shook v. Shook, 95 N.C.App. 578, 383 S.E.2d 405 (holding that Rule 11 requires the court to impose appropriate sanctions if Rule 11 is violated).

Under North Carolina law, a court can assess Rule 11 sanctions against a plaintiff and the plaintiff's counsel regardless of whether a court previously denied the defendant's motion to dismiss pursuant to Rules 12(b)(6) and/or 9(b). See Perkins v. Healthmarkets, Inc., 2007 WL

2570242, *6 (N.C. Super. 2007) (“That the Plaintiff’s Amended Complaint meets the requirements of Rule 9(b), however, does not mean that it satisfies Plaintiff’s pleading obligations under Rule 11 of the North Carolina Rules of Civil Procedure.”); see also Hill v. Hill, 173 N.C.App. 309, 320, 622 S.E.2d 503, 511 (2005) (“...expenses incurred during the motion to dismiss, whether granted or denied, are reasonable expenses incurred due to plaintiff’s signing and filing the frivolous complaint.”). As the Court of Appeals noted, “whether the document complies with ... the Rule is determined as of the time it is signed.” Id. Here, the allegations in the Amended Complaint, while considered to be true in considering a 12(b)(6) motion, are not well grounded in fact or law and the Bostics are entitled to dismissal of the claims and sanctions against Plaintiff and its counsel under Rule 11.

CONCLUSION

At the time the Complaint was signed and later at the time the Amended Complaint was signed, Plaintiff and its counsel not only were aware of facts which contradicted their fraud and UDTP claims but completely ignored such facts. Accordingly, this Court should impose an appropriate sanction under Rule 11 against both Plaintiff and Plaintiff’s counsel, including but not limited to striking the fraud and UDTP claims from the Amended Complaint and ordering Plaintiff and/or Plaintiff’s counsel to pay the Bostics’ expenses, including reasonable attorneys’ fees, incurred in defending these claims.

Respectfully submitted this 6th day of August, 2009.

/s/ Christine L. Myatt
Christine L. Myatt
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N.C. State Bar No. 10444
Jeffrey M. Reichard
N.C. State Bar No. 38453
*Attorneys for Joe E. Bostic, Jr.
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OF COUNSEL:

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CERTIFICATION OF COMPLIANCE WITH BCR 15.8

The undersigned hereby certifies that the Defendants Joe E. Bostic, Jr. and Jeffrey L. Bostics' Brief in Support of Motion to Compel Responses to Discovery complies with the provisions of BCR 15.8.

Respectfully submitted this 6th day of August, 2009.

/s/ Christine L. Myatt
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and Jeffrey L. Bostic*



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 BOWMAN, TYLER MORRIS, BOSTIC)
 DEVELOPMENT, LLC, AND BOSTIC)
 DEVELOPMENT AT ASHEVILLE, LLC)
)
 Defendants.)
)

**AFFIDAVIT OF JEFFREY
L. BOSTIC IN SUPPORT OF
RULE 11 MOTION**

JEFFREY L. BOSTIC, being first duly sworn, deposes and says as follows:

1. I am a named Defendant in this action, and as such I am duly authorized to make this Affidavit on my own behalf.
2. From 1991 through the middle of 1998, my brother, Joe Bostic, and I were the sole owners of Bostic Brothers Construction, Inc. Joe Bostic served as President and was in charge of the company's day-to-day operations and I served as Vice-President and Secretary. I did not have any involvement in the day-to-day operations of the company since I resided in Northern Virginia during this time.
3. Bostic Brothers Construction, Inc. was initially formed to construct multi-family housing projects in North Carolina. Mel Morris joined the company in the early 1990's to assist the company as a construction manager and supervisor. The company later expanded the business in the early 2000s to include student housing projects on various campuses throughout the Southeast.

4. In 1998, I sold my shares in Bostic Brother Construction, Inc. to Joe Bostic and Mel Morris. In 2000, I returned as a minority shareholder in the company. At that time and through sometime in 2006, I resided in Duluth, Georgia. I did not have any involvement in the day-to-day operations of the company.

5. On or about January 1, 2003, Joe Bostic sold his interest in Bostic Brothers Construction, Inc. and certain related entities to Melvin E. Morris and the construction company changed its name to Bostic Construction, Inc. Mel Morris became President of the company and I assumed the role of Vice-President.

6. During 2002- 2004, Bostic Construction built multi-family and student housing projects. I, or affiliated entities, sometimes held a minority membership interest in certain of these projects. In those projects in which either I or an affiliated entity held a membership interest, I guaranteed, with others, the construction loans for these projects.

7. From its inception on April 8, 2002, the membership percentages of Bostic Development at Asheville, LLC were as follows:

Membership Percentages	
JLB2, LLC	40%
MO3, LLC	20%
Michael S. Hartnett	15%
J & L Partners, LLC	25%
Total	100%

My brother, Joe Bostic and I, among others, are members in JLB2, LLC. Upon information and belief, the initial co- managers of Bostic Development at Asheville, LLC were Mel E. Morris and Michael S. Hartnett. Mel Morris resigned as a co- manager in or about October 29, 2004, contemporaneously with his resignation as President of Bostic Construction.

Thereafter Michael S. Hartnett continued to serve as the sole manager of Bostic Development of Asheville, LLC until 2005 when James Bowman and Joe Bostic were elected as co-managers.

8. In or about 2002, Bostic Development at Asheville, LLC entered into a construction contract with Bostic Construction to construct a multi-family project in Asheville by the name of Westmont Commons. Upon information and belief, Bostic Construction entered into a subcontract with the Plaintiff in this action to perform grading services on the Westmont Commons' site.

9. Upon information and belief, Michael S. Hartnett was the developer of the Westmont Commons' project and supervised and oversaw its development and construction.

10. I did not personally communicate, whether written, orally or otherwise, with any employee, agent or representative of Phillips and Jordan, Inc. about the subcontract which is attached to the Complaint as Exhibit A or the services to be performed under the subcontract. I further did not sign, prepare, review or have knowledge of the subcontract.


11. I also have never personally communicated, whether written, orally or otherwise, with any employee, agent or representative of Phillips and Jordan, Inc. about the matters set forth in the Amended Complaint.

FURTHER AFFIANT SAYETH NOT, this the 28th day of July, 2009.



Jeffrey L. Bostic

SWORN TO AND SUBSCRIBED
BEFORE ME THIS THE 28
DAY OF JULY, 2009.



Notary Public

My Commission Expires:

~~My Commission Expires~~
August 28, 2017



NORTH CAROLINA
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PHILLIPS AND JORDAN, INC.)

Plaintiff,)

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

Defendants.)

**AFFIDAVIT OF JOE E.
BOSTIC, JR. IN SUPPORT
OF RULE 11 MOTION**

JOE E. BOSTIC, JR., being first duly sworn, deposes and says as follows:

1. I am a named Defendant in this action, and as such I am duly authorized to make this Affidavit on my own behalf.

2. From 1991 through the middle of 1998, my brother, Jeff Bostic, and I were the sole owners of Bostic Brothers Construction, Inc. I served as President and was in charge of the company's day-to-day operations. Jeff served as Vice-President and Secretary. Jeff did not have any involvement in the day-to-day operations of the Company since he resided in Northern Virginia during this time.

3. Bostic Brothers Construction, Inc. was initially formed to construct multi-family housing projects in North Carolina. Mel Morris joined the company in the early 1990's to assist the company as a construction manager and supervisor. The company later expanded the business in the early 2000s to include student housing projects on various campuses throughout the Southeast.

4. In 1998, Jeff left the company and sold his shares to Mel Morris and me. I continued to serve as President of the company and Mel served as Vice-President and Secretary through December, 2002. In 2000, Jeff returned as a minority shareholder in the company. At that time and through sometime in 2006, Jeff resided in Duluth, Georgia. He did not have any involvement in the day-to-day operations of the company.

5. On or about January 1, 2003, I sold my interest in Bostic Brothers Construction, Inc. and certain related entities to Melvin E. Morris and the construction company changed its name to Bostic Construction, Inc. Upon information and belief, Mel Morris became President of the company and Jeff Bostic assumed the role of Vice-President.

6. After I sold my interest in Bostic Construction, I had no direct involvement with Bostic Construction, Inc or its related entities.

7. Upon information and belief, Bostic Construction, Inc. continued to build multi-family and student housing projects during 2003 and 2004. I, or affiliated entities, sometimes held a minority membership interest in some, but not all, of these projects. In those projects in which either I or an affiliated entity held a membership interest, I guaranteed, with others, the construction loans for these projects.

8. From its inception on April 8, 2002, the membership percentages of Bostic Development at Asheville, LLC were as follows:

Membership Percentages	
JLB2, LLC	40%
MO3, LLC	20%
Michael S. Hartnett	15%
J & L Partners, LLC	25%
Total	100%

My brother, Jeff Bostic and I, among others, are members in JLB2, LLC. Upon information and belief, the initial co- managers of Bostic Development at Asheville, LLC were Mel E. Morris and Michael S. Hartnett. Mel Morris resigned as a co- manager in or about October 29, 2004, contemporaneously with his resignation as President of Bostic Construction. Thereafter Michael S. Hartnett continued to serve as the sole manager of Bostic Development of Asheville, LLC until 2005 when James Bowman and I were elected as co-managers.

9. In or about 2002, Bostic Development at Asheville, LLC entered into a construction contract with Bostic Construction to construct a multi-family project in Asheville by the name of Westmont Commons. Upon information and belief, Bostic Construction entered into a subcontract with the Plaintiff in this action to perform grading services on the Westmont Commons' site.

10. Upon information and belief, Michael S. Hartnett was the developer of the Westmont Commons' project and supervised and oversaw its development and construction.

11. I never visited the Project site and was never involved in the management of the Project or the subcontract.

12. I did not personally communicate, whether written, orally or otherwise, with any employee, agent or representative of Phillips and Jordan, Inc. about the subcontract which is attached to the Complaint as Exhibit A or the services to be performed under the subcontract. I further did not sign, prepare or review the subcontract.

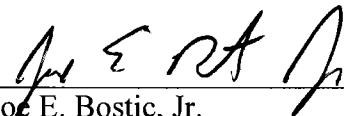
13. I also have never personally communicated, whether written, orally or otherwise, with any employee, agent or representative of Phillips and Jordan, Inc. about the matters set forth in the Amended Complaint.

14. The only communications I have ever had with any employee, agent or representative of Phillips & Jordan, Inc. are one meeting with Dale Irons and one meeting that allegedly occurred with Randy Jordan as outlined below.

15. According to the deposition testimony of Randy Jordan, I was briefly introduced by Mel Morris to Randy Jordan, the Vice President of Phillips & Jordan, Inc. at the Bostic Brothers Construction offices in McLeansville, North Carolina. I do not remember this introduction, as it was allegedly a simple introduction in which Bostic Brothers Construction, Phillips and Jordan, the Project and the subcontract were not discussed. I have had no other communications, whether written, oral or otherwise, with Mr. Jordan.

16. In or about 2006, I briefly met Dale Irons, Project Manager for Phillips & Jordan, Inc., at a diner in Cullowhee, North Carolina. Neither the Westmont Commons project nor the subcontract between Bostic Construction, Inc. and Phillips & Jordan, Inc. were discussed at that introduction. I have had no other communications, whether written, oral or otherwise, with Dale Irons.

FURTHER AFFIANT SAYETH NOT, this the 30TH day of July, 2009.



Joe E. Bostic, Jr.

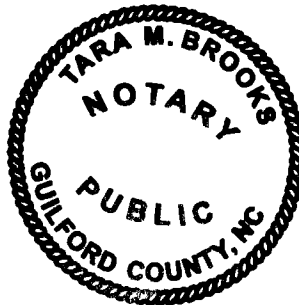
SWORN TO AND SUBSCRIBED
BEFORE ME THIS THE 30th
DAY OF JULY, 2009.

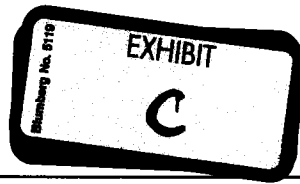


Notary Public

My Commission Expires:

1-16-2011





1 A. That's not a valid question. You're asking
2 a question that there's hundreds of things Aaron Akers
3 told me.

4 Q. Prior to the time that you entered into this
5 contract as Exhibit 6, what did Mr. Akers tell you about
6 either -- that he wanted Phillips & Jordan to do on the
7 project?

8 MR. STILES: Objection to form.

9 Answer if you can.

10 THE WITNESS: Yeah. Obviously, we had
11 quoted him the site work or the heavy civil portion
12 of this job, and that's the only business that we
13 did with Aaron Akers so, obviously, that's what
14 Aaron Akers wanted.

15 BY MS. MYATT:

16 Q. And what conversations, if any, did you have
17 with Mel Morris prior to the time you entered into this
18 contract?

19 A. Same conversation I had with Aaron. They
20 wanted us to do the site work.

21 Q. Did you ever talk with Joe Bostic prior to
22 the time that you entered into this contract?

23 A. I met Joe Bostic at their office in
24 Greensboro. I never spoke to him about any particular
25 project.

1 Q. When did you meet Joe Bostic?

2 A. Mel Morris invited me to their office in
3 Greensboro. I don't have any idea when it was. I went
4 to their office, toured their office, toured the out
5 buildings out back where they stored materials. Mel
6 took me all over Greensboro going from place to place:
7 His door-frame place, you know, all the different little
8 entities they had of building supplies for the
9 apartments, and we toured all of it. And I met Joe that
10 day.

11 Q. What did you and Joe talk about?

12 A. Nothing. It was just an introduction.

13 Q. How long did you spend with Joe Bostic?

14 A. Just an introduction.

15 Q. Have you ever met Jeff Bostic?

16 A. No.

17 Q. Have you ever talked with Jeff Bostic?

18 A. No.

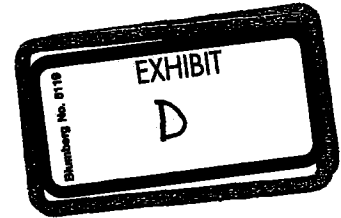
19 Q. Do you recall whether your being with Joe
20 Bostic occurred prior to 2003?

21 A. I don't have any idea.

22 Q. Do you know what role Joe Bostic had at
23 Bostic Construction when you met him?

24 A. No. I just knew his name. It was on the
25 sign outside.

FILED



2004 JUL 28 PM 1: 51 CLAIM OF LIEN

1. ~~BUNCOMBE CO. C.S.C.~~ Name and address of the person claiming the lien: Phillips & Jordan, Inc., P.O. Drawer 604, Robbinsville, NC 28771
2. Name and address of the record owner of the real property claimed to be subject to the lien at the time the claim of lien is filed: Bostic Development at Asheville, LLC, 500 Kivett Dairy Road, McLeansville, North Carolina 27301. (Registered Office Address: 235 North Edgeworth Street, Greensboro, North Carolina 27401)
3. Description of the real property upon which the lien is claimed: all that certain real property described in Deed Book 2792 at Pages 777-779 of the Buncombe County Registry. A more particular description of the real property is attached hereto as Exhibit #1.
4. Name and address of the general contractor with whom the claimant contracted for the furnishing of labor or materials: Bostic Brother's Construction, Inc., P. O. Box 7939, 500 Kivett Dairy Road, Greensboro, North Carolina 27417.
5. Date upon which labor or materials were first furnished upon said property by the claimant: September 7, 2002.
- 5a. Date upon which labor or materials were last furnished upon said property by the claimant: April 2, 2004.
6. General description of the labor performed or materials furnished and the amount claimed therefore: The lien claimant performed grading, erosion control, paving, curb and gutter, water pipeline, and drainage work (storm sewer and sanitary sewer) construction work on the project as a subcontractor of Bostic Brother's Construction, Inc. pursuant to a subcontract with Bostic Brother's Construction, Inc. dated August 26, 2002. The lien claimant is owed the sum of \$644,344.93 for the labor and materials furnished under its subcontract agreement with Bostic Brother's Construction, Inc.

CLAIM OF LIEN

July 28, 2004

Page 2


The undersigned lien claimant gives this notice of claim of lien pursuant to N. C. law and claims all rights of subrogation to which it is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

PHILLIPS & JORDAN, INC.

BY:


Randy Jordan

Filed this 28 day of July, 2004,



Dep. Clerk of Superior Court

Buncombe County

North Carolina



Lying in the City of Asheville, Buncombe County, North Carolina, being a 17.5± acre tract shown as Tract 1 on a plat (the "Timmons Surveyors Plat") entitled "Map for Bostic Brothers - Asheville Site", dated January 14, 2002 and prepared by William Jason Dixon and being more particularly described as follows: Beginning at an iron rod in the eastern right of way of New Leicester Highway (NC Hwy. #63), said iron rod being the southernmost corner of Lot 1 of the plat recorded in Buncombe County Plat Book 82 at page 20, of Leicester Partners, LLC described in the deed recorded in Buncombe County Book 2067 at page 754; and running thence with the line of said Lot 1 and then Lot 2, North 62 deg. 24 min. 51 sec. East 549.13 feet to an iron pin with cap standing at the easternmost corner of said Lot 2; thence with the line of said Lot 2, North 31 deg. 5 min. 32 sec. West 194.41 feet to an iron rod standing in the southern line of the Caldwell property described in the deed recorded in Buncombe County Book 2050 at page 449; thence with the lines of said Caldwell tract the following four courses and distances, to wit: North 69 deg. 10 min. 27 sec. East 49.6 feet to an iron rod, North 3 deg. 24 min. 22 sec. East 140.09 feet to an iron pin, North 41 deg. 23 min. 43 sec. West 109.34 feet to an iron rod and North 38 deg. 55 min. 51 sec. West 132.56 feet to an iron pin at a corner of another Caldwell Tract described in the deed recorded in Buncombe County Book 2050 at page 462; thence a new line, North 61 deg. 41 min. 21 sec. East 778.31 feet to an iron pin; thence another new line South 28 deg. 51 min. 33 sec. East 900.56 feet to an iron pin set in the northwest margin of the right of way of the existing roadway known as Eliada Home Road; thence with said margin of said right of way, on a curve to the left with a radius of 368.7 feet, a chord bearing and distance of South 46 deg. 3 min. 11 sec. West 88.69 feet, an arc length of 88.9 feet to an iron pin set; thence continuing with said margin of said right of way, South 39 deg. 8 min. 43 sec. West 248.61 feet to an iron pin set; thence leaving said margin and running North 31 deg. 6 min. 7 sec. West 166.62 feet to an iron pin set; thence South 58 deg. 54 min. 29 sec. West 512.38 feet to an iron pin set in the northeast line of the tract described in the deed recorded in Buncombe County Book 2070 at page 414 and shown on the plat recorded in Buncombe County Plat Book 48 at page 146; thence with the lines of said last mentioned tract, North 31 deg. 6 min. 7 sec. West 276.82 feet to an iron pin and South 62 deg. 22 min. 29 sec. West 549.98 feet to an iron rod found in the northeast margin of the right of way of New Leicester Highway; thence with said margin of said Highway, North 30 deg. 10

