

STATE OF NORTH CAROLINA
GRAHAM COUNTY

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

PHILLIPS AND JORDAN, INC.,)

Plaintiff,)

v.)

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

Defendants.)

**REPLY BRIEF IN SUPPORT OF MOTION
FOR RULE 11 SANCTIONS FILED BY
DEFENDANTS JOE E. BOSTIC, JR.
AND JEFFREY L. BOSTIC**

Defendants Joe E. Bostic, Jr. (“Joe Bostic”) and Jeffrey L. Bostic (“Jeff Bostic”) (collectively Joe Bostic and Jeff Bostic are collectively referred to hereinafter as the “Bostics”), by and through their undersigned counsel, and pursuant to Rule 15.7 of the General Rules of Practice and Procedure for the North Carolina Business Court respectfully submit this Reply Brief in Support of their Motion for Rule 11 Sanctions (“Reply Brief”) and in opposition to the Plaintiff’s Brief in Response to the Motion for Rule 11 Sanctions Filed by the Defendants Joseph and Jeffrey Bostic (“Responsive Brief”).

PROCEDURAL STATUS

The Bostics filed their Motion for Rule 11 Sanctions with the Court on August 6, 2009 (“Rule 11 Motion”), together with their Brief in Support of Rule 11 Motion (“Brief”) and the affidavits of Joe Bostic and Jeff Bostic.¹ The Rule 11 Motion sought sanctions against the Plaintiff including striking the fraud and unfair and deceptive

¹ Capitalized terms used but not defined in this Reply Brief shall have the meaning given to them in the original brief filed by the Bostics in support of the Rule 11 Motion.

claims asserted in the original Complaint and later asserted in the Amended Complaint (hereinafter collectively sometimes referred to as the “Complaint.”).

On August 30, 2009, Plaintiff filed its Responsive Brief, together with the Affidavit of Eric W. Stiles, counsel for Plaintiff.

REPLY TO RESPONSE BRIEF

I. The Responsive Brief and Affidavit of Mr. Stiles is Generally Unresponsive to the Rule 11 Motion.

Most, if not all, of the arguments in the Responsive Brief and the statements set forth by Mr. Stiles in his Affidavit are directed to the constructive fraud issue which is not before the Court in the Rule 11 Motion. At issue in the Rule 11 Motion are the fraud and unfair and deceptive trade practice claims asserted in the Amended Complaint based upon purported “misrepresentations” made by the Bostics as to the identity of the Property owner in the Contract.² See Amended Complaint ¶¶14, 15, 34, 35, 36, 37. Although Plaintiff contends that the “legal” sufficiency of such allegations was determined at the Rule 12(b)(6) hearing, Rule 11 requires an analysis into the “factual” sufficiency of the allegations at the time the Complaint was signed as addressed in the Bostics’ Brief.

II. The Responsive Brief Ignores the Specific Allegations in the Complaint.

The Plaintiff’s arguments in the Responsive Brief regarding the fraud and unfair and deceptive trade practice claims completely ignore the pleadings in this case as to the

² Both the Responsive Brief, p. 8-9, and Affidavit of Mr. Stiles contain discussion and general statements about purported misappropriation of funds. Although “fraudulent misappropriation” was alleged in ¶21, 22 and 23 of the Complaint, no separate claim for misappropriation has been asserted. Thus, such discussion and statements are more properly addressed in connection with the constructive fraud claim asserted by Plaintiff which is not at issue here.

specific claims asserted by Plaintiff directly against the Bostics. The allegations in paragraphs 14, 15, 34, 35, 36, 37, 38, 39, 40 and 41 reference either the “Defendants” and/or the “Individual Defendants,” each of which generally includes the Bostics, as having made misrepresentations to Plaintiff regarding the ownership of the Property. There is no reference in the Complaint that the Bostics themselves made such statements or that such statements were made by others under the Bostics’ direction or control.

In its Responsive Brief and contrary to the allegations in the Complaint, Plaintiff now concedes that the statement regarding the ownership identity of the Property was made by Aaron Akers, who signed the Contract on behalf of Bostic Construction. However, as was pointed out in the Bostics’ original brief, 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). Plaintiff has offered no case law, argument or evidence in opposition to this well-established law in North Carolina.

Further as set forth in Section III below, Plaintiff has proffered no evidence that the Bostics made *any* misrepresentations directly or indirectly to Plaintiff as alleged in the Complaint. This lack of evidence was known by Plaintiff and/or its counsel at the time the original Complaint was signed and Plaintiff and its counsel chose to ignore this fact.

Recognizing the absence of support for the allegations of fraud and unfair and deceptive trade practices in the Complaint, the Plaintiff now contends in its Responsive Brief and contrary to the specific allegations in the Complaint that “[t]he 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.” See Responsive Brief, p. 22. Not only is such statement directly contradicted by the affidavits of Jeff and Joe Bostic, it asserts a new claim which previously has not been asserted by Plaintiff in either the original Complaint or the Amended Complaint.

As set forth in the Bostics’ affidavits, Joe Bostic left Bostic Construction on or about January 1, 2003 and had no involvement with Bostic Construction or its affiliated entities after his departure. Thereafter, Mel Morris became a majority shareholder in Bostic Construction and served as President. Jeff Bostic, who lived in Duluth, Georgia, continued as a minority shareholder in the company and had no involvement in the daily operations of Bostic Construction. Further and as set forth in the Bostics’ affidavits, neither of the Bostics prepared, reviewed or had any knowledge of the Contract. According to the Bostics, they believe that Michael S. Hartnett, who is not a party to this action, was the developer of the Westmont Commons project and it is Mr. Hartnett who supervised and oversaw its development and construction as a member in Bostic Development and as one of the managers of Bostic Development at Asheville, LLC.

At least one court in North Carolina has determined that an “alter-ego” or “piercing the corporate veil” is a derivative claim arising out of the acts of the company rather than an independent cause of action which can be asserted directly against an officer or director. Strawbridge v. Sugar Mountain Resort, Inc., 243 F.Supp.2d 472, 479 (W.D.N.C. 2003). As demonstrated in the Bostics’ Brief and herein, Plaintiff had no

basis at the time the original Complaint was filed for asserting an independent cause of action against Bostic Construction for fraud and unfair and deceptive trade practices based on the identity of the Property owner given the incontrovertible evidence that Plaintiff was able to and did timely assert its lien claim.

Further, since the “alter-ego” or “veil-piercing” claim was not asserted in the original Complaint, such claim is now barred by the statute of limitations, laches and/or estoppel and cannot be properly raised by Plaintiff in a collateral pleading such as its Responsive Brief. Strawbridge v. Sugar Mountain Resort, Inc., *supra*, 243 F.Supp.2d at 479 (“the statute of limitations for asserting such claim is the same as the statute of limitations for the original suit”).

III. Plaintiff Has Presented No Admissible Evidence to Refute the Affidavits of Joe Bostic or Jeff Bostic.

Pursuant to N.C.G.S. § 1A-1, Rule 43(e) (1990), when a motion is based on facts not appearing of record, the parties may present evidence in the form of affidavits. In the context of a Motion for Rule 11 sanctions, “any affidavits submitted, either in support of or in opposition to a Rule 11 motion, must be based on *personal knowledge*, must set forth facts which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated therein.” Taylor v. Taylor Prods., 105 N.C. App. 620, 629, 414 S.E.2d 568, 575 (1992), *overruled in part on other grounds by Brooks v. Giesey*, 334 N.C. 303, 318, 432 S.E.2d 339, 347 (1993)(emphasis added); see also Lemon v. Combs, 164 N.C.App. 615, 596 S.E.2d 344 (2004). *Cf.* N.C.G.S. § 1A-1, Rule 56(e) (1990).

In support of its Responsive Brief, Plaintiff has tendered no affidavits or evidence from any of its employees or other third parties to refute the statements made by Jeff

Bostic or Joe Bostic in their affidavits. According to Plaintiff, in its responses to the Bostics' discovery requests, only five (5) individuals employed by Plaintiff had knowledge of the facts and circumstances alleged in the Complaint. Depositions of four (4) of these individuals were taken by the Bostics' counsel which included the deposition of Randy Jordan, the Vice President of Plaintiff. Such depositions were conducted as to each deponent's personal knowledge of the facts and circumstances set forth in the Complaint. Although these individuals did not testify as Rule 30(b)(6) deponents (nor were they subpoenaed in such capacity), none of the deponents was able to point to any misrepresentation made by either of the Bostics as alleged in the Complaint. Thus, the statements of Jeff and Joe Bostic that they did not personally communicate, whether written, orally or otherwise, with any employee, agent or representative of Plaintiff about the Contract, the services to be performed under the Contract, or the matters set forth in the Complaint are unrefuted.

The only affidavit submitted by Plaintiff in opposition to the Rule 11 Motion is that of Eric W. Stiles, counsel for Plaintiff in this action ("Affidavit").³ Portions of this Affidavit contain inadmissible hearsay (i.e. statements made by attorneys Joseph Moss, Michael Utley and Stephen Cox), are irrelevant as to what information was discovered after the Complaint was filed, and provide no support whatsoever for Plaintiff's opposition to the Rule 11 Motion as such statements deal solely with the constructive

³ With respect to the statements in the Affidavit as to what Mr. Stiles and/or his law firm did or did not do prior to filing the Complaint, it is conceded that Mr. Stiles may testify to his actions as an officer of the Court in connection with the Rule 11 Motion. However, to the extent that his statements go to the merit of the claims, Mr. Stiles and his firm will be unable to both testify and represent their client later at trial and should consider withdrawing pursuant to RPC 3.7.

fraud claim. Accordingly, this Court should strike Mr. Stiles' affidavit or, in the alternative, give it little or no weight.

Notably the Affidavit and the Responsive Brief contain no reference to any investigation conducted by Mr. Stiles or his law firm prior to the filing of the original Complaint of either his law firm files or the public court records which would have revealed that the initial Claim of Lien and the Lawsuit clearly and correctly denoted the Property owner. Indeed the Responsive Brief, p. 8, concedes that Plaintiff discovered the correct owner of the Property on or about July 28, 2004, well within the North Carolina statutory period for asserting a lien claim. Such statement directly contradicts the allegations in the Complaint that the Plaintiff relied on the ownership designation in the Contract so as to prevent it from asserting its lien rights and also contradicts the allegations in Paragraph 28 of the Complaint that Plaintiff discovered the fraud in 2005. It further evidences that the statute of limitations for asserting a fraud claim expired prior to the filing of the Complaint.

The Affidavit also contains no time-frame as to what actual investigation, if any, was undertaken by Mr. Stiles, his law firm and/or the Plaintiff prior to the filing of the Complaint with respect to the fraud and unfair and deceptive trade practice claims. According to Mr. Stiles, he spoke with several attorneys prior to the filing of the original Complaint. However, as the Fourth Circuit in In re Kunstler noted "total reliance on other counsel is itself a violation of Rule 11." In re Kunstler, 914 F.2d 505, 514 (4th Cir. 1990). In that case, the Fourth Circuit found that the attorney's reliance on others was indeed an improper delegation of his responsibility under Rule 11 to certify that the pleading filed over his name was well grounded in fact and in law. "The signing attorney

cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment.” Id.

As indicated previously, the majority of the statements in the Affidavit and much of the argument in the Responsive Brief pertain to the constructive fraud claim which is not at issue at the present time and will not be discussed herein.⁴

IV. The Affidavit and Responsive Brief Contain Inflammatory Statements which are Outside the Scope of the Rule 11 Motion and Should be Struck.

The Affidavit and Responsive Brief also contain inflammatory and contradictory statements which are outside the scope of the Rule 11 Motion and which should be struck from the Court’s record. The undersigned prefers that counsel focus on the facts and issues in the Rule 11 Motion rather than getting into personal attacks since Mr. Stiles’ recollection of counsel communications differs significantly from the undersigned’s recollection.

The one matter raised in Mr. Stiles’ Affidavit requiring an immediate response is the implication that the undersigned and her firm have impeded document discovery by

⁴ It appears that Plaintiff may also have relied entirely upon discovery in the hope of finding some factual support for its constructive fraud claim. Rule 11 does not authorize counsel to blindly request relief and then search through discovery for facts to support allegations already averred. The rule requires that the pleading be well-grounded in fact at the time the pleading is signed. As now indicated in Mr. Stiles’ Affidavit and in Plaintiff’s Response to the Bostics’ Second Set of Interrogatories, Plaintiff likely was unable to make a showing of facts to support its constructive fraud claim as required by Rule 11 at the time the Amended Complaint was filed absent later discovery. This indicates an unacceptable level of pre-filing investigation.

Plaintiff's counsel. Specific reference is made by Mr. Stiles to Exhibit 1 to his Affidavit which refers to a note with the name "Nexsen Pruet" at the top. As set forth in the affidavit of James W. Russell, which is attached hereto as Exhibit 1, Mr. Russell is a paralegal at the law firm of Nexsen Pruet. He was instructed by the undersigned to review numerous boxes located at the former offices of Bostic Construction in or about July, 2009 to locate any and all documents related to Bostic Construction at Asheville, LLC so that such documents could be produced to Plaintiff's counsel. The document referred to as Exhibit #1 contains Mr. Russell's notes and instructions on what documents to pull and which client to bill. Mr. Russell thereafter engaged in an extensive search of these boxes and located approximately 7 to 8 boxes which contained a few documents related to Bostic Development at Asheville, LLC. Mr. Russell reviewed these boxes substantially during the time that Mr. Stiles was present and reviewing documents at the warehouse. Mr. Russell thereafter marked certain of the documents and segregated the boxes containing the marked items in an area next to the table which Mr. Stiles occupied. At no time were any documents removed from the warehouse by Mr. Russell as alleged in the affidavit of Mr. Stiles.

CONCLUSION

For the foregoing reasons, Defendants Joe Bostic and Jeff Bostic respectfully request that their Motion for Rule 11 Sanctions be granted for the reasons set forth in their original brief and herein.

Respectfully submitted this 4th day of September, 2009.

/s/ Christine L. Myatt
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AFFIDAVIT OF JAMES W. RUSSELL

James W. Russell, being first duly sworn, deposes and says as follows:

1. I am a paralegal for the firm Nexsen Pruet, LLC. Except as otherwise noted herein, I make this Affidavit based upon my personal knowledge.

2. I was asked by Christine Myatt (hereafter "Ms. Myatt") to travel to the former offices of Bostic Construction (hereafter, "the Site") on Monday, July 13, 2009 and Tuesday, July 14, 2009 to review the files stored there in search of any information pertaining to Bostic Development at Asheville, LLC ("Asheville") for production in the above captioned matter.

3. My specific instructions were to work at the Site, "tagging" with sticky notes any files found that fit the above description as well as the boxes in which they were contained, and to leave all files and boxes there on site.

4. In reviewing 200 or more boxes over a period of 2 days, I found only 7 or 8 boxes that contained files with any mention of Asheville and/or Bostic Construction's work on the Asheville project. I tagged each box and file with a sticky note and placed them back with the other boxes.



5. Eric Stiles (hereafter, "Mr. Stiles") was present for the vast majority of my time spent at the site. The four occasions on which I was there without Mr. Stiles present were:

- a. the morning of Tuesday, July 14th from 8:00 a.m. to around 10:30 a.m., when Mr. Stiles showed up for the day;
- b. at around 9:30 a.m. with Ms. Myatt 2 weeks or so after I had finished reviewing the files, in order to show her those 7 or 8 boxes that I had tagged, which I then moved next to the table where Mr. Stiles was working;
- c. the morning of August 21st around 8:00 a.m. to take the tables that belonged to Ms. Myatt and were needed for a function at Nexsen Pruet, and at no time during this visit did I take or even touch a single file or box;
- d. the morning of August 24th around 8:00 a.m. to return those same tables, and again I touched nothing.

6. Mr. Stiles and I had very few conversations during our shared time at the site, but several times he asked what I was doing and whether I was finding anything. On these occasions, I responded that I was looking through the boxes for files pertaining to the Bostic Construction project at Asheville and that I was finding very little, but what I was finding I was making sure to tag with a sticky note and leave in place.

7. I also explained during at least one of these conversations that, when I was done looking through a box, I would stack it neatly in rows on one side of the empty space. This kept me from going over the same box twice and it also served to organize the overall space, since the boxes were in considerable disarray when we arrived there for the first time. At no time during this reorganization did I move any box outside the area where the boxes had originally been piled when we arrived, and no box was ever removed from the site for any amount of time by me or

with my knowledge.

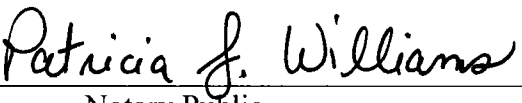
8. The note attached as Exhibit 1 is indeed my handwriting and it is on a Nexsen Pruet branded notepad, but what is written on it is not instructions I wrote to myself on what to steal but, rather, what I should tag. In no way should the word “get” be construed to mean “take” or “remove” – it was merely a reminder of what I should be looking for. I had no prior involvement with this case (nor with any Bostic Construction cases for that matter), and that note contains the entirety of the notes that I took when Ms. Myatt explained to me what I would be doing and to whom I should bill my mileage and time.

9. I had this paper beside me the entire first day that Mr. Stiles and I shared a table in the Site.

9/4/09
Date

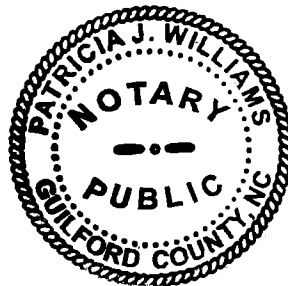

James W. Russell

SWORN TO AND SUBSCRIBED before me
this the 4th day of September, 2009.


Notary Public

Name: Patricia J. Williams

My Commission Expires: 2-23-2010



CERTIFICATION OF COMPLIANCE WITH BCR 15.8

The undersigned hereby certifies that the Reply Brief in Support of Motion for Rule 11 Sanctions filed by Defendants Jeffrey L. Bostic and Joe E. Bostic, Jr. complies with the provisions of BCR 15.8.

Respectfully submitted this 4th day of September, 2009.

/s/ Christine L. Myatt
Christine L. Myatt
NC State Bar No. 10444
Attorney for Jeffrey L. Bostic and Joe E.
Bostic, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **REPLY BRIEF TO MOTION FOR RULE 11 SANCTIONS FILED BY DEFENDANTS JOE E. BOSTIC, JR. AND JEFFREY L. BOSTIC** was duly served upon counsel for Plaintiff in accordance with the provisions of Rule 5 of the North Carolina Rules of Civil Procedure by depositing a copy of same in the United States Mail, first-class postage prepaid, or as otherwise indicated below, addressed as follows:

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This the 4th day of September, 2009

/s/ Christine L. Myatt
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