

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
08-CVS-09546

CROWDER CONSTRUCTION COMPANY, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 ) CITY OF CHARLOTTE; CITY OF )  
 ) CHARLOTTE, CHARLOTTE AREA )  
 ) TRANSIT SYSTEM; and STV/RALPH )  
 ) WHITEHEAD ASSOCIATES, INC. f/k/a )  
 ) STV NORTH CAROLINA, INC., )  
 )  
 ) Defendants. )  
 )  
 )

**MEMORANDUM IN OPPOSITION  
OF STV’S MOTION TO DISMISS**

COMES NOW Plaintiff Crowder Construction Company (“Crowder”), in support of its Motion in Opposition to STV/Ralph Whitehead Associate, Inc. f/k/a/ STV North Carolina, Inc.’s (“STV”) Motion to Dismiss offers the following:

INTRODUCTION AND STATEMENT OF FACTS

Crowder entered into a contract with the CATS (City of Charlotte) on or about November 11, 2005. CATS had contracted with STV to serve as construction manager and/or engineer for the Project.

After Crowder began work on the Project it was determined that the actual subsurface conditions differed greatly from those represented in the Bid Documents which Crowder had relied upon. (Complaint ¶¶ 43, 44). As a result of encountering the different conditions, additional work was necessary which Crowder was directed to undertake by STV. (Complaint ¶¶ 45-50)

STV entered into a Professional Services Agreement which provided in part the following:

That STV was “an independent professional firm” contracting with THE CITY to provide specialized services, and not an agent or servant of CATS. (See Agreement, Paragraph 10).

That under the Scope of Work provisions, STV was to complete a comprehensive review of the design of the South Corridor Light Rail (“SCLR”) and review all work required the three (3) level parking deck. (See Agreement, Attachment A Scope of Work).

That THE CITY was required to provide written notice to STV of any complaints against THE CITY along with full and complete particulars of the claim. (See Agreement, Paragraph 11).

That STV was liable be liable to THE CITY for any reasonable costs incurred to correct, modify, or reconstruct contractor work which was done based on the drawings submitted by STV that were found to be defective.

That STV was to assign an engineer duly licensed to practice in the State of North Carolina to supervise the Project Services.

That the design engineering services for the Project were to be performed and/or approved by a Professional Engineer or Registered Architect licensed to practice in the State of North Carolina. (See Agreement, Paragraph 34).

Additionally, the soil borings that were provided in the geotechnical report were inadequate and incorrect. (Complaint ¶¶ 77-80). Crowder encountered large outcropping in quadrant A that was not shown in the geotechnical report or in the Bid Documents. (Complaint ¶ 85). STV requested a blasting plan from Crowder and after requesting a blasting plan and subsequent resubmitted blasting plan, Crowder was not allowed to blast. STV knew Crowder’s contract rights with CATS and intentionally induced CATS not to perform the contract rights which Crowder was entitled. STV failed to properly administrate and administer the terms of the contract and STV was to review and evaluate all claims and request for change orders.

## ARGUMENT

As this Court has correctly stated on a number occasions, as the standard for considering a Motion to Dismiss, the Court should treat as true all the material allegations in the Complaint and the Complaint should not be dismissed should be liberally construed unless it appears both beyond a doubt that the Plaintiff could not prove any set of facts to support a claim which would entitle the Plaintiff to relief. (See *Fisher v. Communication Workers of America*, 2008 NCBC 18(2008), as well as a number of other unpublished decisions of this Court, which correctly cites the law of the State of North Carolina that the Complaint must be liberally construed and the material facts taken as true.)

Additionally, as the Court rules upon a Motion to Dismiss, the Court is allowed to consider the STV Professional Services Agreement, which is attached as Exhibit A (Affidavit of Rebecca A. Johnson). This Court can consider STV's Professional Services Agreement because it is referenced in the pleadings, and in the Answers of STV and CATS. The consideration of these materials does convert this matter into a Motion for Summary Judgment since the Services Agreement is before this Court and does not create any justifiable surprise for STV. (*Brooks Distributing Co., Inc. v. Jeffrey Pugh*, 91 N.C. App. 715 (1988)).

In considering the matters before this Court on a Motion to Dismiss, the Court can properly consider materials which are not in the Complaint such as the CATS (City of Charlotte) Answer. Such consideration is well within the Court's discretion and does not convert the Motion to Dismiss into a Motion for Summary Judgment. A review of CATS' Answer demonstrates that on no occasion did CATS ever admit that STV was its agent. On the contrary, in CATS' Answer, it refers to their (STV and CATS) agreement as being the best evidence of its Terms and Conditions. (*Brackett v. SGL Carbon Corporation*, 158 N.C. App. 252, 580 S.E.2d

757 (2003) and *Pinney v. State Farm Mutual Insurance Company, et al.*, 146 N.C. App. 248, 552 S.E.2d 186 (2001)).

STV IS NOT AN AGENT

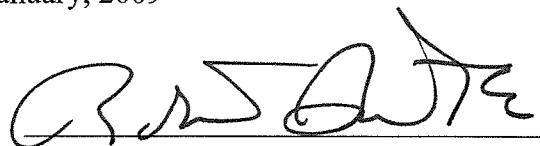
1. STV is not an agent and therefore it can be held liable for its acts and omissions. The question then becomes whether the Complaint, taken in the light most favorable to Crowder sets forth facts which compel a conclusion that STV's actions were unjustified. How can their actions be justified when the evidence before the Court is:

1. That there was a change conditions;
2. That the soil borings were inadequate;
3. That the plans and specifications were defective;
4. That STV was to advise owner on all claims; and
5. That Crowder performed extra work to the extent that the caisson drilling duration and cost increased over 500%. How can it be reasonable to refuse to advise CATS to make payment to Crowder under those circumstances?

CONCLUSION

For the reasons set forth above, STV's Motion to Dismiss should be denied.

Respectfully submitted this the 6<sup>th</sup> day of January, 2009



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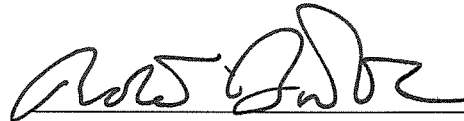
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Memorandum in Opposition of STV's Motion To Dismiss** has been served by United States First Class Mail, postage pre-paid, on all counsel of record in envelopes addressed as follows:

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This the 6<sup>th</sup> day of January, 2009.



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