STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08-CVS-9546

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.

STV/RALPH WHITEHEAD ASSOCIATES, INC. f/k/a STV NORTH CAROLINA, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

NOW COMES Defendant STV, Incorporated, f/d/b/a STV North Carolina, Inc., but now doing business as STV/Ralph Whitehead Associates, Inc. ("STV"), improperly named as STV/Ralph Whitehead Associates, Inc. f/k/a STV North Carolina, Inc., by and through counsel, and pursuant to N.C. Gen. Stat. § 1A-1, 12(b)(6) and Rule 15 of the General Rules of Practice and Procedure for the North Carolina Business Court, submits its Brief in Support of its Motion to Dismiss.

INTRODUCTION AND BACKGROUND

Plaintiff Crowder Construction Company ("Crowder") filed its Complaint against the Defendants and asserted the following claims against the City of Charlotte Defendants[1]: Breach of Contract, Quantum Meruit, Cardinal Change, Constructive Change, and Breach of Implied Warranty. All of the claims against the City of Charlotte Defendants arise out of the November 11, 2005 agreement between the City and Crowder whereby:

[1] The "City of Charlotte" Defendants are defined as all of the Defendants except for STV. See Complaint ¶3. The City of Charlotte Defendants will be referred to as the City or CATS.

> Crowder agreed to 'provide all labor, material tools, equipment, supervision and services necessary to prosecute and complete the construction of the I485 [sic] Parking Garage for the city of Charlotte's South Corridor Light Rail as described in the bid documents, the Terms and Conditions of which were accepted and return[ed] by Contractor on July 26th 2005 entitled "South Corridor Light Rail Project, Contract #6 I-485 Parking Garage" date April 15th 2005 along with the cost reductions identified and accepted by the City on August 19th 2005; collectively they are incorporated herein by reference and hereinafter referred to as the Bid Documents.'

Complaint ¶37.

Crowder alleges that the City "contracted with STV to serve as the construction manager and/or engineer for the Project." Complaint ¶39. STV admits in paragraph 39 of its Answer that "the City contracted with STV to provide construction management and contract administration for the Project for and on behalf of the City and that STV maintained an office on the Project site." On more than twenty different occasions in its Complaint, Plaintiff refers to STV as the "agent" of CATS. Complaint ¶¶ 39, 48-50, 63, 66, 68-70, 73, 76, 81, 87, 89-92, 100, 106, 114, 115, 116. In fact, Crowder admits that "at times relevant hereto [STV] acted as agent for CATS." The single claim alleged against STV by Crowder is for "Wrongful Interference with Contract Right," again referring to the contract with the City. Complaint ¶¶141-151. The substance of Crowder's claim against STV is that:

1. A valid contract existed between Crowder and CATS and that STV had knowledge of the facts giving rise to Crowder's contract right with CATS (Complaint ¶¶142, 143). The existence of a contract between Crowder and the City is not disputed by STV. See STV/Ralph Whitehead Associates, Inc. f/k/a STV North Carolina, Inc.'s Motion To Dismiss and Answer ¶¶36-38.
2. STV intentionally induced CATS not to perform the contract right to which Crowder was entitled (Complaint ¶144);

3. STV intentionally induced CATS to adversely alter the performance of the contract right to which Crowder was entitled (Complaint ¶145);

4. STV failed to properly administer the terms of the Contract between CATS and Crowder (Complaint ¶146);

5. STV failed to timely and properly submit Crowder's Change Orders and Pay Applications to CATS (Complaint ¶147);

6. STV demanded that Crowder and its subcontractors perform "force account" work under the terms of the Contract but refused to negotiate proper payment to Crowder for the same (Complaint ¶148);

7. STV acted without justification (Complaint ¶149); and

8. STV's actions resulted in actual damages to Crowder (Complaint ¶150).

The facts set forth in the Complaint, taken as true or admitted, and in the light most favorable to Plaintiff, do not set forth a claim against an agent for interference with the contract of its principal and do not support the elements of tortious interference with contract. For those reasons, Crowder's claim against STV must be dismissed.

ARGUMENT

I. STV Cannot Be Liable For Tortious Interference With Its Principal's Contract with the Plaintiff.

Crowder contends that STV wrongfully interfered with Crowder's Contract with the City. To establish a claim for tortious interference with contract, a plaintiff must show the following:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

White v. Cross Sales & Engineering Company, 177 N.C. App. 765, 768-69, 629 S.E.2d 898, 901

(2006) (*quoting* United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)).

In the matter before this court, there is no "third person" with whom Crowder has contracted or that STV allegedly intentionally induced not to perform the contract. As the admitted agent of the City, STV and the City must be treated as one. "An agent may not be held liable by a third person for acts done in the scope of his authority for a disclosed principal, the acts of the agent in such instance being the acts of the principal alone." Strong's NC Index 4th, Principal and Agent § 19 (*citing* Walston v. R.B. Whitley & Co., 226 N.C. 537, 39 S.E.2d 375 (1946) and Hedgepeth v. Lumbermen's Mutual Casualty Co., 209 N.C. 45, 182 S.E. 704 (1935)). "An agent does not become liable because of this principal's breach of a contract negotiated by the agent for the principal." Forbes Homes, Inc. v. Trimpi, 318 N.C. 473, 479-80, 349 S.E.2d 852, 856 (1986) (*citing* Walston v. R.B. Whitley & Co., supra).

Even if the City breached its contract with Crowder, which is denied, STV is not liable for that breach. Crowder admits that STV was acting at all times as the City's agent. Crowder does not allege that STV undertook any action that was outside the scope of its authority with the City. STV's actions were those of its disclosed principal, the City of Charlotte. There is no claim against STV.

Similarly, if principal and agent are to be treated as one, then it is only logical that one cannot tortiously interfere with its own contract. In other words, an agent cannot tortiously interfere with its principal's contract. North Carolina has long recognized the doctrine of *respondeat superior.* "A principal is liable for the torts of its agent which are committed within the scope of the agent's authority, when the principal "retains the right 'to control and direct the manner'" in which the agent works." Daniels ex rel. v. Reel, 133 N.C. App. 1, 10, 515 S.E.2d 22, 28 (1999) (*quoting* Vaughn v. N.C. Dept. of Human Resources, 296 N.C. 683, 686, 252 S.E.2d

792, 795 (1979)(*quoting* Hayes v. Board of Trustees of Elon College, 224 N.C. 11, 15, 29 S.E.2d 137, 139 (1944)). "An agency relationship arises when parties manifest agreement that one of them shall act subject to and on behalf of the other." Id. at 10-11, 515 S.E.2d at 28 (*citing* Hayman v. Ramada Inn, Inc., 86 N.C. App. 274, 277, 357 S.E.2d 394, 397 (1987)). If the parties act subject to and behalf of one another, it is only logical that an agent cannot tortiously interfere with its principal's contract.

While there are no cases in North Carolina directly addressing the issue of whether an agent is liable for tortious interference with the contract of its principal, there are numerous jurisdictions that have addressed the issue. For example, in Shenandoah Associates Limited v. Tirana, 322 F. Supp.2d 6 (D.D.C. 2004), the District Court for the District of Columbia analyzed under Virginia law whether an agent could be liable for allegedly tortiously interfering with a contract between the agent's principal and another party. Under Virginia law, there are four elements to establish a prima facie case of tortious interference:

> (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Id. at 9-10 (*quoting* Chaves v. Johnson, 230 Va. 112, 335 S.E.2d 97, 102 (1985)). The Shenandoah court also stated that the party with the burden of proof must prove that it was a third party, not the contracting party that interfered with the contract. Id. at 10. "Where the third party is an agent who is acting within the scope of his agency, he cannot intentionally interfere with the contract of his principal." Id. (*quoting* Fox v. Deese, et al., 234 Va. 412, 362 S.E.2d 699, 708 (1987)).

Similarly, the Southern District of West Virginia has recognized the proposition that "[o]nly a third party to a contract may be held liable for intentional interference of another's

contract." Cotton v. Otis Elevator Company, 627 F. Supp. 519, 522 (S.D. W.Va. 1986) (*quoting* Brown v. Loudoun Golf and Country Club, Inc., 573 F. Supp. 399, 404 (E.D. Va. 1983)). In Otis Elevator, the sole shareholders of an elevator company brought suit against Otis Elevator, alleging anticipatory breach of contract. They also alleged that the vice-president of Otis Elevator tortiously caused Otis Elevator to breach the contract. The court dismissed the tortious interference claims against the vice-president. In its analysis, Chief Judge Haden held:

> A corporation cannot tortiously interfere with an agreement to which it is a party and accordingly, where an agent breaches a contract to which his principal is a party on behalf of his principal, no cause of action for tortious interference with regard to such contract can be had.

Id. (*citing* DuSesoi v. United Refining Co., 540 F. Supp. 1260, 1275 (W.D. Pa. 1982)). Because the allegation was that the vice-president was acting in his capacity as the agent for Otis Elevator, the court held that the agent could not be held liable for tortious interference with its principal's contract and dismissed that count of the complaint. Id. at 522-23.

Another example of the application of this rule is found in COC Services, Ltd. v. CompUSA, Inc., 150 S.W.3d 654 (Tex. Civ. App.-Dallas 2004). In Texas, the elements for tortious interference are again very similar to the elements in North Carolina: (1) the existence of a contract subject to interference, (2) a willful and intentional act of interference, (3) such act was a proximate cause of damage, and (4) actual damage or loss occurred. Id. at 670 (*citing* Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 926 (Tex. 1993)). In discussing whether an agent could tortiously interfere with its principal's contract the court stated as follows:

> The acts of a corporate agent on behalf of the principal are ordinarily deemed to be the corporation's acts. Holloway v. Skinner, 898 S.W.2d 793, 795 (Tex. 1995). To show interference with the principal's contract, the plaintiff must prove the agent acted solely in furtherance of his or her personal interests; this preserves the logically necessary rule that a party (e.g., a corporation) cannot tortiously interfere with its own contract. Id. at 796 (rule avoids converting ordinary breach of contract actions into tort actions). Agents are not liable for tortious interference with their principals' contracts merely because they have mixed motives to benefit themselves as well as their principals. ACS Investors, Inc. v. McLaughlin, 943 S.W.2d 426, 432 (Tex. 1997). Rather, the plaintiff must prove the

agent acted "so contrary to the corporation's interests that his or her actions could only have been motivated by personal interest." Id.

COC Services, 150 S.W.3d at 675. Ultimately, the court held that a corporate officer's desire to continue to receive compensation does not establish that an act was "solely" in the agent's own interest and contrary to the corporate principal's interest. Id. (*citing* Holloway, 898 S.W.2d at 796).

Other jurisdictions have reached similar conclusions: Rudd v. Burlington Coat Factory Warehouse of Colorado, Inc., 388 F.Supp.2d 1201, 1207 (D. Colo. 2005)(an "agent who, while acting within the scope of official duties, causes his or her principal to breach a contract generally will not be held liable for tortious interference with that contract. . . . An agent may be liable only if he acts not at all in service to the corporation's interests but instead is motivated solely out of animus toward one or both contracting parties." (citations omitted)); CGB Occupational Therapy, Inc. v. RHA Health Services, Inc., 499 F.3d 184, 188 (3d Cir. 2007) (the Third Circuit reversed the trial court's verdict on the tortious interference claim because "under Pennsylvania law, '[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.'"); Bray & Gillespie Management LLC v. Lexington Insurance Company, 527 F.Supp.2d 1355, 1367-68 (M.D. Fla. 2007) ("One cannot tortiously interfere with a contract to which it is a party. . . . Consequently, an agent generally cannot be held liable for tortiously interfering with the contract of its principle [sic] because the agent is privileged to act in the best interest of the principle [sic]."(citation omitted)); Restatement (Second) of Torts §770 (1979) ("One who, charged with responsibility for the welfare of a third person, intentionally causes that person not to perform a contract . . . , does not interfere improperly with the other's relation if the actor (a) does not employ wrongful means and (b) acts to protect the welfare of the third person."); and 24 N.C. Index 4th Principal and Agent § 19 ("An agent may not be held liable by a third person for acts done in the scope of his

authority for a disclosed principal, the acts of the agent in such instance being the acts of the principal alone.').

In this case, Crowder alleges and admits that STV had a contract with the City to serve as the construction manager and engineer of the project. Complaint ¶39. Crowder goes on to make numerous factual allegations regarding STV's actions as the "agent" for the City. Complaint ¶¶ 48-50, 63, 66, 68-70, 73, 76, 81, 87, 89-92, 100, 106, 114, 115, 116. There is not a single allegation that STV acted outside the scope of its agency or that STV was not acting in furtherance of the City's interests. Therefore, Crowder has failed to state a claim against STV for tortious interference and its claims must be dismissed.

II. Plaintiff Fails to Allege Any Facts That STV Acted Without Justification

As noted above, to establish a claim for tortious interference with contract, a plaintiff must show the following:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

White v. Cross Sales & Engineering Company, 177 N.C. App. 765, 768-69, 629 S.E.2d 898 (*quoting* United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)).

Even if an agent can interfere with its principal's contract, Crowder cannot establish that STV "acted without justification" as it alleges in paragraph 149 of its Complaint. First, no facts are alleged to support that legal conclusion. "In ruling on a Rule 12(b)(6) motion to dismiss, the trial court regards all factual allegations of the complaint as true. . . . Legal conclusions, however, are not entitled to a presumption of truth." Miller v. Rose, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000); see, also, Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)("For the purpose of a Rule 12(b)(6) motion, the well-pleaded material allegations of the

complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted."). Here, Crowder does not offer any "well-pleaded" factual allegations regarding STV's alleged lack of justification in its actions. For that reason alone, the claim against STV should be dismissed.

Second, Crowder's allegations in the Complaint confirm that STV's actions were justified. Crowder admits that STV's actions were taken in STV's capacity as the City's agent. Crowder does not allege that STV was doing anything other than furthering the City's interests under the City's contract with Crowder. In Peoples Security Life Ins. Co. v. Hooks, 322 N.C. 216, 219, 367 S.E.2d 647, 649-50 (1988), the North Carolina Supreme Court stated as follows:

> A motion under Rule 12(b)(6) should be granted when the complaint reveals that the interference was justified or privileged. See, e.g. Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976); Childress v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1974). In Smith we held that: [t]he privilege [to interfere] is conditional or qualified; that is, it is lost if exercised for a wrong purpose. In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved." Smith v. Ford Motor Co., 289 N.C 71, 91, 221 S.E.2d 282, 294 (quoting Carpenter, *Interference With Contract Relations*, 41 Harv.L.Rev. 728, 746 (1928)). . . . If, however, the defendant is acting for a legitimate business purpose, his actions are privileged. Numerous authorities have recognized that competition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interests and by means that are lawful.

Peoples Security Life Ins. Co., 322 N.C. at 220-21, 367 S.E.2d at 650. In Peoples, the Supreme Court concluded that the hiring and placing of the plaintiff's former employees for the purpose of developing territory amounted to justifiable interference. Id. at 222, 367 S.E.2d at 650.

STV clearly has a legitimate business interest in complying with its own contractual obligations with the City and furthering the City's interests. Under the facts alleged by Crowder, STV is an agent of the City and is a party to a contract with the City to manage the project, thereby necessarily defining STV as a "non-outsider". As explained in Smith v. Ford Motor Company, 289 N.C. 71, 221 S.E.2d 282 (1976), "one who is a non-outsider is one who, though not a party to the terminated contract, had a legitimate business interest of his own in the subject

matter." Id. at 87, 221 S.E.2d at 292. Conversely, a person who is an "outsider" is "one who was not a party to the terminated contract and one who had no legitimate business interest of his own in the subject matter thereof." Id.

In Ford Motor Company, the plaintiff alleged that Ford had a malicious intent for causing his employer to terminate his employment contract, i.e., Ford wanted to punish the plaintiff for his refusal to terminate his personal affiliation with the Ford Dealer Alliance. Id. No evidence was presented to the Court that the plaintiff's affiliation would jeopardize the successful operations of the plaintiff's employer, any other Ford dealer or any legitimate business interest of Ford. Id. In its opinion, the Court analyzed several cases alleging wrongful interference with employment contracts, but distinguished the facts as alleged by the plaintiff. Ultimately, the Court held that under the circumstances as alleged by the plaintiff, he could maintain an action against Ford for its alleged malicious interference with by Ford with the plaintiff's employment contract. Id. at 84 and 94, 221 S.E.2d at 290 and 296.

In this instance, STV is clearly a "non-outsider" to the contract between Crowder and the City. Obviously, STV has a legitimate business interest in that contract due to fact that STV was acting as the City's agent in furtherance of that contract. Crowder has failed to allege any facts that would support a malicious intent for STV's actions or any claim that STV acted without justification. To the contrary, the consistent theme of the Complaint is that STV acted at all times as the City's agent and within the scope of its agency with the City. As such, Plaintiff has failed to allege a critical element of a tortious interference claim and its claim against STV should be dismissed.

CONCLUSION

Accordingly, for the reasons set forth above, Defendant STV respectfully prays that the Court enter an Order dismissing Plaintiff's claim against STV with prejudice pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

CERTIFICATE OF COMPLIANCE WITH BCR 15.8

The undersigned hereby certifies that this Memorandum in Support of Motion to Dismiss is in compliance with BCR 15.8.

This 8th day of December, 2008.

/s Robert C. Dortch, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **"STV/Ralph Whitehead Associates, Inc. f/k/a STV North Carolina, Inc.'s Memorandum in Support of Motion to Dismiss**" has this day been served as noted below, by placing a copy of the same in the United States Mail, First Class, postage prepaid and properly addressed as follows:

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This the 8th day of December, 2008.

/s Robert C. Dortch, Jr.
Robert C. Dortch, Jr., Bar No. 10857