

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10 CVS 20825

DAVID J. DeGORTER,

Plaintiff,

v.

CAPITOL BANCORP LTD, CAPITOL
WEALTH, INC. d/b/a/ CAPITOL WEALTH
ADVISORS, and CAPITOL NATIONAL
BANK, N.A.,

Defendants.

ORDER

THIS MATTER is before the Court on Defendants Capitol Bancorp Ltd (“Bancorp”), Capitol Wealth, Inc. (“Wealth”), and Capitol National Bank, N.A.’s (“National”) (collectively, “Defendants”) Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure in the above-captioned case (the “Motion”). Having considered the Motion, the parties’ briefs and submissions in the support of and opposition to the Motion, and the arguments of counsel at a hearing on July 9, 2012, the Court GRANTS in part and WITHHOLDS its ruling in part on the Motion.

“The purpose of summary judgment is to determine whether any issues of material fact exist, and if not, eliminate the necessity of a full trial where only questions of law are involved.” *Strickland v. Lawrence*, 176 N.C. App. 656, 661, 627 S.E.2d 301, 305 (2006) (citing *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 641–42, 281 S.E.2d 36, 40 (1981)). Thus, the Court must grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. R. Civ. P. 56(c). To warrant such a determination, the movant bears the burden of proving either that “an essential element of the opposing party’s claim does not exist, cannot be proven at trial, or

would be barred by an affirmative defense”; or “that the opposing party cannot produce evidence to support an essential element of her claim.” *Strickland*, 176 N.C. App. at 661, 627 S.E.2d at 305 (internal quotation and citation omitted).

Based on the representations of counsel at a case management conference held on January 24, 2014, it appears that Defendant Bancorp remains under an automatic stay in the Bankruptcy Court, preventing the Court from proceeding against it in this action. And, given the related nature of claims brought against Bancorp and Wealth as well as their interconnected structure, the Court concludes that proceeding with a resolution of this Motion as to Wealth would prove inefficient. Therefore, the Court, in the interest of judicial economy, WITHHOLDS its ruling on the Motion as to Wealth until such time that Bancorp is released from the automatic stay.

As to Defendant National, David J. DeGorter (“Plaintiff”) alleges constructive fraud and negligent misrepresentation in the execution of two lines of credit loaned to Plaintiff by National to purchase securities in Bancorp. To prove constructive fraud, Plaintiff must be able to show “facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.” *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 679 (1981). However, in this case, the Court discerns no evidence to support a relationship of trust and confidence between Plaintiff and National.

“[A]n ordinary debtor-creditor relationship generally does not give rise to such a ‘special confidence’: ‘[t]he mere existence of a debtor-creditor relationship between [the parties does] not create a fiduciary relationship.’” *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53,

61, 418 S.E.2d 694, 699 (1992) (citations omitted). Here, the record is devoid of evidence revealing a relationship with National beyond that of an ordinary creditor.

Indeed, Plaintiff freely admits that he never even spoke to anyone at National until after the loans were approved. And, although there is evidence that National is a wholly-owned subsidiary of Bancorp, Plaintiff refutes any allegation that National was involved in the alleged joint venture between it, Bancorp, and Wealth. Further, Plaintiff alleges no claim for conspiracy or piercing the corporate veil that might implicate National in either Wealth or Bancorp's interactions with Plaintiff. In an attempt to salvage his claim, Plaintiff points out that Cristin Reid served as President of Bancorp as well as Chairman of the Board for National. However, this fact alone is insufficient to extend to National any fiduciary duty owed by Bancorp to Plaintiff, particularly given the lack of evidence that Cristin Reid had any direct contact with Plaintiff that might give rise to a relationship of trust. According to Plaintiff's own argument, National had no relationship with Plaintiff beyond its connection to Bancorp. Therefore, the Court concludes that Plaintiff cannot support an essential element of his claim for constructive fraud. For that reason, the Court GRANTS the Motion, and DISMISSES this claim with prejudice as to National.

Similarly, on his claim for negligent misrepresentation, Plaintiff must prove that National owed him a duty of care, and that Plaintiff "justifiably relie[d] to his detriment on information prepared [by National] without reasonable care" *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988). In addition to the dearth of evidence to support a duty owed by National to Plaintiff, the record also lacks any showing of a representation made by National to Plaintiff. All the misrepresentations alleged in the Complaint apparently came from Bob Hogan, the President and CEO of Wealth. And, as previously noted,

Plaintiff never spoke with anyone from National. Accordingly, Plaintiff's claim against National for negligent misrepresentation fails as a matter of law. The Court GRANTS the Motion, and DISMISSES this claim with prejudice as to National.

Finally, National moves for summary judgment on its breach of contract counterclaim against Plaintiff for Plaintiff's failure to pay the debt owed to National, and demands judgment in an amount equal to the principal sum of \$912,329.65, accrued interest in the amount of \$61,600.40, and interest accruing since January 17, 2012 at a daily rate of \$81.01287. (Aff. Cunningham ¶ 23.) Reviewing the record, it is undisputed that Plaintiff and National entered into valid contracts for the lines of credit, and that, thereafter, Plaintiff refused to pay the secured line of credit when it became due. Despite that, Plaintiff contends that National's claim is barred by the defense of misrepresentation, which renders the contract voidable. However, nothing in the record reveals any material misrepresentation by National to induce Plaintiff into the contract. Instead, Plaintiff attempts to rely on the alleged misrepresentations of Bancorp and Wealth. While Bancorp and Wealth's misrepresentations may give rise to claims against them, they do not support an affirmative defense to the contract with National. In light of the current record, the Court concludes that there are no genuine issues of material fact remaining as to Plaintiff's liability for breach of contract, and the claim is not otherwise barred by any of the affirmative defenses asserted by Plaintiff. The Court, therefore, GRANTS the Motion, and enters judgment in favor of National on its counterclaim for breach of contract.

Wherefore, the Court hereby ORDERS, ADJUDGES, and DECREES as follows:

1. The Court WITHHOLDS its ruling on the Motion as to Wealth;
2. The Court GRANTS the Motion as to National;

3. Plaintiff's claims against National for constructive fraud and negligent misrepresentation are DISMISSED with prejudice;
4. Upon its counterclaim for breach of contract, National shall have and recover from Plaintiff the principal sum of \$912,329.65, accrued interest in the amount of \$61,600.40, and interest accruing since January 17, 2012 at a daily rate of \$81.01287 until the judgment is satisfied in full; and
5. Within 45 days from the entry of this Order, National may move for attorney's fees pursuant to the loan agreement and controlling law.

SO ORDERED, this the 26th day of June 2014.

/s/ Calvin E. Murphy
Calvin E. Murphy
Special Superior Court Judge