

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL ACTION NO: 09-CVS-2227

Elizabeth C. Donovan,

Plaintiff,

v.

Jeffrey Scott Huffman, Charlotte Internet,
LLC, and Bank of America Corporation

Defendants.

MEMORANDUM IN SUPPORT OF
DEFENDANT HUFFMAN'S MOTION TO
DISMISS PLAINTIFF'S COMPLAINT

The Defendant Jeffrey Scott Huffman ("Mr. Huffman") submits this Memorandum in support of his motion to Dismiss the Complaint.

STATEMENT OF FACTS

Near the end of December 2008, Elizabeth Donovan's employment with Charlotte Internet, LLC ("Charlotte Internet") was terminated. Following her termination, she engaged an attorney and entered into negotiations with the company over claims for unpaid wages and expenses. In January, she brought this action against Charlotte Internet, LLC, Mr. Huffman and the Bank of America. Though she named Mr. Huffman as a Defendant in this action, her Complaint fails to satisfy the basic pleading requirements of N.C.G.S. 1A-1 Rule 8(a) (1) that she provide "A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to Relief". Rule 8(a) (2) requires that the complaint contain "A demand for judgment for the relief to which he deems himself entitled."

The Complaint in this action seeks dissolution of Charlotte Internet, appointment of a receiver *pendent lite*, and payment by Charlotte Internet of amounts she claims are due for unpaid wages and expenses. There is nothing in the complaint showing a claim against Mr. Huffman for which she seeks relief. The demand for Judgment seeks no relief from Mr. Huffman.

The Complaint seeks the following relief:

WHEREFORE, the Plaintiff prays for relief as follows:

1. That this verified complaint be received as an affidavit for all purposes;
2. Charlotte Internet be dissolved by an Order of Dissolution
3. A Receiver be appointed to immediately take control of Charlotte Internet and manage its affairs until dissolution;
4. Charlotte Internet be required to immediately restore payments made to Verizon Wireless in the amount of \$504.00 and connection and late charges in the amount of \$30.00;
5. Immediate distribution of wages owed Plaintiff from the calendar year 2008 in the amount of \$5396.23, and 2009 wages owed to Plaintiff;
6. For trial by jury;
7. That the costs of this action, including reasonable counsel fees, be taxed against Defendant Charlotte Internet, LLC and/or Huffman; and
8. That Plaintiff be granted such other and further relief as the Court may deem just and proper in this case.

Complaint at 6, 7

ARGUMENT

A. The Complaint States No Claim For Relief Against Huffman

The Defendant may seek dismissal of this action under N.C.G.S. 1A-1 Rule 12(b) (6) if the complaint fails to state a claim against him upon which relief can be granted. The Complaint makes no claim for relief against Mr. Huffman. Though pleading standards have evolved from the “fact” pleading to “notice pleading”, Shuford cautions that, “The court of appeals has also warned that the mere assertion of a grievance will not be sufficient under the Rules and that in addition to giving notice, the statement of claim must cover the substantive elements involved. Shuford, North Carolina Civil Practice and Procedure §8.1 (Sixth Ed. 2003) at 157, 158.

In this action, the claim is against the corporation. There is no nuance in the pleadings. Though Mr. Huffman’s actions as a manager are referenced in the claim against the corporation, the relief which the Plaintiff seeks is against the company. Indeed, the North Carolina Limited Liability Act contains specific provisions protecting members from claims being asserted against them solely due to their status as members or managers and providing clear guidance in insulating managers from liability for performing their duties:

57C-3-22. Duties of managers

(a) The provisions of this section are all subject to [G.S. 57C-3-30](#).

(b) A manager shall discharge his duties as manager in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner the manager reasonably believes to be in the best interests of the limited liability company. In discharging his duties, a manager is entitled to rely on information, opinions, reports, or statements, including, but not limited to, financial statements or other financial data, if prepared or presented by:

(1) One or more employees of the limited liability company whom the manager reasonably believes to be reliable and competent in the matters presented;

(2) Legal counsel, certified public accountants, or other persons on matters the manager reasonably believes are within the person's professional or expert competence; or

(3) A committee of managers of which the manager is not a member if the manager reasonably believes the committee merits confidence.

(c) A manager is not acting in good faith if the manager has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) of this section unwarranted.

(d) A manager is not liable for any action taken as a manager, or any failure to take any action, if the manager performs the duties of his office in compliance with this section.

(e) Except as otherwise provided in the articles of organization or a written operating agreement, every manager must account to the limited liability company and hold as trustee for it any profit or benefit derived without the informed consent of the members by the manager from any transaction connected with the formation, conduct, or liquidation of the limited liability company or from any personal use by the manager of its property.

(f) Except to the extent otherwise provided in the articles of organization or a written operating agreement, each director and executive shall be subject to the same requirements and afforded the same rights as are provided in this section for a manager when the director or executive exercises authority in the management of a limited liability company's affairs that would otherwise be vested in the managers pursuant to [G.S. 57C-3-20\(b\)](#).

N.C. G.S. §57-3-22

The immunity from liability under §57-3-22(d) sets forth the policy under North Carolina law that a manager is not liable for acts taken as a manager in compliance with the duties identified in that section. In addition, the Limited Liability Law includes other provisions protecting managers from claims of third parties:

§ 57C-3-30 Liability to third parties of members, managers, directors, and executives; parties to actions; governing law.

(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 liability to the limited liability company.

(c) The liability of members, managers, directors, and executives of a limited liability company formed and existing under this Chapter shall at all times be determined solely and exclusively by this Chapter and the laws of this State.

(d) If a conflict arises between the laws of this State and the laws of any other jurisdiction with regard to the liability of members, managers, directors, or executives of a limited liability company formed and existing under this Chapter for the debts, obligations, and liabilities of the limited liability company, this Chapter and the laws of this State shall govern in determining the liability. (1993, c. 354, s. 1; 2001-387, s. 69.)

G.S. §57C-3-30

In the face of the statutory scheme under which Charlotte Internet was created and operates, the Complaint sets forth no basis for a claim for relief against Mr. Huffman. To the extent that the Complaint seeks relief, it is against Charlotte Internet alone. Mr. Huffman is not a proper party to this litigation and the Complaint should be dismissed for failing to state a claim against him.

B. Dismissal Under Rule 12(b)(6) Is the Appropriate Remedy

The purpose of a motion to dismiss is to test the legal sufficiency of the pleading against which the motion is directed. *Sutton v. Duke*, 277 N.C. 94,98,176 S.E.2d 161 (1970). The Business Court has discussed the role of Motions under Rule 12(b)(6). In *Branch Banking & Trust Co. v. Lighthouse Fin. Corp.*, 2005 NCBC 3 (N.C. Super. Ct. July 13, 2005), <http://www.ncbusinesscourt.net/opinions/2005%20NCBC%203.htm>, this Court summarized the 12(b)(6) standard as follows:

When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine “whether, as a matter of law, the allegations of the complaint... are sufficient to state a claim upon which relief may be granted.” In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true.

The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. When considering a motion under Rule 12(b)(6), the court is not required to accept as true any conclusion of law or unwarranted deductions of fact in the complaint. When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint should be dismissed under Rule 12(b)(6).

The Complaint fails to state any claim against Mr. Huffman and should be dismissed.

JEFFREY SCOTT HUFFMAN

By His Attorney,

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s/Dennis O’Dea
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CERTIFICATE OF SERVICE

July 1, 2009
Charlotte, NC

I certify under penalty of perjury that I have this day served a true copy of the foregoing Memorandum in Support of Defendant Huffman's Motion to Dismiss Plaintiff's Complaint upon the Plaintiff Elizabeth C. Donovan through her counsel at the address indicated below by depositing a copy enclosed in a post-paid properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service after 5:00 PM and by confirmed telefacsimile transmission transmitted after 5:00 PM received at the telephone number set forth below as evidenced by a telefacsimile transaction report and by email addressed to the email address of Kenneth Davis set forth below:

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s/Dennis O'Dea
Dennis O'Dea

CERTIFICATE OF COMPLIANCE WITH N.C. BUS. RULE 15.8

The undersigned hereby certifies that the Memorandum in Support of Defendant Huffman's Motion to Dismiss Plaintiff's Complaint has a word count of less than 7,500 words which complies with North Carolina Business Court Rule 15.8.

s/Dennis O'Dea
Dennis O'Dea