

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 5938

ESSA COMMERCIAL REAL ESTATE, INC.,)
)
Plaintiff,)
)
v.)
)
FIVE TREES, LLC, KEITH CANDOTTI and)
MARK WALKER,)
)
Defendants and Third-Party)
Plaintiffs,)
)
v.)
)
FREDERICK RUBENSTEIN and)
JEFFREY RUBENSTEIN,)
)
Third-Party Defendants.)

ORDER AND OPINION

[1] THIS CIVIL ACTION arises from a failed commercial development venture in Guilford County, North Carolina. Among other things, it presents the issue of whether the damages doctrine of “one-satisfaction” precludes Plaintiff from seeking to recover damages from the Defendants. The case is before the court for hearing upon the following motions (“Motion(s)”): Plaintiff’s Motion for Summary Judgment (“Motion for Summary Judgment”), Plaintiff’s Motion for Writ of Attachment or Order of Garnishment (“Motion for Attachment”), and Third-Party Defendants’ Fourth Defense and Motion to Dismiss/Stay First and Second Claims and to Compel Arbitration (“Arbitration Motion”).¹

¹ Defendants previously filed and briefed a Motion for Release of Escrow Funds in Satisfaction of Judgment (“Motion for Release of Funds”). However, on October 30, 2008, the Defendants withdrew this motion. Defs.’ Br. Resp. Pl.’s Summ. J. Mot., p. 4, fn. 2.

[2] After considering the pleadings, exhibits, affidavits, other matters of record, and the briefs and arguments of counsel, as discussed *infra*, the court concludes that the Motion for Summary Judgment should be GRANTED, in favor of Defendants; the Motion for Attachment should be DENIED and the Arbitration Motion should be GRANTED.

Forman Rossabi Black, PA by Amiel J. Rossabi, Esq. and Emily J. Meister, Esq. for Plaintiff Essa Commercial Real Estate, Inc.

Hagan Davis Mangum Barrett Langley & Hale, PLLC by J. Scott Hale, Esq. and Jason B. Buckland, Esq. for Defendant and Third-Party Plaintiff Five Trees, LLC.

Sparrow Wolf & Dennis, PA by Donald G. Sparrow, Esq. and Jason B Sparrow, Esq. for Defendant and Third-Party Plaintiff Keith Candiotti.

Nexsen Pruet, PLLC by Eric H. Biesecker, Esq. for Defendant and Third-Party Plaintiff Mark Walker.

Sharpless & Stavola, PA by Frederick K. Sharpless, Esq. for Third-Party Defendants Frederick M. Rubenstein and Jeffrey K. Rubenstein.

Jolly, Judge.

[3] This action was filed in Guilford County Superior Court. It was designated a complex business case by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to N.C. Gen. Stat. § 7A-45.4(b) (respective sections of the North Carolina General Statutes are cited herein as “G.S.”), dated June 18, 2007; and was assigned to the undersigned Special Superior Court Judge for Complex Business Cases, by Order of the Chief Special Superior Court Judge for Complex Business Cases, also dated June 18, 2007.

[4] The court concludes that the material facts discussed in the following paragraphs exist without substantial controversy, are undisputed and are pertinent to the issues raised by the Motions.

I.

THE PARTIES

[5] Essa Commercial Real Estate, Inc. (“Essa”) is a North Carolina corporation providing commercial real estate brokerage, development, management, consulting and marketing services in Guilford County, North Carolina.

[6] Five Trees, LLC (“Five Trees”) is a limited liability corporation organized and existing under the laws of the State of North Carolina. It has a registered office in Greensboro, North Carolina.

[7] Keith Candiotti (“Candiotti”) is a citizen and resident of the State of Florida.

[8] Mark Walker (“Walker”) is a citizen and resident of the State of Florida.

[9] Frederick Rubenstein and Jeffrey Rubenstein (the “Rubensteins”) are citizens and residents of the State of North Carolina. Frederick Rubenstein is a member manager of Five Trees.

II.

FACTUAL AND PROCEDURAL BACKGROUND

[10] In the fall of 2003, the Rubensteins approached Essa for assistance in acquiring and developing real property located at 2410 and 2414 Battleground Avenue in Greensboro, North Carolina (the “Battleground Property”), into a commercial center (the “Commercial Center”). After discussing development of the Battleground Property, on or about November 4, 2003, Essa and Frederick Rubenstein entered into a Project Consulting Agreement, Listing Agreement and Exclusive Representation Agreement. Thereafter, on April 5, 2004, Essa and the Rubensteins entered into a new or modified

Project Consulting Agreement (the “Project Consulting Agreement”),² Representation Agreement and Listing Agreement relative to development of the Commercial Center. The modified Project Consulting Agreement anticipated development of eleven properties, including the Battleground Property.

[11] Defendants Candiotti and Walker subsequently agreed to partner with the Rubensteins in undertaking and completing the Commercial Center. On November 5, 2004, the Rubensteins, Candiotti and Walker formally incorporated Five Trees for this purpose. The Battleground Property ultimately was deeded to Five Trees.

[12] As Essa’s work in support of developing the Battleground Property proceeded, Defendants encountered financial difficulties and ceased making payments to Essa for its services. On or about February 14, 2005, Essa ceased work due to the failure and refusal of Defendants to pay money owed for services rendered pursuant to the agreements between the parties.

[13] On or about November 4, 2005, Essa filed suit against Five Trees in Guilford County. *Essa Commercial Real Estate, Inc. v. Five Trees, LLC*, 05 CVS 11265 (the “Prior Action”). During the pendency of the Prior Action, Five Trees sought to sell the Battleground Property; and Essa sought a temporary restraining order prohibiting the sale, or in the alternative, attachment of the Battleground Property.

[14] Thereafter, the parties reached an agreement that would allow sale of the Battleground Property to go forward. On November 29, 2006, the Honorable Lindsey R. Davis, Jr., entered a Consent Order Regarding Sale of Property and Sale Proceeds in the Prior Action (the “Consent Order”).³ The Consent Order anticipated that sale of the

² Five Trees’ Br. Supp. Mot. Dismiss, Ex. D.

³ Defs.’ Br. Supp. Mot. Release Funds, Ex. A.

Battleground Property would proceed, but provided that the proceeds of the sale must be placed in escrow⁴ in an interest-bearing account (the “Escrow Account”). The Consent Order further provided that the escrowed funds could not be released from escrow until either (a) an agreement was reached by all parties or (b) after due application a court order authorized their release. The Consent Order also provided that either party had the right to apply to the court for its modification upon a showing of good cause.

[15] The Battleground Property thereafter was sold; and as of July 31, 2008, the Escrow Account had a balance of \$438,020.02.

[16] The Escrow Account is an asset of Five Trees.

[17] On or about March 6, 2006, Essa and the Rubensteins commenced an arbitration proceeding⁵ before the Honorable Peter M. McHugh, which resulted in an award for \$325,051.83 in favor of Essa. The issues between Essa and the Rubensteins involved Essa’s contentions that the Rubensteins had breached their contracts with Essa involving various properties, including the Battleground Properties. On September 27, 2006, an Order Confirming Arbitration Award (the “Arbitration Award”)⁶ was entered. On or about October 4, 2006, the Arbitration Award was confirmed and judgment on the award was entered (the “Judgment”)⁷ in favor of Essa and against the Rubensteins in the amount of \$325,051.83. Contentions by Plaintiff Essa with regard to further theories of liability and damages were denied by the arbitrator.

⁴ With Mack Sperling, Esq., of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, as counsel for Five Trees in the Prior Action. Defs.’ Br. Supp. Mot. Release Funds, Ex. L.

⁵ The arbitration vehicle as a means of dispute resolution was provided for in the Project Consulting Agreement. Proj. Consul. Agmt., ¶ 7B.

⁶ Five Trees’ Br. Supp. Mot. Dismiss, Ex. B.

⁷ *Id.*, Ex. E.

[18] On or about March 5, 2007, Essa voluntarily dismissed the Prior Action. With the agreement of Five Trees, the notice of voluntary dismissal⁸ was conditioned upon the funds from sale of the Battleground Properties being maintained in the Escrow Account established pursuant to the Consent Order.

[19] On or about March 12, 2007, Essa and the Rubensteins entered into a Settlement Agreement & Release (the "Settlement Agreement").⁹

[20] The Settlement Agreement speaks for itself. On its face, it clearly was reached in the context of the Judgment and constitutes a compromise of the Arbitration Award.

[21] Specific to the issues in this matter, paragraphs 1 through 5 of the Settlement Agreement require the Rubensteins to:

- (a) Pay Essa \$25,000 by March 7, 2007 ("Condition (a)");¹⁰
- (b) Assign to Essa their interests and rights in the assets of Five Trees ("Condition (b)");¹¹
- (c) Pay Essa the difference between \$125,000 and what Essa receives from the Five Trees assignment, Five Trees' remaining principals or this lawsuit, if less than \$125,000 ("Condition (c)");¹²

⁸ *Id.*, Ex. G.

⁹ *Id.*, Ex. F.

¹⁰ Settl. Agmt., ¶ 1.

¹¹ *Id.*, ¶ 2. There is no limiting language in the Settlement Agreement or the assignment documents indicating that the assignments were to be given as collateral or for any other security purposes. However, Defendants here contend that the Rubensteins' assignment to Essa of interests and rights in the assets of Five Trees was without effect as to Five Trees, on the grounds that such an assignment violated material provisions of the Five Trees Operating Agreement. Defs.' Reply Pl.'s Mot. Writ Attach. Object. Defs.' Mot. Release Funds, p. 6. Both the Plaintiff and the Defendants have referred to the Five Trees' Operating Agreement in their respective arguments; and the court concludes that it is undisputed that the Operating Agreement is of record, is accurate and was in effect at times material to the Motions.

¹² *Id.*, ¶ 4.

(d) Provide specified collateral to secure their payment of the \$125,000 or whatever portion of it the Rubensteins might be required to pay (“Condition (d)”);¹³ and

(e) Render truthful testimony in this lawsuit (“Condition (e)”);¹⁴

[22] The Settlement Agreement further provides that upon Conditions (a), (b) and (d) having been met, once Essa receives payment of a total of \$150,000 as provided in Condition (c), Essa “shall, within ten (10) days, take such steps as are necessary to have the Judgment marked satisfied.”¹⁵

[23] In March 2007, Conditions (a), (b) and (d) were met by the Rubensteins.

[24] On April 27, 2007, Essa filed the present action against Defendants Five Trees, Candiotti, and Walker. In its Amended Complaint,¹⁶ Essa alleges claims for breach of contract, unjust enrichment, fraud, unfair and deceptive trade practices and recovery of the Arbitration Award with regard to the contended failures associated with the project (the “Claim(s)”).

[25] Thereafter, the respective Defendants filed various motions to dismiss the Complaint pursuant to Rules 9(b), 12(b)(1), 12(b)(3) and 12(b)(6), North Carolina Rules of Civil Procedure (“Rule(s)”); On June 13, 2008, after hearing argument on the various motions to dismiss, the court dismissed Plaintiff’s Claims for (a) breach of contract, (b) unjust enrichment, (c) fraud and (d) unfair and deceptive trade practices.¹⁷

¹³ *Id.*, ¶ 4.

¹⁴ *Id.*, ¶ 5.

¹⁵ *Id.*, ¶ 8.

¹⁶ By order of the undersigned dated June 13, 2008, Plaintiff was allowed to amend its Complaint.

¹⁷ Order, June 13, 2008. The court concluded that the issues raised in this action regarding damages allegedly suffered by Essa from Defendants’ alleged (i) breaches of contract, (ii) unjust enrichment, (iii) fraudulent conduct and (iv) unfair and deceptive conduct (collectively “Essa’s Substantive Claims”), are identical to issues litigated in the Arbitration; and that both actions require determination of the damages resulting from breach of the same contracts and the same work performed in relation to the same

[26] In its June 13, 2008 Order, the court further concluded that Essa's Fifth Claim for Relief (Recovery of Arbitration Award) could not be dismissed because "whether such award has been satisfied so as to defeat Essa's claim remains to be determined in due course."¹⁸

[27] On August 4, 2008, Defendants filed their now-withdrawn Motion for Release of Funds. On the same date, Defendants also filed their Third-Party Complaint against the Rubensteins.¹⁹ Thereafter, on August 25, 2008, Plaintiff Essa filed its Motion for Attachment; and on September 30, 2008, Essa filed its Motion for Summary Judgment.

[28] On or about September 22, 2008, counsel for the Rubensteins delivered to counsel for Essa a check in the amount of \$125,000. The legend "Full and Final Settlement" was written on the memo line of the check. The check was accompanied by a letter from counsel for the Rubensteins stating that the check was tendered in full payment of any remaining obligations of the Rubensteins under the Settlement

projects. The court further concluded that Essa had a full and fair opportunity to litigate those issues in the Arbitration, and that the issues were determined by the Arbitrator as a necessary part of the Arbitration Award. ("This Award is in full satisfaction of all claims submitted to the Arbitrator. All claims not expressly granted herein are hereby denied.") Arbitration Award, p. 5, ¶ 7. Accordingly, the court concluded that the doctrine of collateral estoppel served to bar Essa from relitigating the same issues in this action and against the instant Defendants. *See Thomas M. McInnis & Assocs., Inc.*, 318 N.C. at 434-35 (1986) (providing that "[u]nder the doctrine of collateral estoppel the plaintiff should be unable to augment an award which was rendered by a prior court in a case in which it was a party by institution of a second action on the very question decided by the prior court"). Consequently, the court dismissed Essa's Substantive Claims. The court further determined that collateral estoppel did not, however, provide a basis upon which to dismiss the Amended Complaint's claim for Recovery of Arbitration Award (the Plaintiff's Fifth Claim for Relief). *See generally* G.S. 1-113(4)(2007) (providing that when a plaintiff has brought an action against one party jointly and severally liable upon the contract, and has obtained a judgment from that defendant that remains unsatisfied, the plaintiff may by separate civil action recover of another party who is jointly and severally liable upon the contract, upon proving such later defendant's joint liability -- notwithstanding that the later defendant was not named in the original action).

¹⁸ Order, June 13, 2008, p. 19.

¹⁹ The Third-Party Complaint stated two claims against the Rubensteins: First Claim for Relief (Indemnification/Breach of Operating Agreement) and Second Claim for Relief (Breach of Fiduciary Duty by Fred Rubenstein).

Agreement. On September 30, 2008, counsel for Essa sent a letter acknowledging Essa's receipt of the \$125,000 payment, but refusing to mark the Judgment satisfied.

[29] The Third-Party Complaint was amended on October 24, 2008, by adding a Third Claim for Relief (Declaratory Relief), in which Defendants seek a declaration from the court that (a) Essa's remaining Claim in this action -- that of collection on the Judgment -- has been fully satisfied and (b) Defendants are entitled to the funds held in the Escrow Account.

[30] On October 30, 2008, Defendants withdrew their Motion for Release of Funds. The Rubensteins filed their Arbitration Motion on November 24, 2008; and on January 5, 2009, the Defendants voluntarily dismissed the First and Second Claims for Relief in their Amended Third-Party Complaint.²⁰

[31] It is undisputed by the parties that above Conditions (a), (b), and (d) of the Settlement Agreement were timely met; and that the Rubensteins have not been called upon by Essa with regard to Condition (e). The only dispute is whether Condition (c) has been met, and the legal effect of the total payment of \$150,000 by the Rubensteins to Essa.

[32] The court heard oral argument on the Motions on January 12, 2009.

²⁰ Consequently, with regard to Defendants' Third-Party action, only the Third Claim for Relief remains extant.

III.

DISCUSSION

A.

The Motion for Summary Judgment

[33] The court concludes that the issues presented by Plaintiff's Motion for Summary Judgment are dispositive of this action, and therefore should be addressed first.²¹

[34] In this regard, the Plaintiff seeks summary judgment in its favor as to its Fifth Claim for Relief, to the effect that Defendants Five Trees, Candiotti and Walker are liable to Plaintiff for the full unpaid amount of the Arbitration Award. Under various theories,²² Plaintiff argues that the Defendants share liability with the Rubensteins for the Arbitration Award; and that notwithstanding the Settlement Agreement between Plaintiff and the Rubensteins, Defendants are liable for the full amount of the Arbitration Award.

[35] In response, Defendants argue that Plaintiff's contentions are without merit. Further, they contend that as a threshold matter, Defendants as a matter of law are entitled to summary judgment in their favor as to the legal ramifications of the September 22, 2008 payment of \$125,000 to Essa by the Rubensteins. In this regard, Defendants argue that:

²¹ With regard to the Motion for Summary Judgment, it is not proper for a trial court to make findings of fact in determining a motion under Rule 56. However, it is appropriate for a Rule 56 order to reflect material facts that the court concludes exist and are not disputed, and which support the legal conclusion with regard to summary judgment. *Hyde Ins. Agency v. Dixie Leasing*, 26 N.C. App. 138 (1975).

²² Plaintiff contends that as a matter of law, Five Trees and the individual Defendants have liability to Essa under theories of agency, ratification, collateral estoppel, res judicata and/or by virtue of acceptance by one or more of the Defendants of the contractual benefits of the agreements between Essa and the Rubensteins.

(a) The court's June 13, 2008 Order dismissing the first four Claims in Plaintiff's Amended Complaint constituted a final order establishing as a matter of law that Defendants have no liability or damages exposure to Plaintiff beyond the Arbitration Award;

(b) Pursuant to Condition (c) and Paragraph 8 of the Settlement Agreement, once Essa received payment from the Rubensteins of a total of \$150,000,²³ Essa was required to "within ten (10) days, take such steps as are necessary to have the Judgment marked satisfied";

(c) The requisite \$150,000 payment by the Rubensteins to Essa having been made, the Judgment -- and consequently the underlying Arbitration Award -- should be deemed satisfied as a matter of law; and

(d) Essa's sole remaining claim against Defendants in this action therefore no longer exists and the Complaint is subject to dismissal in its entirety.

[36] Defendants argue that consequently, Plaintiff's summary judgment contentions, even if meritorious, are not germane and should be denied. The court is forced to agree with Defendants.

[37] In North Carolina, summary judgment in favor of a nonmovant is appropriate when the evidence presented demonstrates that no material issues of fact are in dispute and that the nonmovant is entitled to entry of judgment on a material issue as a matter of law. *Kessing v. National Mtg. Corp.*, 278 N.C. 523 (1971); *Coulter*

²³ Pursuant to Condition (c) of the Settlement Agreement, one trigger of further payment to Essa by the Rubensteins would be Essa's ultimately receiving less than \$125,000 from the Rubensteins' assignments to Essa of their interest in the assets of Five Trees. Because at the time of the \$125,000 payment to Essa there had not yet been a determination of the value of the Rubensteins' assignment to Essa, it can be argued that the \$125,000 payment to Essa by the Rubensteins was either premature or voluntary. However, the payment was made and received, and the court concludes the assignment is not relevant to the issues between Essa and these Defendants.

v. City of Newton, 100 N.C. 523 (1990); *Little v. National Servs. Indus., Inc.*, 79 N.C. App. 688 (1986).

[38] With regard to the Plaintiff's four dismissed Claims, the court's ruling constituted a final order. *Green v. Dixon*, 137 N.C. App. 305, 310 (2000) (holding that a cause of action determined at the trial level by a ruling as a matter of law -- here an order for summary judgment -- constitutes a final judgment on the merits); and *McArdle Corp. v. Patterson*, 115 N.C. App. 528, 532 (1994) (holding that where a trial judge rules on a dispositive issue as a matter of law, as on a motion for summary judgment,²⁴ the rights of the parties are finally determined, subject only to reversal on appeal). Therefore, the June 13, 2008 Order established as a matter of law that Defendants have no liability or damages exposure to Plaintiff beyond the Arbitration Award.

[39] With regard to the Arbitration Award, the substance of Defendants' argument is that under the doctrine of damages known as the one-satisfaction rule, Plaintiff Essa is only entitled to a single recovery for any damages or injuries it suffered arising from the transactions or occurrences complained of in this matter, regardless of which individual Defendants have been released by the Settlement Agreement.

[40] It is well established that a plaintiff cannot recover more than one satisfaction for the same injury, even if that injury is caused by different parties. *Sun Chemicals Trading Corp. v. SGS Control Services, Inc.*, 159 Fed. Appx. 459, 2005 WL 3403622 (4th Cir. Dec. 13, 2005) (unpublished) (holding that the complaint failed to state a claim because the arbitration award fully compensated the Sun Plaintiffs for all of their compensable injuries). Under the rule of one-satisfaction, a claimant may obtain judgments against any and all joint tort-feasors for a single injury or wrongful death, but

²⁴ Or pursuant to Rule 12(b)(6).

the claimant may only have one satisfaction. Satisfaction of the judgment by any tort-feasor acts to discharge all other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not necessarily impair any potential rights of indemnity or contribution between the tort-feasors. *Ipock v. Gilmore*, 73 N.C. App. 182, 186 (1985).

[41] Defendants further contend that once Essa received the \$150,000 payment from the Rubensteins, it was required by the Settlement Agreement to mark the Judgment satisfied. Consequently, they argue that when the payment was made, it ended this case; and that any issues raised by the Plaintiff's Motion for Attachment or the Third Party Defendants' Arbitration Motion are moot and subject to dismissal. They also seek an award of attorneys fees from Essa, pursuant to G.S. 1-239(c), for failure of Essa to cause the Judgment be marked satisfied.

[42] Plaintiff, in response, argues that this action has not been resolved by the \$150,000 payment to Essa, and that Plaintiff's efforts to recover additional funds from the other Defendants do not violate the rule of one-satisfaction. In support, Plaintiff points out that the Arbitration Award concluded that Plaintiff was damaged by the Rubensteins in the amount of \$324,648, plus interest accruing from October 4, 2006. Plaintiff argues that the award of \$324,648, when compared to the \$150,000 amount reflected in the Settlement Agreement with the Rubensteins (reached approximately a week after the arbitration trial), shows that the Settlement Agreement was not intended to prevent the Plaintiff from seeking further recovery from other Defendants. Plaintiff contends that under the Settlement Agreement, it only recovers the \$150,000 from the Rubensteins if that amount or greater is not recovered from the other Defendants. It

argues that this language demonstrates that payment by the Rubensteins to the Plaintiff of \$150,000 would not constitute a “full, complete and final satisfaction” with regard to the Plaintiff’s Claims against the Defendants. Essa contends that it is not foreclosed in this action and that its various theories of liability against the Defendants should go forward and that it is entitled to judgment against them.

[43] Essa further contends that because the Settlement Agreement is only between Essa and the Rubensteins, it cannot apply to any liability of Five Trees or its principals and does nothing to prevent Essa from recovering additional damages from Five Trees and others. In support of this position, Plaintiff relies upon the language of the Settlement Agreement providing that “nothing in this Agreement shall act to release, dispose of, compromise, or otherwise impair the right or ability of [Essa] to seek recovery from Five Trees, its members or members of its members under any theory of law or for recovery of the Arbitration Award.”²⁵

[44] If payment to Essa of \$150,000 by the Rubensteins would be deemed a full satisfaction of the damages arising from Essa’s Claims against Defendants, it would be fatal to those Claims. *Piedmont Inst. of Pain Mgmt. v. Staton Found.*, 157 N.C. App. 577, 593 (2003) (language of settlement agreement signed by plaintiff indicated settlement compensated plaintiff for same losses that plaintiff sought to recover from defendants, thereby barring recovery under the one-satisfaction doctrine); *Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 138 (2000) (settlement agreement compensated plaintiff for losses for which it also sought recovery in the pending action, and therefore it was barred by North Carolina’s one-satisfaction doctrine); see *also Nye v. Lipton*, 50 N.C. App. 224, 229 (1980) (allowing separate, consistent claim arising out

²⁵ Settl. Agmt., ¶ 7.

of the same transaction to go forward, but holding that payment of either claim would extinguish both).

[45] The instant case is on point with the facts of *Chemimetals*, where the plaintiff unsuccessfully argued that its claims were not barred by the settlement agreement it entered because the release language did not include all defendants. 140 N.C. App. 135, 138 (2000). In *Chemimetals*, although the settlement agreement did not address the plaintiff's specific claims, the Court of Appeals held that the payment made under the settlement agreement had fully compensated plaintiff for the same losses it sought in the lawsuit against the moving defendants and was therefore barred by the one-satisfaction doctrine. Here, the Settlement Agreement between the Plaintiff and the Rubensteins requires that upon payment of \$150,000 to Essa, the Judgment shall be "marked satisfied."²⁶

[46] Consideration of the language of the Settlement Agreement and the other undisputed facts of record forces the court to conclude that by way of this civil action, Essa is seeking to recover damages from Defendants for the same injuries for which Essa was seeking compensation from the Rubensteins; and that those issues were resolved by the Arbitration Award and the Settlement Agreement. Indeed, the Complaint states that "the Arbitration, which lasted approximately six (6) days, arose predominantly out of the same events and issues as exist in this pending action"²⁷ Further, upon comparing the face of the Complaint here with the Arbitration Complaint, it is apparent that the Claims of this action and those of the Arbitration are substantially similar. In fact, the Complaint in this action borders on being identical to the Arbitration

²⁶ Settl. Agmt., ¶ 8.

²⁷ Am. Compl., ¶ 51.

Complaint, although it alleges that Five Trees, Candiotti, and Walker committed those wrongs that the Arbitration Complaint attributes to the Rubensteins.

[47] Accordingly, as to Essa's Claim against Defendants, when Essa received the final \$125,000 payment anticipated in the Settlement Agreement, the requirements of paragraph 8 of the Settlement Agreement were met. It is within both the letter and spirit of the Settlement Agreement that upon receipt of such payment, Essa was required to mark the Judgment "satisfied" on the books and records of the Guilford County Clerk of Superior Court. At that point, Essa as a matter of law had received full satisfaction for the same injuries for which it seeks recovery from Defendants in this lawsuit. Therefore, Essa's remaining Claim then was subject to dismissal as to Defendants.

[48] Essa's contentions that one or more of the Defendants in this action have liability to it for the Arbitration Award -- whether based on theories of agency, ratification, collateral estoppel, res judicata or acceptance by Defendants of benefits of the agreements between Essa and the Rubensteins -- simply are not supported by the facts of this action or the authorities cited by Plaintiff. In this regard:

(a) The Rubensteins were not acting as agents of Five Trees when they signed the Project Consulting Agreement. Indeed, Five Trees had not even been formed at that time. The agreements involved in the issues resolved by the Arbitration Award were between Essa and the Rubensteins, and it was to the Rubensteins that Essa looked for performance. Essa's agency contention is not supportable. *Tate v. Chambers*, 94 N.C. App. 154, 156 (1989).

(b) The Rubensteins were not perceived by Essa as purporting to act as the agent of either Defendant, and Essa did not believe the Rubensteins were acting on anyone else's behalf in entering into the Project Consulting Agreement. There was neither actual nor apparent authority for the Rubensteins to bind any of the Defendants, and no evidence that any Defendant ratified the Project Consulting Agreement. The law does not support Plaintiff's ratification argument. *Id.* at 157.

(c) Defendants were not parties to the Arbitration and had no opportunity to litigate in that proceeding any contended liability on their part to Essa. Collateral estoppel and res judicata therefore are not available to Plaintiff. *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268 (1997).

(d) None of the Defendants received any benefit from the Project Consulting Agreement between Essa and the Rubensteins. Accordingly, they are not charged with the burdens. *DeCarlo v. Gerryco, Inc.*, 46 N.C. App. 15, 21 (1980).

[49] Therefore, with regard to Plaintiff's Claim for recovery against Defendants of the Arbitration Award, the court concludes that there exist no material issues of fact and that the Motion for Summary Judgment should be GRANTED in favor of Defendants, and DENIED as to Plaintiff.

B.

The Motion for Attachment

[50] By way of its Motion for Attachment, pursuant to the various provisions of G.S. 1-440.1 *et seq.*, Plaintiff Essa seeks a writ of attachment or an order of garnishment with regard to the Five Trees Escrow Account.

[51] As a basis for its Motion for Attachment, Plaintiff contends it is entitled to secure a judgment for money in this civil action, as required by G.S. 1-440.2. However, the court has concluded, *supra*, that the total payment to Essa by the Rubensteins of \$150,000 satisfies Essa's remaining Claim for money as against the Defendants arising from the Arbitration Award; and nothing else appearing, that determination would preclude Plaintiff's Motion for Attachment without further inquiry.

[52] However, Essa also contends that it has an ownership or beneficial interest in the remaining funds balance in the Escrow Account, which is an asset of Five Trees; and that such an interest would support the ancillary remedies of attachment or garnishment. In support, Essa points to the March 15, 2007 Settlement Agreement and the resulting assignments by the Rubensteins to Essa of any and all interests the Rubensteins then had in the assets of Five Trees (the "Assignments"). Plaintiff seeks to attach or garnish the funds held in the Escrow Account until determination can be had as to ownership of those funds.

[53] The remedies of attachment and garnishment are ancillary remedies designed to preserve and hold funds, property or other assets of a party defendant until trial can be had and the rights of the parties determined. Such extraordinary remedies constitute a substantial deprivation of a significant property interest subject to protection

of the due process clause. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975). They are statutory remedies that must be strictly construed. *Connolly v. Sharpe*, 49 N.C. App. 152 (1980). These ancillary remedies typically involve the seizure of property of a non-resident or fraudulent²⁸ party defendant that otherwise might escape the jurisdiction of the State. G.S. 1-440.1 *et seq.* In substance, they require a threshold showing that the party against which attachment or garnishment of property is sought is either (a) a non-resident or foreign corporation, or (b) a domestic corporation whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence. G.S. 1-440.3.

[54] Plaintiff argues that it should be able to attach or garnish the Escrow Account pursuant to the various provisions of G.S. 1-440.2 (actions in which attachment may be had), 1-440.3 (grounds for attachment), 1-440.4 (property subject to attachment) and 1.440.21 (nature of garnishment). The substance of Essa's argument is that only one of the managers of Five Trees, Frederick Rubenstein, lives in North Carolina; and that although Five Trees is an LLC organized under the laws of North Carolina, it is a resident of the State of Florida and currently does not engage in business within the State of North Carolina. Consequently, Essa argues that Five Trees' assets located in North Carolina potentially are subject to the writs sought, pursuant to the various provisions of G.S. 1-440.3.

[55] On the other hand, Defendants' contend that pursuant to G.S. 1-440.3, Five Trees' North Carolina assets are not available for attachment or garnishment by Plaintiff because (a) one of its managers, Frederick Rubenstein, is tantamount to an officer, lives in North Carolina and is readily available to process; and (b) Five Trees has

²⁸ G.S. 1-440.3(4) and (5). Fraud is not argued by Essa here.

a registered office in Greensboro, North Carolina, and that pursuant to G.S. 1-79(a)(1), for purposes of suing and being sued, the registered office of a domestic corporation is sufficient to establish the residence of the corporation. They contend therefore, that Five Trees is deemed to be present in North Carolina, and that it is not subject to the writs of attachment or garnishment under the circumstances of this matter.

[56] The court is forced to agree with Defendants that the undisputed facts of record in this action establish that Five Trees is a resident of the State of North Carolina and do not support Plaintiff's Motion for Attachment. Accordingly, notwithstanding Essa's claim that as assignee of the Rubensteins it has an interest in the Escrow Account assets of Five Trees, the Motion for Attachment should be DENIED.

C.

The Arbitration Motion

[57] The Third-Party Defendants seek an order either dismissing or staying the remaining Third-Party Claim against them and ordering it to binding arbitration.

[58] As previously observed in this Order, with regard to the Third-Party action, only the Third Claim for Relief remains extant. That Claim seeks declarations from the court that (a) Essa's Claim in this action for collection against Defendants on the Judgment arising from the Arbitration Award has been fully satisfied, and that (b) Defendants are entitled to all remaining funds held in the Escrow Account.

[59] Essa's Arbitration Award Claim. The court has concluded in this Order that Essa's Claim in this action for collection against Defendants on the Arbitration Award has been satisfied by Essa's receipt of a total payment from the Rubensteins in the amount of \$150,000, and that such Claim is subject to summary judgment dismissal.

[60] Essa's Assignment Claim. Essa contends that as assignee of the Rubensteins, it has an ownership interest in the assets of Five Trees, which include the balance of the Escrow Account (Essa's "Assignment Claim"). The Assignments are of record and speak for themselves, and Essa's argument is simple and straightforward. It contends that notwithstanding the various rulings of the court in this Order and the June 13, 2008 Order, the dispute between Essa and the Defendants has not been resolved with regard to the respective parties' ownership interests, if any, in the Escrow Account; and that further adjudication as to that dispute is required. In its Motion for Attachment, Essa argues that the court should protect its interest in the Escrow Account by ordering the Escrow Account preserved by attachment or garnishment until Essa's interests, if any, are determined. Although the court has determined that the Motion for Attachment should be denied, it has not disposed of Essa's Assignment Claim.

[61] Defendants vigorously oppose Essa's Assignment Claim. They contend that Essa has no interest in the Escrow Account, on the grounds that the Assignments to Essa by the Rubensteins of their interest in Five Trees' assets violated the Five Trees Operating Agreement.²⁹ Defendants point out that under Section 9 of the Operating Agreement, in order to make a valid assignment to third parties of their interest in the assets of Five Trees, the Rubensteins were required first to secure the approval of all Five Trees managers³⁰ or give Five Trees' other members a right of first refusal.³¹ Defendants argue that because this was not done as part of the Settlement Agreement and the attendant Assignments between the Rubensteins and Essa, as to Defendants the Assignments were ineffective; and that Essa therefore has no interest in either the

²⁹ Defs.' Br. Supp. Mot. Release Funds, Ex. I.

³⁰ Oper. Agmt., § 9.1(b).

³¹ *Id.*, § 9.2.

Escrow Account or any other assets of Five Trees.³² They seek a declaration that neither Essa nor the Rubensteins have any interest in the Escrow Account. Based on this position, Defendants ask the court to discharge the escrow agent and give Five Trees control over all funds held in escrow on its behalf. Alternatively, they ask the court to direct the escrow agent to reimburse Defendants Candiotti and Walker for amounts paid to Five Trees' current and prior counsel in support of this litigation.

[62] In response, Essa argues that the Rubensteins' assignment to Essa of their interests in the assets of Five Trees only mirrors what Essa characterizes as a charging lien.³³ It contends the Assignments do not violate Section 9 of the Operating Agreement because they are assignments only of interests in the "assets" of Five Trees, and do not constitute a transfer, assignment or disposal of the Rubensteins' "actual" interest in Five Trees.³⁴

[63] Other than in the Third Claim for Relief of the Third-Party Complaint, the issues raised by Essa's Assignment Claim have not been joined directly by pleadings in behalf of all interested parties to this civil action. However, the March 15, 2007 Assignments executed by the Rubensteins are of record, and the respective parties have presented arguments in support of and opposition to Essa's contention in this regard. No parties have objected to the court's considering this issue in the context of

³² This issue also is raised in Defendants' Third-Party Complaint. There, in their Third Claim for Relief, Defendants seek a declaration from the court to the effect that (a) the funds held in the Escrow Account may be used to satisfy Five Trees' attorneys fees and expenses from this litigation and (b) the balance of the Escrow Account shall be distributed to the members of Five Trees other than the Rubensteins.

³³ Essa does not support this contention with any cited authority. Typically, a charging lien is an equitable lien that arises in a different context from the circumstances presented here. *Mack v. Moore*, 107 N.C. App. 87, 92 (1992). However, in view of the court's ultimate conclusion on this issue, further inquiry as to the viability of a charging lien in this context is unnecessary.

³⁴ In light of the court's conclusion on the issue, a determination at this stage of whether Plaintiff's argument is substantive or merely semantical is not necessary.

this action, and the court therefore concludes that under concepts of notice pleading the issue of Essa's Assignment Claim properly is at issue and before the court.

[64] After due consideration of the facts of record, the court concludes that there exist one or more material issues of fact with regard to the discrete issue of the respective ownership rights, if any, in the Escrow Account presented by the Rubensteins' Assignments to Essa of their interests in the assets of Five Trees. Accordingly, dispositive action as a matter of law by the court on this issue would be inappropriate, and to the extent any Motions lodged in this matter seek dispositive action on the issue by the court, they should be DENIED.

[65] Therefore, Essa's Assignment Claim remains the only unresolved issue in this civil action.

[66] The Arbitration Agreements. There are numerous agreements of record between the various litigants. Two are material to the Arbitration Motion.

[67] The Representation Agreement between the Defendants and the Rubensteins, entered in late July and early August 2005, reflects on its face that it grew out of the litigation (referenced as the "Essa Dispute") between Essa and the Rubensteins arising from the Battleground Property venture. It contains an arbitration clause, which provides:

To the extent that there are any disputes among the undersigned regarding their respective responsibilities for any ultimate liability on account of the Essa Dispute, whether by settlement, judgment, arbitration award or otherwise . . . they will be resolved by binding arbitration

[68] The earlier Project Consulting Agreement between Essa and the Rubensteins, entered on April 5, 2004, also grew out of the Battleground Property venture. It also contains an arbitration clause, which provides:

Any dispute or controversy that may arise between the parties hereto concerning any transaction or the construction, performance or breach of this or any other agreement between said parties, whether entered into prior, on or subsequent to the date hereof, shall be determined by an arbitration . . . and shall be final and binding on all parties.

[69] The various disputes between Plaintiff, Defendants and Third-Party Defendants all arise from the Battleground Property venture. Essa's Assignment Claim, the only remaining issue in this action, also clearly arises from the same background of facts and circumstances.

[70] Each of the parties to this action is a signatory to one or more of the above contractual binding arbitration agreements with regard to disputes arising from the Battleground Property venture. The respective contentions of the parties with regard to Essa's Assignment Claim are tied to each other inextricably. In this regard: (a) Plaintiff argues that by way of the Assignments it is entitled to the Rubensteins' proportionate ownership interests in assets of Five Trees, especially any remaining balance in the Escrow Account; (b) Defendants contend the Assignments were ineffective and that neither the Plaintiff nor the Rubensteins have any remaining interest in the Escrow Account; and (c) the Rubensteins contend that the Assignments of their interests in Five Trees to Essa should be cancelled and declared to be of no effect.³⁵ It is clear these respective contentions should be resolved in one proceeding.

[71] In North Carolina, arbitration agreements are governed by the North

³⁵Answer Am. Third-Party Compl., Claim Decl. Relief, ¶ 9 and Prayer Relief, ¶ 5.

Carolina Arbitration Act (the “Arbitration Act”), G.S. 1-569.1 *et seq.* Section 1-569.6, specifically, defines the parameters of which disputes should be referred to arbitration:

Validity of agreement to arbitrate. (a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract. (b) The Court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate . . .

[72] North Carolina has a strong public policy in favor of arbitration and it is clear that any uncertainty as to the scope of an arbitration clause should be resolved in favor of arbitration unless it is clear that the arbitration language in question cannot be read to include the asserted dispute. *In re: Jarvis & Sons*, No. COA08-605, slip op. (N.C. App. filed Jan. 6, 2009); *Carteret County v. United Contractors*, 120 N.C. App. 336 (1995).

[73] Essa’s Assignment Claim is the only substantive issue remaining in this civil action. As to this Claim, the court concludes that under the collective contractual agreements between the parties to this action, (a) valid arbitration agreements exist between the parties and (b) the dispute is within the substantive scope of those arbitration agreements. The court further concludes that binding arbitration would be an efficient, appropriate and just mechanism for resolving this remaining dispute between the parties.

[74] Therefore, as to Essa’s Assignment Claim the Arbitration Motion should be GRANTED. Further proceedings in this court should be stayed and said Claim should be submitted to binding arbitration pursuant to the provisions of the Arbitration Act.

[75] Pending completion of arbitration, the Escrow Account should remain in place; provided however, the court concludes and finds that the litigation fees and expenses incurred by Five Trees in the course of this and related litigation should be paid from the Escrow Account, along with other business expenses incurred in the ordinary course of business.

NOW THEREFORE, based upon the foregoing CONCLUSIONS, it is ORDERED that:

[76] As to Plaintiff's Fifth Claim for Relief (recovery of Arbitration Award), the Motion for Summary Judgment is DENIED as to Plaintiff and is GRANTED as to Defendants Five Trees, Candiotti and Walker. Consequently, Plaintiff's Fifth Claim for Relief hereby is DISMISSED.

[77] Within thirty (30) days of the date of this Order, Plaintiff shall cause the Judgment arising from the Arbitration Award to be marked "satisfied" on the books and records of the Clerk of Superior Court of Guilford County. Should Plaintiff fail to comply with this mandate, Defendants may apply to the court for appropriate relief.

[78] The Plaintiff's Motion for Attachment is DENIED.

[79] The Third-Party Defendants' Arbitration Motion is MOOT to the extent it seeks arbitration on the issue of Essa's Claim in this action for collection against Defendants on the Judgment arising from the Arbitration Award, the rulings reflected in this Order being dispositive of such issue; and no action by the court is necessary.

[80] The Third-Party Defendants' Arbitration Motion is GRANTED to the extent it seeks arbitration on the discrete issue of Essa's Assignment Claim as to whether the March 15, 2007 Assignments by the Rubensteins were effective to transfer to Essa their

interests in the Escrow Account balance or other assets of Five Trees; and if so, whether satisfaction of the Judgment arising from the Arbitration Award, as required by this Order, dictates cancellation of the Assignments.

[81] The parties are ORDERED to proceed to arbitration of Essa's Assignment Claim pursuant to G.S. 1-567.1 *et seq.*

[82] Further proceedings in this civil action are STAYED, pending completion of arbitration between the parties.

[83] Mack Sperling, Esq., as escrow agent of the Escrow Account established pursuant to the Consent Order of November 29, 2006, is authorized to make the following payments from the Escrow Account: (a) to Defendants Candiotti and Walker, the amount of \$60,002.68 as reimbursement for attorneys fees and litigation costs incurred by Five Trees and paid by them through July 25, 2008; (b) continuing attorneys fees and litigation costs incurred by Five Trees in this civil action; and (c) other ordinary business expenses, including but not limited to accounting and other professional fees incurred by Five Trees in the ordinary course of its business.

[84] Unless otherwise agreed by all parties to this action, the balance of the Escrow Account shall be held by the Escrow Agent until completion of the arbitration ordered herein and further order of this court.

[85] Defendants' request for an award of attorneys fees against Essa pursuant to G.S. 1-239(c) is DENIED.

[86] To the extent any of the Motions have not been granted in this Order, they are DENIED.

This the 4th day of May, 2009.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases