

STATE OF NORTH CAROLINA
COUNTY OF HALIFAX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 922

MILTON JAMES GARRETT, on Behalf of)
Himself and the CITY OF ROANOKE)
RAPIDS and its TAXPAYERS,)
Plaintiff)

v.)

RANDLE "RANDY" H. PARTON, RICHARD)
"RICK" G. WATSON; ERNEST C.)
PEARSON; MOONLIGHT BANDIT)
PRODUCTIONS, LLC; MOONLIGHT)
BANDIT PROPERTIES, LLC; FRIENDS OF)
MOONLIGHT BANDITS, LLC; MOONLIGHT)
BANDIT CONCESSIONS, LLC;)
MOONLIGHT BANDIT MERCHANDISING,)
LLC; NORTHEASTERN NORTH)
CAROLINA REGIONAL ECONOMIC)
DEVELOPMENT COMMISSION; and)
NORTH CAROLINA'S NORTHEAST)
PARTNERSHIP,)
Defendants)

ORDER AND OPINION

[1] THIS CAUSE came before the court for hearing upon the Defendants' respective motions, pursuant to the provisions of Rules 12(b)(1) and 12(b)(6), North Carolina Rules of Civil Procedure (the "Rule(s)"), to dismiss the Amended Complaint of Plaintiff Milton James Garrett ("Garrett") (collectively the "Motion(s) to Dismiss"), propounded in this civil action on behalf of himself and the City of Roanoke Rapids and its taxpayers.

[2] After considering the arguments, briefs, other submissions of counsel and appropriate matters of record, as discussed *infra*, the court concludes that Defendants' Motions to Dismiss should be GRANTED.

North Carolina Institute for Constitutional Law by Jeanette K. Doran, Esq. and Robert F. Orr, Esq. for Plaintiff Milton James Garrett.

Poyner & Spruill, LLP by J. Nicholas Ellis, Esq. and Jenny M. McKellar, Esq. for Defendants Randle “Randy” H. Parton; Moonlight Bandit Productions, LLC; Moonlight Bandit Properties, LLC; Friends of Moonlight Bandit, LLC; Moonlight Bandit Concessions, LLC and Moonlight Bandit Merchandising, LLC.

Bailey & Dixon, LLP by Cathleen M. Plaut, Esq. and David S. Coats, Esq.; and Harris, Winfield, Sarratt & Hodges, LLP by John L. Sarratt, Esq. for Defendant Richard “Rick” G. Watson.

McAngus, Goudelock & Courie by Mary M. Webb, Esq.; and Ward & Smith by Gary J. Rickner, Esq. for Defendant Northeastern North Carolina Regional Economic Development Commission and North Carolina Northeastern Partnership.

Jolly, Judge.

PROCEDURAL BACKGROUND

[3] On June 19, 2008, Plaintiff filed a Complaint against Defendants in Halifax County. Plaintiff asserted claims for relief against one or more Defendants for civil conspiracy (Count 1), breach of fiduciary duty (Count 2), common law fraud (Count 3), tortious acting in concert (Count 4), unfair and deceptive trade practices (Count 5), fraudulent misrepresentation (Count 6) negligent misrepresentation (Count 7) and declaratory judgment (Count 8).

[4] On July 25, 2008, this matter was designated a mandatory 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) (subsequent citations herein to the General Statutes will be to “G.S.”), 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.

[5] On August 28, 2008, Defendant Randle “Randy” H. Parton (“Parton”) filed his Motion to Dismiss. On the same date, Defendants Moonlight Bandit Productions, LLC; Moonlight Bandit Properties, LLC; Friends of Moonlight Bandit, LLC; Moonlight Bandit Concessions, LLC and Moonlight Bandit Merchandising, LLC (collectively “Moonlight Bandit Entities”) filed their Motion to Dismiss the Complaint. The next day, on August 29, 2008, Defendants Northeastern North Carolina Regional Economic Development Commission (the “NC Commission”) and North Carolina’s Northeast Partnership (the “NC Partnership”) filed their Motion to Dismiss the Complaint.¹ On September 3, 2008, Defendants Parton and Moonlight Bandit Entities filed a Motion for Sanctions and Costs. On September 11, 2008, Defendant Watson filed his Motion to Dismiss the Complaint.²

[6] On September 26, 2008, pursuant to Rule 41(a), Plaintiff voluntarily dismissed this action, with prejudice, as to Defendant Ernest C. Pearson. On the same date, Plaintiff filed his Amended Complaint, in which he asserted claims breach of fiduciary duty (Count 1), tortious acting in concert (Count 2), negligent misrepresentation (Count 3) and negligent supervision (Count 4).

[7] Thereafter, on October 6, 2008, Defendant Watson renewed his Motion to Dismiss as to the Amended Complaint. On October 10, 2008, Parton, Moonlight Bandit

¹ These Defendants also sought relief as to the original Complaint pursuant to Rules 9(b) and 12(e). However, in light of the later filing of Plaintiff’s Amended Complaint and the rulings reflected in this Order and Opinion, the substance of those motions is moot and they are not dealt with herein.

² Each moving Defendant timely filed a brief in support of their respective Motions to Dismiss the Complaint, as required by Rule 15.2 of the General Rules of Practice and Procedure for the North Carolina Business Court (“Business Court Rule(s)”). Plaintiff filed a response opposing the Motion for Sanctions and Costs, but did not file a response to the Motions to Dismiss the original Complaint. Notwithstanding the provisions of Business Court Rule 15.11, in light of Plaintiff’s filing the Amended Complaint, (*supra* paragraph 6) the court did not entertain the Motions to Dismiss the original Complaint, on either substantive or technical grounds.

Entities, the NC Commission and the NC Partnership renewed their respective Motions to Dismiss as to the Amended Complaint.³

[8] The court heard oral argument on all the Motions to Dismiss on October 14, 2008.

FACTUAL BACKGROUND

Among other things, the Amended Complaint alleges:

[9] Garrett is a citizen and resident of the City of Roanoke Rapids, Halifax County, North Carolina (the “City”), and is a taxpayer to the governments of the City, Halifax County, and the State of North Carolina. (Am. Compl. ¶ 3.)

[10] Parton currently is a citizen of the State of Tennessee. He was a citizen of the State of North Carolina and domiciled in Halifax County, North Carolina at the material times set forth in the Amended Complaint. Parton is the managing member of Defendant Moonlight Bandit Productions, LLC (“Moonlight Bandit”). (*Id.* ¶ 4.)

[11] Watson is a citizen and resident of Edenton, Chowan County, North Carolina. Watson was at various times the President and Chief Executive Officer of the NC Commission and NC Partnership, as well as a member and member-manager of Defendant Moonlight Bandit. (*Id.* ¶ 5.)

[12] Each of the Moonlight Bandit Entities was incorporated in North Carolina. In June 2008, Moonlight Bandit Merchandising, LLC; Moonlight Bandit Concessions, LLC and Friends of Moonlight Bandit were dissolved. The Moonlight Bandit Entities’ principal offices and operations were located in North Carolina until July 31, 2008, after which the existing Moonlight Bandit Entities ceased to have a principal office in North Carolina. (*Id.* ¶ 6.)

³ These Motions to Dismiss were timely briefed by all parties.

[13] The NC Commission is the regional entity designated by statute to market the northeastern area of the State for economic development. The NC Commission was created in 1993 pursuant to G.S. §158-8.2 for the purpose of facilitating economic development in certain counties in the northeastern part of North Carolina, including Halifax County. (*Id.* ¶ 7.)

[14] The NC Partnership was incorporated in August 1994, by the NC Commission as a tax-exempt 501(c)(6) non-profit corporation, for the purpose of administering the objectives of the NC Commission. (*Id.* ¶ 8.)

[15] In 2004, Watson began working on plans to develop an entertainment theater in eastern North Carolina. Watson then traveled to Pigeon Forge, Tennessee, to meet with Parton. (*Id.* ¶ 15.) As reflected in subsequent letters and communications, Watson developed plans for The Randy Parton Theater (the “Theater”), which Watson initially envisioned as a project (the “Theater Project”),⁴ between the NC Partnership and Currituck County. (*Id.* ¶ 16.) On October 15, 2004, Watson presented a letter of intent to Currituck County, outlining the tentative terms of an agreement for such a project between the NC Partnership, Currituck County and Parton. (*Id.* ¶ 17.) Currituck County chose not pursue the Theater Project. (*Id.* ¶ 19.)

[16] In November and December 2004, the City expressed interest in the Theater Project, and Rick Benton, formerly Roanoke Rapids’ City Manager, e-mailed Watson about the project. (*Id.* ¶ 24.) On or about January 13, 2005, the City and the Halifax County Tourism Development Authority presented a letter of intent to Parton, outlining the proposed rights and responsibilities of Parton and the City with regard to the project. (*Id.* ¶ 25.)

⁴ The facility now is known as The Roanoke Rapids Theater.

[17] On February 11, 2005, Moonlight Bandit was formed. (*Id.* ¶ 28.) Sam Whitt, its registered agent, contacted the City’s attorneys and discussed the issuance of tax increment financing (“TIF”)⁵ bonds to support the Theater Project. In this e-mail, Whitt suggested that the City seek approval from the North Carolina Local Government Commission (“LGC”)⁶ to issue TIF bonds to finance the Theater Project, and proposed an agreement. (*Id.* ¶ 29.) The City Council approved the TIF financing arrangement with Moonlight Bandit on April 5, 2005. (*Id.* ¶ 31.)

[18] On April 7, 2005, Cathy Scott, an employee of the NC Commission, e-mailed Rick Benton that Parton’s business plan would be ready on April 15, 2005, and that the consultants were still preparing the feasibility study. Benton had requested the business plan on behalf of the City for use in seeking approval of the TIF bond to finance the Theater Project. (*Id.* ¶ 32.)

[19] Economic Research Associates (“ERA”) was commissioned to prepare a feasibility study of the Theater Project. In its April 14, 2005 report, ERA concluded that the Theater Project could be market-viable if the surrounding development of the Carolina Crossroads Music and Entertainment District (“Carolina Crossroads”), a

⁵ Tax increment financing is a public finance mechanism by which local governments use bond proceeds to make public improvements in order to spur private investment in a designated area. The new private investment is expected to raise property values within the area, which in turn increases property tax revenue. The increased tax revenue or “increment” is set aside to amortize the bonds that were used to pay for the public improvements. TIF bonds have been available in North Carolina since 2007, when voters approved an amendment to the State Constitution (Amendment One). Joseph Blocher & Jonathan Q. Morgan. *Questions About Tax Increment Financing in North Carolina*, UNC School of Government Community and Economic Development Bulletin, August 2008, available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/cedb5.pdf>.

⁶ The LGC is an administrative body designed to ensure that North Carolina municipalities do not overextend themselves in debt, requiring the state to pay the defaulted balance. Once a municipality has demonstrated itself capable of assuming the debt, the LGC takes responsibility for selling the debt, in the form of TIF bonds, on the municipality’s behalf. Here, approval of the LGC was required before the City could issue the TIF bonds.

proposed entertainment district in the City in which the Theater was to be located, was complete and operating by the time the Theater opened. In the feasibility study, ERA assumed Carolina Crossroads would have two hotels, at least 200,000 square feet of retail and additional entertainment opportunities in place and operational by the time the Theater opened. (*Id.* ¶ 33.)

[20] On April 22, 2005, staff with the State and Local Government Finance Division of the State Treasurer's Office recommended to the City that it renegotiate certain terms of a draft agreement between the City and the relevant Defendants. These recommendations, however, were not incorporated into the final agreement. (*Id.* ¶ 38.)

[21] On June 30, 2005, the Economic Development Agreement ("EDA") was signed by Defendants Parton, Moonlight Bandit and the City. The EDA set out the terms of use of the Theater by Defendants Parton, Moonlight Bandit and Watson. (*Id.* ¶ 39.)

[22] In February 2006, the City established Carolina Crossroads. (*Id.* ¶ 52.)

[23] On or about March 7, 2006, the LGC approved the use of TIF bonds for the Theater Project and Carolina Crossroads (*Id.* ¶ 53), and the LGC gave initial approval for the City to borrow \$21 million. (*Id.* ¶ 55.) No approval vote of the taxpayers was taken as a condition of issuance of the TIF bonds. (*Id.* ¶ 66.)

[24] At times material, Moonlight Bandit produced to the City a business plan intended to be used to support and secure financing for the Theater Project. (*Id.* ¶ 34.) The business plan held Parton out as being experienced as a performer business manager when in fact he was not. (*Id.* ¶ 35.)

[25] The business plan submitted by Moonlight Bandit also held Watson out as being business manager for Moonlight Bandit, but did not disclose that Watson held an ownership interest in Moonlight Bandit at the same time he held management positions with the NC Commission and the NC Partnership. (*Id.* ¶ 36.)

[26] In November 2005, Watson had received approval from the NC Commission to work for Moonlight Bandit while keeping his paid management position with the NC Commission. (*Id.* ¶ 47.)

[27] At later times material, Watson's relationship with the NC Commission, the NC Partnership and Moonlight Bandit became controversial. In March 2006, the North Carolina State Auditor reported a host of internal management problems involving the NC Commission, NC Partnership and Moonlight Bandit. The Auditor found a conflict of interest with Watson's role in the various entities. (*Id.* ¶ 56.) Watson's positions with the NC Commission and NC Partnership were terminated in March 2006. (*Id.* ¶ 57.)

[28] After construction of the Theater began, final approval by the LGC for the TIF bonds for the Theater Project and Carolina Crossroads was given on February 6, 2007. (*Id.* ¶ 61.)

[29] In March 2007, construction of the Theater was completed, at a total cost of \$13,002,051.02. (*Id.* ¶ 64.) The lease term commenced March 15, 2007, and Parton took possession of the Theater that day. The lease term was to run through March 15, 2010. (*Id.* ¶ 67.)

[30] When the Theater opened, the surrounding Carolina Crossroads project was neither in place nor operational. (*Id.*)

[31] After the Theater opened, Moonlight Bandit began live performances. The first show by Parton took place July 26, 2007. (*Id.* ¶ 69.) Thereafter, the relationship between the City, Parton and Moonlight Bandit deteriorated. Parton and Watson misused millions of dollars from the Theater Project, including \$2 million spent by Parton on such things as trips to Las Vegas, liquor purchases, apartment rents for Watson’s son, and other improper expenditures. (Compl. ¶ 38.) In September 2007, City officials negotiated a new contract with Parton that reduced his role as manager and lead performer. Parton’s compensation was also reduced from an annual guarantee of \$750,000.00 to \$250,000.00.⁷ (Am. Compl. ¶ 70.)

[32] On December 6, 2007, Parton failed to give a scheduled performance at the Theater. Officials stated he was “under the weather,” but media reports indicated he appeared to have been intoxicated. (*Id.* ¶ 71.) The next day, on December 7, 2007, City Manager Phyllis Lee directed employees that Parton was not permitted on the premises of the Theater. (*Id.* ¶ 72.) On January 8, 2008, the City renamed the Theater the “Roanoke Rapids Theater.” (*Id.* ¶ 73.)

[33] As a result of poor attendance rates and a lack of revenues, the Theater Project did not generate sufficient revenue to cover debt service on the TIF bonds. (*Id.* ¶ 75.) The City closed the Theater in June 2008, pending new management arrangements. (*Id.* ¶ 74.)

⁷ The brief in behalf of Parton and the Moonlight Bandit Entities in support of their Motion to Dismiss the Amended Complaint indicates that on November 20, 2007, the City, Parton, and Moonlight Bandit entered into a Performance and Management Agreement (“PMA”) (Mem. Law Supp. Parton Moonlight Companies’ Mots. Dismiss Am. Compl. p. 2.) The PMA terminated, among other things, Moonlight Bandit’s lease of the Theater and turned over all aspects of management and operation of the Theater Project to the City. Plaintiff’s brief does not refer to the PMA, and the court deems it not to be of record for purposes of the Motions to Dismiss.

[34] In February 2008, the City and Defendants Parton and the Moonlight Bandit entered into a Settlement Agreement and Release of All Claims (“Settlement Agreement”).⁸ The Settlement Agreement provides for release by and between the City and Defendants Parton and Moonlight Bandit of and from any and all claims, actions or causes of action each of the parties to the Settlement Agreement had or might have had against the other party to the Settlement Agreement. Pursuant to the Settlement Agreement, the City agreed to pay \$750,000.00 to Parton and Moonlight Bandit as consideration for the mutual release. (Compl. ¶ 44.)

[35] Watson was grossly negligent and committed fraud, and the Boards of Directors of the NC Commission and the NC Partnership were grossly negligent in allowing Watson, and others, to aid and advise the City in moving the Theater Project forward when they were charged with knowledge of Watson’s conflicts of interest involving the NC Commission, the NC Partnership and Moonlight Bandit. As a result, the NC Commission unlawfully caused tax funds to be paid to private parties, including Watson, and the State of North Carolina was deprived and defrauded of such funds. (See generally Am. Compl. ¶¶ 76-113.)

⁸ The Settlement Agreement is alleged specifically in paragraph 44 of the initial Complaint and in paragraph D of the Prayer for Relief in the Amended Complaint. It has been attached as Exhibit 1 to the brief by Defendant Watson in support of his Motion to Dismiss. It is discussed by various moving Defendants and Plaintiff in their respective briefs and was discussed at oral argument. Its existence and authenticity has been confirmed by both Plaintiff and Defendants. For purposes of the Motions to Dismiss, the court deems it to be part of the record in this matter. The Settlement Agreement provides that its intent was to effect the “extinguishment of all claims or obligations . . . relating to the Economic Development Agreement . . . the Performance and Management Agreement . . . and the creation, ownership, management, promotion of and operation of the . . . Theatre [sic].” (Settlement Agmt. ¶ 1.) The Settlement Agreement contains a very broad form of release of all claims by and against all signatory parties, and others.

[36] Among other things, Plaintiff seeks actual and punitive damages from the Defendants and a declaration that all contracts relative to the Theater Project entered into by or among any Defendants are null and void. (Compl., Prayer Relief.)

DISCUSSION

STANDING IN GENERAL

[37] “Standing” refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter. *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006). It is a jurisdictional issue and does not generally concern the ultimate merits of a lawsuit. *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001). Standing properly is challenged by a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001); and the burden to show that standing exists is on the party asserting standing. *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002).

[38] The Defendants contend that Plaintiff, as a citizen and taxpayer of the City, lacks the necessary standing to bring an action on behalf of himself, the City, and its taxpayers to recover monetary damages or other relief from any Defendants.⁹

[39] In response to the standing issues raised by the Motions to Dismiss, the Plaintiff contends that he has standing to assert a legal challenge to the contended unlawful disbursement of public funds on the ground that he is a taxpayer, and (a) can

⁹ In addition, Defendants Parton, Moonlight Bandit Entities and Watson contend that because the City by way of the Settlement Agreement released them from any and all claims concerning the Theater, Plaintiff can have no greater rights against them than the City and thus is bound by the release.

bring an action against Defendants because of losses from the Theater Project that will be borne by all taxpayers of the City; or in the alternative, (b) can bring an action derivatively in behalf of the City because the proper authorities have refused to act with regard to such losses. Under this theory, Plaintiff relies on *Goldston v. Harrington*, 361 N.C. 26, 28, 637 S.E.2d 876, 878 (2006) to assert standing.

[40] The issue of standing is jurisdictional. *Neuse River Foundation, Inc.*, 155 N.C. App. at 113, 574 S.E.2d at 51 (2002). If contested, the issue must be resolved before the merits of a lawsuit may be addressed. The issue before the court in this matter is whether Plaintiff, as an individual taxpayer, has the ability to sue on behalf of either himself and other taxpayers or the City.

STANDING OF PLAINTIFF AS AN INDIVIDUAL TAXPAYER

[41] In North Carolina, generally an individual taxpayer has no standing to bring a suit in the public interest. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43 (2001), *citing Greene v. Eure*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975). However, Plaintiff contends he falls within an exception to this rule.

[42] Exceptions to the rule limiting taxpayer standing may apply when the taxpayer shows that (a) a tax levied upon him is for an unconstitutional, illegal, or unauthorized purpose, (b) the carrying out of a challenged provision will cause him to sustain personally a direct and irreparable injury, or (c) he is a member of a class prejudiced by the operation of a statute. *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E.2d 21, 21 (1979). Plaintiff here does not allege that he falls within either of the latter two *Texfi* exceptions above; that is, he does not contend that the actions complained of in the Amended Complaint will cause him to sustain

personally a direct and irreparable injury, nor does he allege himself to be a member of a class of persons prejudiced by the operation of a statute which he funds as a taxpayer. Rather, Plaintiff appears to contend that he falls within the first *Texfi* exception above, in that he alleges that the Theater Project levies a tax upon him that is for an unconstitutional, illegal or unauthorized purpose. In this regard, he argues that under the *Texfi* standard he has standing to seek relief for the illegal or unauthorized expenditure of public monies ostensibly in support of the Theater Project, a material part of which was used ultimately for the improper personal gain of Defendants.

[43] However, here the expenditures used in support of the Theater Project were funded by TIF bonds that were issued only after a feasibility study was conducted for the benefit of the City, and which was lawfully approved by the City and the LGC. Furthermore, Watson's various potentially conflicting roles with the Theater Project, complained of by Plaintiff, were disclosed and discussed; and Watson was terminated more than a full year before the bonds received final LGC approval. Notwithstanding that the Theater Project ultimately failed and well may have been a very bad business decision by the City, the obligations undertaken by the City were neither illegal nor unauthorized.

[44] Therefore, because the City was acting within its authority with regard to the Theater Project, the first *Texfi* exception does not apply to support Plaintiff's contention of standing. Plaintiff therefore does not fall within any of the *Texfi* exceptions to the general rule that taxpayers do not have standing to sue on their own behalf.

DERIVATIVE STANDING

[45] In further response to the standing arguments raised by the Defendants, Plaintiff raises a theory of derivative taxpayer standing. In this regard, Plaintiff contends that he can bring this action on behalf of the City against Defendants in order to restore the losses incurred by the City and its taxpayers as a result of the Defendants' contended unlawful conduct. In response, Defendants argue that the elements of derivative standing cannot be met by Plaintiff because (a) he has made no demand for action by the City and (b) the City in fact has taken action in protection of itself and its taxpayers, as reflected in the Settlement Agreement.

[46] In North Carolina, in order for a taxpayer to bring an action on behalf of a public agency under the derivative theory that the public authorities wrongfully neglect or refuse to act, the Plaintiff must allege that there either (a) has been a demand upon and wrongful refusal by the proper authorities to act, or (b) the particular facts would make such a demand futile. *Fuller v. Easley*, 145 N.C. App. at 393, 553, S.E.2d at 47.

[47] Plaintiff contends a demand on the City would be futile. In a different context, the substantive facts alleged in the Amended Complaint well might support action by a taxpayer in behalf of a municipality, even one seeking to bypass the demand requirement. Here, however, by negotiating with regard to the respective claims between the City, Parton and Moonlight Bandit, growing out of the Theater Project, the City already in fact has taken action, which resulted in the Settlement Agreement. The Settlement Agreement acts to resolve the very claims in behalf of the City that otherwise -- given refusal or inaction after a timely taxpayer demand -- arguably might be available derivatively to a taxpaying citizen. In fact, the City's action in settling with Parton and

Moonlight Bandit on terms with which the Plaintiff disagrees apparently is the very reason Plaintiff seeks to bypass the City. However, Plaintiff has made no contention or showing here that the City was not within its lawful authority to resolve the legal disputes, short of formal legal proceedings, by way of the Settlement Agreement.¹⁰ *Clayton v. Branson*, 170 N.C. App. 438, 448, 613 S.E.2d 259, 267 (2005). Plaintiff's contention as to demand futility therefore is without merit.

[48] As such, because the City did not wrongfully neglect or refuse to act, the court is forced to conclude that Plaintiff does not have standing under a derivative taxpayer theory.

[49] The Plaintiff's lack of standing is fatal to all his claims against the various Defendants. Consequently, Defendants' Motions to Dismiss should be GRANTED, pursuant to Rule 12(1).

[50] This ruling disposes of all claims in this civil action, and there consequently is no need for the court to address the remaining contentions raised by the respective Defendants under either Rules 9(b), 12(b)(6) or 12(e); or the substantive contentions by Parton, Moonlight Bandit and Watson that they were specifically released by the Settlement Agreement from any claims that might have been brought against them by or in behalf of the City.

SANCTIONS

[51] Defendants Parton and Moonlight Bandit Entities have moved the court for sanctions, fees and costs against Plaintiff pursuant to Rule 11 and G.S. §75-16.1.

¹⁰ G.S. §160A-11 gives a city the right to sue and be sued and the right to contract and be contracted with. Here, the City entered a contract settlement agreement with Defendants. Absent an allegation that the conduct of the local government officials was wrongful, a taxpayer does not have standing to sue on behalf of the local government. *Branch v. Board of Educ.*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951).

[52] Rule 11 allows for sanctions in the form of attorney fees and expenses to be imposed against a party for filing a pleading for an improper purpose or if the pleading is not well grounded in fact and is not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. *Static Control Components, Inc. v. Voglar*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). It is the burden of the movant to prove that an improper purpose or other violation of Rule 11 exists. *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996).

[53] By way of Count 5 in his original Complaint, Plaintiff also posited a claim against Defendants for unfair and deceptive trade practices. Such a claim falls within the provisions of Chapter 75 of the North Carolina General Statutes (“Chapter 75”). Pursuant to G.S. §75-16.1, reasonable attorney fees may be awarded to the prevailing party upon a finding that the party making a Chapter 75 claim knew or should have known that the action was frivolous and malicious. Such an award is a matter within the discretion of the court.

[54] With regard to Rule 11, while Defendants vigorously dispute Plaintiff’s actions in filing this civil action, the court is not persuaded that the Amended Complaint, while insufficient to survive the Defendants’ Motions to Dismiss, violates the provisions of Rule 11. Accordingly, sanctions under Rule 11 should be DENIED.

[55] In this action, the Plaintiff did not bring his Chapter 75 claim forward in his Amended Complaint, and therefore it is deemed abandoned. Accordingly, in the exercise of its discretion, the court declines to impose an attorney fee pursuant to G.S. §16.1, and the motion for an award in this regard should be DENIED.

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

[56] The Defendants' Motions to Dismiss this civil action are GRANTED, and Plaintiff's Amended Complaint hereby is DISMISSED.

[57] The Motion for Sanctions and Costs by Defendants Parton and Moonlight Bandit Entities for sanctions against Plaintiff is DENIED.

[58] Taxable costs shall be charged to Plaintiff.

This the 30th day of January, 2009.

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