

NORTH CAROLINA :
MECKLENBERG COUNTY:

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 5354

JDH CAPITAL, LLC)
)
 Plaintiff,)
)
 v.)
)
 REBECCA D. FLOWERS, DWF)
 DEVELOPMENT, INC., and FLOWERS)
 PLANTATION FOUNDATION, INC.)
 f/k/a FLOWERS PLANTATION, INC.,)
)
 Defendants)
)

**DEFENDANTS’ REPLY BRIEF
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

All Defendants, pursuant to Business Court Rule 15, submit this brief in reply to *Plaintiff’s Response in Opposition to Defendants’ Motion for Summary Judgment* [“the JDH Response”], filed May 15, 2008.

ARGUMENT

Defendants’ motion and supporting brief demonstrated, with citations, specific evidence and relevant authority, that JDH’s purported claims are without merit as a matter of law. This court and others have consistently dismissed as a matter of law similar claims on similar facts. Defendants’ Brief in Support of Motion for Summary Judgment, filed April 22, 2008 [“Defendants’ Opening Brief”].

JDH may not defeat Defendants’ properly supported Motion for Summary Judgment by relying on conclusory assertions in its pleadings and response which are unsupported by competent evidence and which, even if believed, would not change the outcome of the case. N.C. R. Civ. Pro. 56(e); *See e.g. Lowe v. Bradford*, 305 N.C. 366, 369-371, 289 S.E.2d 363, 366-367 (1982) (affirming summary judgment because plaintiff did not produce evidence of any specific

facts showing there was a genuine issue of material fact but only mere conclusory allegations). Because it bears the ultimate burden of proof, JDH can avoid summary judgment only by submitting competent evidence of facts which, if believed, would establish the elements of a valid claim under applicable law. *See, e.g., Campbell v. Bd. of Educ.*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

The JDH Response, however, does not meet that burden: JDH (i) fails to identify genuine issues of material fact; (ii) fails to cite competent record evidence to create issues of fact; (iii) fails to cite meaningful legal authority on key points; and (iv) ignores common sense and reality.

1. JDH Fails to Identify Any Material Factual Disputes.

Although JDH asserts that it disagrees with Defendants' factual summary [JDH Response at 3], JDH in fact identifies no evidence disputing Defendants' Motion on any material point. A comparison of the evidence cited by both sides reveals no genuine dispute about the material facts and that the parties' primary disagreement is about the application of the law to those facts – a classic situation for disposition by summary judgment. While the parties disagree about some “factual” assertions in the JDH Response (especially those for which JDH cites no admissible evidence), those disagreements are not material because they would not change the outcome even if they were all resolved in favor of JDH.

As Defendants' Opening Brief demonstrates, this court and others have consistently held as a matter of law that circumstances such as those asserted in the JDH Response do not create an enforceable contract – especially when, as here, the letter of intent at issue expressly disclaims any binding contractual effect, leaves open terms and contemplates the subsequent execution of more formal binding documents. [Defendants' Opening Brief at 15-17; *See also, Defendants'*

Brief in Opposition to Motion to Amend Complaint at 2-5]. Similarly, the courts have rejected similar efforts by other plaintiffs to convert disappointment at failed negotiations into misrepresentation claims. [Defendants' Opening Brief at 24-25; Defendants' Brief in Opposition to Motion to Amend Complaint at 6-7]. Virtually every factual allegation made in the JDH Response was anticipated by Defendants' Opening Brief and addressed by the authorities cited therein.

What is more, the JDH Response does not dispute critical facts shown by competent evidence in the record and identified in Defendants' Opening Brief. JDH presents no evidence disputing:

- That substantial and critical portions of the alleged activities “in furtherance of the joint venture” upon which JDH relies (including the development of site plans and sharing of intellectual property and expertise about the need for a large box grocery store) were carried out before even JDH contends a joint venture agreement existed negating any contention that JDH relied on the existence of a joint venture in doing such work. [Defendants' Opening Brief at 4, 21-22 & 26-27].
- That Ms. Flowers told JDH before the non-binding LOI was signed that she wanted to agree on as many matters as possible relating to the development before any binding agreement was reached. [Defendants' Opening Brief at 4].
- That the language in the LOI stating that “[t]his letter of intent does not create any binding, contractual rights between Flowers and JDH” was drafted and inserted in the LOI by JDH, not Ms. Flowers. [Defendants' Opening Brief at 4-5].

- That JDH never told Ms. Flowers or Mr. Woodall that the language disclaiming contractual effect meant anything different than its express meaning. [Defendants' Opening Brief at 5].
- That Ms. Flowers desired to have final decision on architectural matters was expressly disclosed to JDH and was the subject of negotiations. [Defendants' Opening Brief at 6].
- That the draft LLC Agreement, belatedly prepared by JDH's attorneys pursuant to the express provision of the LOI, contained numerous new and additional provisions not addressed in the LOI. [Defendants' Opening Brief at 7-8].
- That Ms. Flowers sent JDH the communications listed in Defendants' Opening Brief at 12-13, which reflected her understanding (consistent with the JDH-drafted language in the LOI) that no binding agreement had yet been reached.
- That JDH never disputed Ms. Flowers' statements that no joint venture agreement had been reached and in fact confirmed that the parties had not done "enough to establish a meeting of the minds on all key issues." [Defendants' Opening Brief at 13].

The few new factual assertions in the JDH Response do not materially change the analysis. For example, the issuance of a press release about the anticipated formation of the joint venture [JDH Response at 5] did not convert the non-binding letter of intent into a binding contract. Communications to (or even reliance by) third parties do not convert a non-binding letter of intent into a binding contract. *Rennick v. O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309, 313, 317 (9th Cir. 1996) (affirming summary judgment dismissing claims based on letter of intent with non-binding language and part performance even though plaintiff issued a press release about the

contemplated joint venture in reliance on the non-binding letter of intent); *Phoenix Mut. Life Ins. Co. v. Shady Grove Plaza, Ltd. P'ship.*, 734 F. Supp. 1181, 1188 (Dist. Md. 1990) (holding that communication of LOI to third party lender to obtain release of construction funds did not convert LOI into binding contract between the parties).

Similarly, the new and inadmissible hearsay assertion by JDH's expert (see p. 6 below) that Ms. Flowers allegedly said at some unidentified time (and in reference to unspecified terms) that "we have a deal" would not support any of JDH's claims even if the hearsay were admissible. *See, e.g., 168th and Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F3d 945, 954-57 (8th Cir. 2007) (affirming summary judgment on claims arising from letter of intent):

[E]ven if we accepted RED's argument that Stevenson's comment that the lease agreement was a "done deal" qualifies as a sufficient promise, we would nevertheless hold, as a matter of law, that RED could not reasonably rely on such a promise. . . . because RED should know that a 20 year lease for interest in real estate must be in writing, it cannot now argue that it reasonably relied on Stevenson's oral assurance that the lease agreement was a "done deal."

Here, JDH should have known that a contract requiring the conveyance of Ms. Flowers property worth more than \$1 Million was required to be in writing even if (contrary to fact) there were some admissible evidence that the amorphous statement was made. See authorities at Defendants' Opening Brief at 20 and discussion at pages 8-9 below.

2. JDH Improperly Relies on Factual Assertions Unsupported by Competent Evidence.

As noted above, Defendants would be entitled to summary judgment even if all factual assertions in the JDH Response were supported by competent evidence. It should be noted,

however, that the JDH Response is replete with factual assertions for which JDH provides no citation to competent evidence that actually supports the assertion.¹

JDH's citation of inadmissible or inapposite evidence is exemplified by its use of the testimony of its purported expert, David Haggart, to support the allegation that Ms. Flowers told David Hill that the parties "had a deal" (whatever that may mean). [JDH Response at 4, citing Haggart Dep. p. 224]. The Haggart testimony is not admissible evidence because Mr. Haggart is not a fact witness with personal knowledge of the alleged (but non-existent) statement by Ms. Flowers. Rather, he is an expert witness, retained after the fact, who merely repeated what he had been told by JDH's principal owner David Hill in an unsworn conversation during the pendency of this action. [Attachment A, Haggart Dep. pp. 223-224]² Accordingly, the Haggart testimony is hearsay – and the worst kind of hearsay because it was communicated to him by Hill specifically for use in this lawsuit.³ [Id.] Significantly, JDH does not cite any sworn testimony by Mr. Hill – nor has it submitted an affidavit by Mr. Hill – supporting the existence of the alleged statement. The reason for this stunning omission is simple: Mr. Hill cannot make such a statement without perjuring himself. Indeed, Mr. Hill, as JDH's Rule 30(b)(6) designee admitted that JDH has no knowledge to support the equivalent allegations in Paragraph 17 of the Complaint. [Attachment B, Hill Dep. Vol. I pp. 218-219].

¹ In several places, the JDH Response makes factual statements without any citation to the record and/or cites the unverified Complaint as support for factual statements. [See, e.g., JDH Response at 7.] JDH may not defeat summary judgment by citing to the Complaint or relying on statements in its brief without supporting evidence. *Nasco Equip. Co., v Mason*, 291 N.C. 145, 150-152, 229 S.E.2d 278, 282-283 (1976).

² Discovery materials cited in this brief that were not previously cited in Defendants' Opening Brief are attached hereto and cited as "Attachment ____". All other discovery material cited in this brief appear in *Defendants' Appendix of Materials in Support of Motion for Summary Judgment* ["Appendix"] previously filed with this court. Affidavits cited herein have been filed separately.

³ Even if the Haggart hearsay were admissible, Defendants note that JDH has not designated Mr. Haggart as an expert in support of its affirmative claims. It has designated him only as an expert in opposition to Defendants' counterclaims. [See Defendants Response to Motion to Exclude Expert Testimony at 2.]

In another stretch of the record, JDH cites certain e-mails as purported support for the assertion that it “negotiate[ed] and prepar[ed] a lease agreement between the joint venture and a grocery anchor tenant” and “negotiate[ed] and prepar[ed] leases for numerous out parcel users and shopping space tenants.” [JDH Response at 7, 21]. Those e-mails, however, do not say that JDH negotiated and prepared leases with any tenants, and the testimony of JDH’s own employee, Jude Crayton, confirms that JDH never actually secured any tenants for the project, much less negotiated and prepared leases.⁴ [Attachment C, Crayton Dep. pp. 100-101].

JDH’s suggestion that it negotiated and prepared a lease agreement between the joint venture and a grocery store anchor tenant [*i.e.* Lowes Foods] [JDH Response at 7] is especially misleading. JDH relies on that assertion not only in an effort to establish the existence of a binding contract with Ms. Flowers, notwithstanding the JDH-drafted disclaimer of binding contractual effect, but it also relies on that contention as its central premise of its *quantum meruit* claim that seeks compensation of over \$6 Million (a heck of a real estate commission) for securing Lowes Foods as a tenant. [JDH Response at 22]. The problem with all of this, however, is that the affidavit of Roger Henderson, upon which JDH relies, does not state that JDH negotiated and prepared a lease with Lowes Foods, nor does it state that Lowes Foods actually agreed to lease space in the project. Rather, it states only that Lowes Foods is interested in the possibility of leasing space in the project. [Henderson Aff. ¶ 7.]

The following chart is a non-exhaustive summary of other statements in the JDH Response that are inconsistent with (or are nonsensical in light of) the record:

⁴ JDH relies on the same e-mails for the assertion that it generated and reviewed a complete budget and pro forma for the project; however, David Hill and JDH’s own expert admit in their deposition testimony that the budget prepared by JDH was only a preliminary budget. [Attachment B, Hill Dep. Vol. 1, pp. 128–129; Attachment A, Haggart Dep. pp. 196-197]

JDH ASSERTION	THE RECORD
LOI not entitled "Letter of Intent". [JDH Response at 18]	The LOI's text refers to itself as "this letter of intent . . ." [Ex. 33 at p. 3.]
LOI does not refer to any future written agreements. [JDH Response at 17, 20].	LOI expressly provides that the parties will work toward limited liability company documents reflecting the agreed terms and conditions. [Ex. 33 at p. 3.]
LOI does not leave any open terms [JDH Response at 17].	Draft Operating Agreement contains numerous additional terms and conditions not contemplated by the LOI [See examples with record cites in Defendants' Opening Brief at 7-8].
JDH worked closely with Ms. Flowers' engineer on the site plan, coordinated design professionals and consulted regularly with design professionals. [JDH Response at 8, 21-22].	JDH acknowledges that no contract had been formed between the parties when it worked with Paul Smith to redesign site plan [Hill Dep. Vol. II pp. 241-242, 263-264, 344-345, 350]. JDH representatives had some communications with Paul Smith in the Summer and Fall of 2006 but those communications consisted of occasional correspondence informing Mr. Smith that his work look good and work in obtaining government entitlements was primarily done by Mr. Smith, not JDH [Smith Aff. ¶ 8; Ball Dep. pp. 67-80].

3. JDH's Claims Are Not Supported by the Authority It Cites.

Defendants' Opening Brief cites multiple decisions by this court and others dismissing as a matter of law claims relating to letters of intent substantially similar to those asserted by JDH here. In contrast, JDH does not cite a single case enforcing a similar LOI on similar facts.

What is more, the cases that JDH does cite are not apposite. Although JDH cites cases holding that certain partnerships can be formed by oral agreement [JDH Response at 16, 18], JDH fails to cite a single case holding that a partnership agreement is enforceable without satisfying the Statute of Frauds if, as here, it includes a requirement that an entering partner convey her preexisting real property to the partnership. To the contrary, one of the cases cited by

JDH acknowledges this critical distinction. *See Potter v. The Homestead Pres. Ass'n.*, 330 N.C. 569, 577, 412 S.E.2d 6, 15 (1992), citing *Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985). *See also* authorities cited at Defendants' Opening Brief at 20.

Similarly, JDH fails to cite any meaningful authority in support of its contention that it constituted fraud or negligent misrepresentation for Ms. Flowers not to disclose certain alleged bargaining positions. Defendants' Opening Brief cites authorities holding that a party to negotiations does not have a duty to disclose its bargaining position. In contrast, JDH does not cite a single case holding that a party who is unsuccessful in negotiating for a contract can sue the opposing party for fraud or negligent misrepresentation for failing to fully disclose its bargaining position.

JDH's "failure to disclose" contentions are specious on their face:

- JDH accuses Ms. Flowers of failing to disclose that she had never ceded architectural approval in any of her prior deals. Leaving aside whether she had a duty to disclose this fact, the record is undisputed that she and her representatives told JDH orally and in e-mails that she wanted final architectural approval, and the non-binding LOI expressly gave her that authority. [Ex. 90; Hill Dep. Vol. II, 278-281, Vol I, 72, 76; Flowers Aff. ¶ 2, 7; Woodall Aff. ¶ 7]. For JDH to contend that it was unaware that she wanted the final say on architectural matters staggers the imagination.
- JDH complains that Ms. Flowers failed to disclose that she had never given up the right of approval over tenants in a prior deal. [JDH Response at 10, 15]. JDH presents absolutely no evidence, however, that the question of tenant approval was ever an issue between the parties. To the contrary, the record is undisputed that

the revised draft of the proposed LLC Agreement (which JDH claims was acceptable to it) expressly contemplates preparation of leasing guidelines excluding the right to lease certain tenants. [Ex. 60; Ex. 62, p. 4 and Exhibit F to Ex. 62 captioned “Lease Guidelines”]

- JDH makes the mystifying assertion that a couple of unremarkable e-mails between Mr. Woodall and Ms. Flowers prior to execution of the LOI reflect an undisclosed intent not to proceed with the joint venture. Leaving aside the fact that the e-mails say no such thing, it is worth noting that the concerns reflected by those e-mails were in fact communicated to JDH. For example, JDH cites an e-mail from Mr. Woodall to Ms. Flowers on March 18, 2006 that expresses certain concerns about the proposed deal. [JDH Response at Ex. 10 (Document No. RDF-00665).] JDH fails to acknowledge, however, that Ms. Flowers had communicated substantially the same concerns directly to JDH in an e-mail three days earlier. [JDH Response at Ex. 4 (Document RDF-00983).]

4. JDH’s *Quantum Meruit* Claim is Contrary to Undisputed Facts and the Law.

The intellectual bankruptcy of JDH’s claims also is illustrated by its request for over \$6 Million in damages on a *quantum meruit* theory.

JDH utterly fails to acknowledge that much of the work relating to the project upon which it attempts to base the claim was performed merely to explore the possibility of a joint venture at a time when even JDH acknowledges there was no agreement. Thus, as a matter of law, JDH could not have had a reasonable expectation of being paid for that work. [Compare JDH Response at 21-22 with Defendants’ Opening Brief at 3-4, 21-22 & 26-27.]

In addition, JDH seeks compensation in excess of \$6 Million for bringing Lowes Foods to the project based solely on evidence that Lowes Foods is “interested” in leasing space when the record is undisputed that (i) Lowes Foods has not in fact signed a lease, (ii) it is uncertain whether Lowes will ever sign a lease and (iii) the affidavit submitted by JDH does not indicate that Lowes is ready, willing and able to sign a lease on any particular terms. In short, JDH’s claim is based on speculation about what might happen in the future.

What is more, JDH has never presented any evidence of its recoverable damages on a quantum meruit claim even if (contrary to fact) it could establish such a claim. JDH has never cited any authority for its contention that it is entitled to recover for introducing a possible tenant an amount equal to the full present value of all lease payments that such a tenant might pay if a lease were ever entered. Nor has JDH ever produced any evidence of a calculation of *quantum meruit* damages under a correct measure of damages despite (i) interrogatories and document requests from Defendants seeking that information and (ii) an order compelling answers to that discovery. [Attachment D, Rebecca D. Flowers’ First Set of Interrogatories and Request for Production of Documents to Plaintiff, p. 12, # 18].

Finally, JDH has never cited any authority for its contention that it is entitled to recover on its *quantum meruit* claim the full amount of the profit that it speculates that it would have made if the project had been fully developed [JDH Response at 22] even though it is undisputed that JDH never performed most of the work that would have been entailed in actually developing and managing the property and that JDH never incurred the financial risk of guaranteeing the financing for the project. [Defendants’ Opening Brief at 3, 14, 26-27.] Nor has JDH ever produced any evidence of *quantum meruit* damages under the correct standard (benefit of the work to Defendants).

CONCLUSION

For the reasons set forth above and in Defendants prior briefs cited herein, as well as for additional reasons to be shown at the hearing of this motion, Defendants are entitled to judgment dismissing all claims as a matter of law on the undisputed facts. Accordingly, the Motion for Summary Judgment should be granted.

Undersigned counsel certifies that this brief conforms to Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

This the 22 day of May, 2008.

/s/ Michael T. Medford
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *Defendants' Reply Brief in Support of Motion For Summary Judgment* was duly served this day on all parties by substituted Electronic Service pursuant to Rule 6 of the General Rules of Practice and Procedures for the North Carolina Business Court and the Case Management Order entered in this action and by forwarding a copy thereof enclosed in a postage paid envelope deposited in the United States mail, addressed as follows:

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This the 22 day of May, 2008.

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ATTACHMENT A

Page 1

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

JDH CAPITAL, LLC,
Plaintiff,

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FILE NO. 07-CVS-5354

vs.

REBECCA D. FLOWERS, DWF
DEVELOPMENT, INC., and
FLOWERS PLANTATION
FOUNDATION, INC., f/k/a
FLOWERS PLANTATION, INC.,
Defendants.

Deposition of David Haggart, taken on behalf of the Defendant, pursuant to the stipulations agreed to herein, before LeShaunda D. Cass-Byrd, Certified Shorthand Reporter and Notary Public, at Johnston Allison & Hord, P.A., 1065 East Morehead Street, Charlotte, North Carolina, taken on the 3rd day of April, 2008, commencing at 9:00 a.m.

1 the value of the project.

2 Did you -- did you look at JDH's
3 proposed budget for the construction of
4 the -- of the project?

5 A. Yes. I looked at it. I did not try
6 to pick through it and come to a
7 determination as to cost accuracy. When I
8 looked at it, I didn't have the site plan in
9 front of me and I didn't know what uses they
10 were proposing for individual buildings. I
11 looked at the grocery store number, which I
12 thought was in the ballpark of where it was
13 likely to be.

14 Q. Okay. I noticed that a lot of the
15 numbers in the budget information I saw were
16 sort of round numbers. Is that -- would that
17 be indicative of a preliminary budget?

18 A. Yes.

19 Q. And so would you agree that what was
20 produced was a preliminary budget?

21 A. It was a preliminary budget that had
22 enough categorical detail to it to be useful
23 for making projections on the likely
24 profitability of the project.

25 Q. Okay. Do you know who did the

1 budgeting?

2 A. I do not.

3 Q. You testified this morning -- I
4 asked you some questions about the letter of
5 intent and particularly any disclaimer
6 language in the letter of intent, and you
7 described to me your understanding of the
8 purpose of the disclaimer language. Where
9 did you get that understanding?

10 A. Based on my own personal experience
11 of working on deals like this.

12 Q. And have you discussed that
13 interpretation with anyone?

14 A. Not that I recall.

15 Q. All right. When you say your own
16 experience in working on deals like this,
17 explain to me what experience you have had as
18 it relates to the significance of that type
19 of language.

20 A. Well --

21 Q. Are you referring to what you meant
22 when you put it in a -- in a letter?

23 A. I would have referred to what I
24 would have meant when I put it into a letter.

25 And I don't know -- I don't recall

1 the whole business?

2 A. Correct.

3 Q. Your time is the business's time?

4 A. Right.

5 Q. What about those who work on other
6 activities, like working with the engineers
7 and working with contractors and working on
8 doing market studies and stuff? What about
9 keeping a record of the time spent by those
10 folks?

11 A. They are not required to keep track
12 of their time.

13 Q. At least in your company?

14 A. Correct. They have deadlines, that
15 they have to produce certain work product by
16 a certain date. And so whether it gets done
17 or not is evidence of whether the time was
18 spent smartly and accurately.

19 Q. Okay. One of the things listed, I
20 think, in the -- one of the expert
21 disclosures that supposedly you will say is
22 something about it being common to rely on
23 oral representations of the person with whom
24 you are dealing.

25 And, first of all, do you have any

1 understanding about what oral
2 representations, if any, were made by or on
3 behalf of Ms. Flowers to JDH?

4 A. I have an understanding, as they
5 have been represented to me by Dave Hill.

6 Q. Okay. And what did he represent to
7 you?

8 A. He represented to me that she told
9 him that they had a deal; that her goal was
10 to get it permitted and built as fast as
11 possible; and that she directed him to start
12 engaging in development activities, which
13 included getting involved with the civil
14 engineer, getting involved with pursuing
15 anchor tenant approvals.

16 Q. Okay. When -- as you understand it
17 from Mr. Hill, when did she supposedly make
18 the representation, We have a deal?

19 A. On or about the time that the letter
20 of intent was signed.

21 Q. And was that -- how was that done?

22 A. I don't know the method of
23 communication. I mean, obviously, she signed
24 the letter of intent. So that got mailed or
25 e-mailed to Dave Hill, one way or the other.

ATTACHMENT B

Page 1

STATE OF NORTH CAROLINA GENERAL COURT OF JUSTICE
COUNTY OF MECKLENBURG SUPERIOR COURT DIVISION

07-CVS-5354

-----X

JDH CAPITAL, LLC, :

Plaintiff, :

v. :

REBECCA D. FLOWERS, DWF :

DEVELOPMENT, INC., and FLOWERS :

PLANTATION FOUNDATION, INC., :

f/k/a FLOWERS PLANTATION, INC., :

Defendants. :

-----X

Deposition of DAVID PETER HILL

(Taken by Defendants)

Charlotte, North Carolina

December 19, 2007

Reported by: Andrea L. Nobrega

Court Reporter

Notary Public

COPIY

1 explained these to Len and Mrs. Flowers, was that
2 we would be utilizing a third-party consultant and
3 so Mr. Schutt helped us put numbers together.

4 Q. Did Crossroads do the budget or did it
5 simply bless the budget that you had prepared?

6 A. Probably not the best question for me,
7 but what I encouraged our people to do was to do
8 their own preliminary budget, and then to have the
9 outside consultant prepare their own preliminary
10 budget, and then to get back together and look for
11 differences. So --

12 Q. Do you know if that was done here?

13 A. That would have been my general policy
14 direction. I don't know if it was done here
15 specifically, because I would have been brought in
16 to the budget process after the two of those things
17 took place and the final result being something
18 that everybody was comfortable with.

19 MR. MEDFORD: Mark this next.

20 (Exhibit No. 36 marked for identification.)

21 BY MR. MEDFORD:

22 Q. I hand you now a document marked for
23 identification as Exhibit No. 36, JDH 997 through
24 998, I believe, yes. Is that the budget that we
25 have been talking about?

1 this under construction. You have got to get this
2 done. You have to finish these things. I need my
3 village. I need you to construct this.

4 Q. And the communications you are talking
5 about would be in the late summer, early fall of
6 2006?

7 A. Throughout the relationship.

8 Q. Any other basis for the contention that
9 she knew her representations were falsely when
10 made?

11 A. Not specifically.

12 Q. I missed one thing. Go back to paragraph
13 17. That alleges that during this period of time a
14 writing to memorialize the joint venture was
15 prepared and circulated among JDH Flowers -- among
16 JDH and Flowers in her individual and
17 representative capacities. Based on Flowers
18 representations and those of consultants,
19 representatives and advisors, she had a few minor
20 and superfluous changes to make to the writing. Do
21 you see that?

22 A. I do.

23 Q. Tell me what that's referring to?

24 A. I'm going to have to read a couple of the
25 prior paragraphs.

1 Q. Sure, read whatever you need to look at.

2 A. Pardon my mental fog, but subsequent
3 means after --

4 Q. Subsequent means after.

5 A. Fine. I had a mental block, I'm sorry.
6 Okay, I read it.

7 Q. There is an allegation there that based
8 on her representations and those of consultants,
9 representatives and advisors, she had a few minor
10 and superfluous changes to make to the writing.

11 My question is what exactly -- what
12 representations are you -- who made them? When did
13 they make them? To whom did they make them?

14 A. I think what this paragraph is referring
15 to is that the comments that they had to the LLC
16 document that we furnished to them were minor and
17 superfluous and easily resolved.

18 Q. Did Ms. Flowers or anyone that you
19 understood to be speaking on her behalf ever say to
20 you we have only minor or superfluous changes to
21 make?

22 A. I don't recall that, no.

23 Q. So that allegation is based not on their
24 telling you, hey, there is no big deal here, we
25 don't have anything important, it was your view of

ATTACHMENT C

Page 1

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-5354

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JDH CAPITAL, LLC, :

:

PLAINTIFF, :

:

v. :

:

REBECCA D. FLOWERS, DWF :

DEVELOPMENT, INC., and FLOWER :

PLANTATION FOUNDATION, INC., :

f/k/a FLOWERS PLANTATION, INC., :

:

DEFENDANTS. :

:

-----X

DEPOSITION OF JUDE CRAYTON
(Taken by the Defendants)
Charlotte, North Carolina
February 29, 2008

Reported by: Jackie Johnson
Court Reporter
Notary Public

1 well, I can't find it. But yeah, there was progress
2 being made on it, on the dentist.

3 Q. Then he goes on to say, "I think we have a
4 great deal more momentum than you realize. He --
5 presumably referring to you -- is in negotiations
6 with a number of good tenants, and I believe you will
7 begin to see the fruits of his labor shortly."

8 Were you, in fact, in negotiations with a
9 number of good tenants at this point in time?

10 A. The ones that I've mentioned to you before
11 as being solid prospects, the Dominos Pizza, the
12 Subway, the H&R Block, the nail salon.

13 Q. At least two of those were referred by
14 Ms. Flowers?

15 A. I believe so.

16 Q. And the only ones you actually had a
17 proposal out on were from Ms. Flowers, Exhibit 87, if
18 you want to look back.

19 A. Well, from the people that are on there,
20 yes, I believe so.

21 Q. Were there others that aren't on there?

22 A. There may have been.

23 Q. Those are in the documents that you
24 disposed of?

25 A. I mean, if I had something and we don't

1 have it here, I would have to take into consideration
2 that that's what it was.

3 You know, I think an important thing is,
4 you know, people get prospects from a lot of
5 different places, but at the end of the day, it's
6 about being able to, you know, bring them from just
7 seeing the project and getting a signed lease.

8 I think that regardless, and maybe I'm on
9 the defensive here, but regardless of where the
10 prospect comes from, it's still, you know -- leasing
11 is a numbers game. It's about getting in front of a
12 lot of different people.

13 As previously stated on the -- I'm going to
14 find it this time. Well, as previously stated in
15 Exhibit 89, we still hadn't nailed down, which is
16 dated August 23rd, a lease rate, which is important.

17 In Exhibit 78, the first e-mail from David
18 Hill, Paragraph 5, we still haven't nailed down an
19 anchor. So it's tough to get people to commit to
20 something when you don't know how much it's going to
21 cost. You don't know who the anchor is, and you
22 don't know when it's going to get built.

23 Q. You said that you were talking to Bruce
24 Lynch at some point, not in connection with Flowers,
25 but that he had some nail salons or something. What

NORTH CAROLINA :
MECKLENBURG COUNTY:

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-5354

JDH CAPITAL, LLC)
)
Plaintiff,)
)
v.)
)
)
REBECCA D. FLOWERS, DWF)
DEVELOPMENT, INC., and FLOWERS)
PLANTATION FOUNDATION, INC.)
f/k/a FLOWERS PLANTATION, INC.,)
)
Defendants.)
)

REBECCA D. FLOWERS' FIRST SET
OF INTERROGATORIES AND FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS TO
PLAINTIFF, JDH CAPITAL, LLC

Defendant Rebecca D. Flowers ["Ms. Flowers"] submits this First Set of Interrogatories and First Request for Production of Documents to Plaintiff, JDH Capital, LLC ["JDH"] pursuant to the provisions of Rule 33 and 34 of the North Carolina Rules of Civil Procedure and Rule 18.2 of the General Rules of Practice for the North Carolina Business Court as follows:

I.

INSTRUCTIONS AND DEFINITIONS

The following instructions and definitions apply to each interrogatory and request for production set forth below:

A. Each interrogatory and request for production shall be continuing to the extent permitted by Rule 26(e) of the North Carolina Rules of Civil Procedure.

B. In answering each interrogatory, you must furnish all information known to you or to your employees, agents or representatives, including attorneys. If you cannot answer any interrogatory in full, you must answer to the fullest extent possible, stating whatever information knowledge or belief you now have concerning the unanswered portions.

17. Identify each and every person known or believed by Plaintiff to possess knowledge or information relating to whether "defendants knew that the aforementioned intellectual capital, services and labor were not given gratuitously to them by JDH," as alleged in Paragraph 36 of the Complaint, briefly summarizing the nature of the knowledge or information known or believed to be possessed by each person so identified.

ANSWER:

18. State the amount, specific causation, method of determination or calculation of amount for each and every separately identifiable component and/or subcomponent of damage for which Plaintiff seeks recovery under its purported second cause of action, specifically including a detailed description of how Plaintiff calculated the figure of \$450,000 alleged in Paragraph 37 of the Complaint.

ANSWER:

19. State in detail the factual basis for the allegations in Paragraph 42 that "Defendants had no intention of carrying out [the statements alleged in Paragraph 41] at the time they [allegedly] were made," and the similar factual allegation in Paragraph 50 of the Complaint, identifying each person known or believed to have knowledge or information supporting such

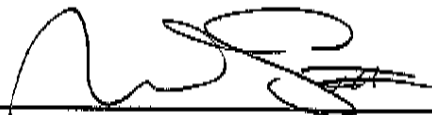
29. Any documents identified in Plaintiff's responses to the foregoing Interrogatories and any documents consulted by Plaintiff in compiling the answers to the foregoing Interrogatories.

RESPONSE:

30. All documents Plaintiff contends support its allegations against Flowers or any other named Defendant, to the extent not produced in response to any of the foregoing requests.

RESPONSE:

This the 11th day of June, 2007.



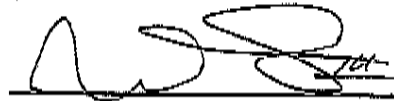
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *Rebecca D. Flowers' First Set of Interrogatories and First Request for Production of Documents to Plaintiff, JDH Capital, LLC* was duly served this day on all parties by forwarding a copy thereof via telefax and United States mail, addressed as follows:

Robert L. Burchette
Martin L. White
Kenneth Lautenschlager
Johnston Allison & Hord, P.A.
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Attorneys for Plaintiff

This the 11th day of June, 2007.



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