

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1760

BEFORE THE NORTH CAROLINA BUSINESS COURT

MILLER & LONG CO., INC.,

Plaintiff,

v.

INTRACOASTAL LIVING, LLC; SUPERIOR
CONSTRUCTION CORPORATION;
WESTERN SURETY; ET AL.,

Defendants.

**MEMORANDUM OF LAW IN
OPPOSITION TO PRESERVE HOLDING,
LLC'S EMERGENCY MOTION TO
DISMISS CLAIM AND MOTION TO
CANCEL LIS PENDENS**

COMES NOW, Defendant, Superior Construction Corporation ("Superior"), by and through its undersigned counsel, and pursuant to Rule 15.6 of the General Rules of Practice and Procedure for the North Carolina Business Court and presents this Memorandum of Law in Opposition to Preserve Holding, LLC's Emergency Motion to Dismiss Claim and Motion to Cancel *Lis Pendens*.

In opposition to this Motion, Superior states as follows:

BACKGROUND FACTS/PROCEDURE

On or about January 21, 2005, Superior entered into a written contract (the "Primary Contract") with Intracoastal Living, LLC the Owner ("Intracoastal" or the "Owner") of the Preserve Project, located in Oak Island, North Carolina ("Preserve" or "Project") for the construction of Buildings 2, 3, and 4 of the Project.

Subsequently, the Defendant, Superior, as general contractor, entered into written subcontract agreements (the "Subcontracts") with Miller & Long, as subcontractor, pursuant to which Miller & Long was to, among other things, furnish and install all concrete, post-tensioning

materials and accessories, reinforcing steel and accessories, and the placement of all other sub trade embeds required to construct these concrete frame buildings from the stone columns (by others) up through and including the roofs in connection with the construction of the Project.

Intracoastal entered into a construction loan agreement with Wachovia wherein Wachovia was to advance Intracoastal money to be used specifically for the construction of the Project, as evidenced by Intracoastal's Note, which was secured by a Deed of Trust on the Project. Intracoastal defaulted on its obligations pursuant to the agreement with Wachovia in relation to the Project. Wachovia requested that the Trustee initiate foreclosure proceedings on the real property upon which the Project is located as a result of Intracoastal's default.

On or about October 9, 2007, James and Bridget Chirico formed Preserve Holdings, LLC ("Preserve Holdings") and thereafter, on or about January 16, 2008, the remaining Preserve Project was sold to Wachovia at foreclosure.

Preserve Holdings later purchased the Project from the trustee with an upset bid of \$17,500,000.00.

Since the foreclosure sale of the Project, numerous parties, including Miller & Long, in the multiple actions involved in the litigation surrounding the Project, have amended their claims to include allegations against Preserve Holdings, and James and Bridget Chirico, including, but not limited to, allegations of various breaches of fiduciary duty, unfair and deceptive trade practices, punitive damages and misconduct by James and Bridget Chirico relating to the Project.

After Preserve Holdings purchased the Project from the trustee, they resumed construction of the Project. Preserve Holdings has sold multiple units and have pending sales on other units within the Project.

ARGUMENT

I. Miller and Long has alleged a valid recognizable claim for relief in its Amended Complaint and Preserve Holding, LLC's Motion to Dismiss should be denied.

Preserve Holding's Motion to Dismiss is brought pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure specifically alleging that Miller and Long's Fifth Claim for Relief in its Amended Complaint, in which Miller & Long seeks the imposition of a constructive trust on the real property upon which it performed work, fails to state a claim upon which relief can be granted.

A Motion to Dismiss brought under Rule 12(b)(6) is a motion to test the legal sufficiency of a Complaint. When considering a 12(b)(6) Motion the Court should determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *Craven v. Cope*, 656 S.E.2d 729, 731 (2008). Towards that end, "*the complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.*" *Id.* Quoting *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C.App. 477, 480, 593 S.E.2d 595, 598 (2004). [Emphasis supplied by Court].

As Preserve Holdings correctly notes in its brief, dismissal under Rule 12(b)(6) is only appropriate when one of the following three conditions is satisfied: (1) the Complaint on its face reveals that no law supports the plaintiffs' claim, (2) the complaint on its face reveals the absence of facts sufficient to make a claim, or (3) the complaint discloses some fact that necessarily defeats the plaintiffs' claim. *Harrold v. Dowd*, 149 N.C.App. 777, 780, 561 S.E.2d 914, 917 (2002). "A

claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle him to relief.” *Id.*

In its brief, Preserve Holdings seeks to clear the formidable legal hurdles posed above by asserting that the Plaintiff’s fifth claim for relief in its amended complaint is not recognized or supported by any legal authority and must therefore be dismissed. Preserve Holdings relies heavily on the differences between an equitable lien imposed on personal property and a constructive trust imposed on real property to make its argument. In *Embree*, which is cited by Plaintiff and Defendant Preserve Holdings alike in their briefs, the Court imposed an equitable lien on the funds held by a construction lender for the benefit of a subcontractor that performed work on the project. *Embree Construction Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 411 S.E.2d 916 (1992). The Plaintiff in *Embree* found itself in a position similar to the position that Miller & Long currently occupies, but instead of real property in the hands of the owner, *Embree* had the luxury of pursuing unspent funds in the hands of the construction lender. In this case, Miller & Long does not have the benefit of undisbursed funds, and their only remedy against Preserve Holdings lies in the real property in question.

Preserve Holdings argues that the claim for a constructive trust sought in this case should be dismissed based on the fact that a similar plaintiff in *Embree* sought and was granted a different sort of equitable relief in its claim. In so doing, however, Preserve Holdings conveniently ignores the fact that Miller and Long has no unspent funds upon which to seek relief, and fails to mention or explain the *Embree* Court’s further reasoning which states that “a person entitled to restitution is entitled, in an appropriate case, to a remedy by a proceeding in equity...such remedies include decrees establishing *and enforcing a constructive trust upon property...*” *Id.* (Emphasis added). In *Embree*, when the subcontractor sought recovery against the lender, the facts logically led the

subcontractor to seek an equitable lien on funds, which was appropriate. In this case the subcontractor seeks recovery against the owner of the real property, which logically leads to a constructive trust on the real property held by the owner, which the *Embree* Court acknowledges as one of several appropriate remedies in a case of unjust enrichment. *Id.*

Furthermore, Preserve Holding's assertions that a constructive trust is not an appropriate remedy following the purchase of a parcel of property after a foreclosure are not supported by law. There are numerous cases in North Carolina confirming that a property sold and purchased at foreclosure can be the subject of a constructive trust. For instance, if the administrator of an estate breaches his duty, allows a property to go into foreclosure, and then purchases the property in his personal name for his own benefit, a constructive trust will be imposed on the property to prevent the unjust enrichment of the administrator. *Pearson v. Pearson*, 227 N.C. 31, 40 S.E.2d 477 (1946). Clearly, the mere sale and purchase of a parcel of property at foreclosure is not sufficient to deny a plaintiff the right to seek a remedy against the property itself in the form of a constructive trust. Preserve Holdings attempts to convince the Court that its title obtained through foreclosure automatically prevents the imposition of a constructive trust. If that were the case, however, the mechanism of a constructive trust would essentially be useless since its entire purpose is to place a lien on a parcel of property whose title would otherwise be clear.

Therefore, the imposition of a constructive trust and *lis pendens* are certainly supported by the principals of equity and the laws of the State of North Carolina in consideration of the allegations of mismanagement and breaches of duty levied against Mr. Chirico. These include his acts and omissions which caused Intracoastal to default on its obligations to Wachovia resulting in the foreclosure, and his subsequent actions on behalf of Preserve Holdings to obtain the property in question after the foreclosure, without compensation to the parties who improved the property for

the \$8,000,000 that remains unpaid. Mr. Chirico and Preserve Holdings seek to profit from their abuse of the foreclosure mechanism to the detriment of the parties who added in excess of \$8,000,000.00 to the value of the property by virtue of the improvements placed thereon.

II. Miller & Long is entitled to a *lis pendens* on the Property since its Complaint alleges a valid claim affecting title to real property.

Miller & Long's Amended Complaint seeks the imposition of a constructive trust on the property currently held by Preserve Holdings. In support of its constructive trust, Miller and Long filed a *lis pendens* against the property to preserve and protect their rights in the property. Preserve Holdings seeks to have the *lis pendens* cancelled by asserting that Miller & Long's claim for a constructive trust is an insufficient interest in property to support the imposition of a *lis pendens*. The North Carolina Supreme Court and the North Carolina Court of Appeals, however, have both held that a *lis pendens* is appropriate where a plaintiff: (1) can trace his funds into the property; and (2) alleges either an express or implied trust. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965); *Pegram v. Tomrich Corp.*, 4 N.C.App. 413, 166 S.E.2d 849 (1969); *Cap Care Group, Inc. v. McDonald*, 149 N.C.App. 817, 824, 561 S.E.2d 578, 583 (N.C.App. 2002).

Miller & Long performed work on the property in question, and can certainly trace its expenditures for labor, equipment, and materials into the property. In support of its attempts to gain recompense for its expenditures, Miller & Long alleges an implied trust on the property upon which it performed the work. Miller and Long has unequivocally met both considerations demanded by the Court for the imposition of a *lis pendens*, and the cancellation of their interest in the property would deprive them of their sole remedy against one of the wrongdoers in question.

III. Preserve Holdings Allegations Regarding the burden imposed by Miller & Long's *Lis Pendens* is Irrelevant and Does Not Support the Dismissal of the *Lis Pendens*

Preserve Holdings notes several times in its brief that the constructive trust and *lis pendens* filed by Miller & Long places a burden on their ability to sell units within the Project. Unfortunately for Preserve Holdings, the burden imposed by a constructive trust and *lis pendens* is not a factor to be considered in deciding a 12(b)(6) motion to dismiss. In fact, Preserve Holdings cited no legal authority to support their position that the burden imposed by *lis pendens* should be a consideration in this matter.

Ironically, Preserve Holdings seems to argue that equity favors Preserve Holdings motion to dismiss and cancel the *lis pendens*. However, their argument regarding the inequitable burden imposed by the *lis pendens* ignores the burden that would be placed on Miller & Long if their *lis pendens* is dismissed leaving them without an effective remedy against Preserve Holdings. This is especially true in light of Miller & Long's role as an unpaid subcontractor that improved the real property purchased by Preserve Holdings with full knowledge of Miller & Long's status as an unpaid subcontractor.

Moreover, even if Miller & Long's *lis pendens* is dismissed Preserve Holdings still will not have clear title to the property. Defendant, Superior, also has a *lis pendens* and constructive trust on the real property in its action against Preserve Holdings, James Chirico and Bridget Chirico. Due to its role in the Project as general contractor with a direct contract with the owner, Superior is also entitled to a constructive trust and *lis pendens* which will remain a burden on the property regardless of the court's decision in this matter. Therefore, Preserve Holdings argument regarding the burden it faces as a result of the *lis pendens* filed by Miller & Long is a futile and irrelevant

argument due to the nature of a 12(b)(6) motion to dismiss and the other existing constructive trust and *lis pendens* currently in effect in a separate action.

IV. Conclusion

Given the stringent legal standards that Preserve Holdings must satisfy to prevail on their Motion to Dismiss pursuant to Rule 12(b)(6), the allegations contained within the Amended Complaint filed by Miller and Long are more than sufficient to satisfy the legal requirements for a constructive trust and *lis pendens* sought by Miller and Long. Accordingly, Preserve Holdings Motion to Dismiss Claim and Cancel *Lis Pendens* should be denied.

This the 25th day of November, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Superior Construction Corporation's **MEMORANDUM OF LAW IN OPPOSITION TO PRESERVE HOLDING, LLC'S EMERGENCY MOTION TO DISMISS CLAIM AND MOTION TO CANCEL LIS PENDENS**, has been filed with the North Carolina Business Court and notification form the Court sent to the following:

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