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,

vs.

INTRACOASTAL LIVING, LLC, SUPERIOR CONSTRUCTION CORPORATION and PRESERVE HOLDINGS, LLC,

Defendants.

PRESERVE HOLDINGS, LLC'S REVISED MEMORANDUM IN SUPPORT OF MOTION TO DISMISS and MOTION TO CANCEL LIS PENDENS

COMES NOW Preserve Holdings, LLC ("Preserve"), through counsel, and hereby submits this Revised Memorandum in support of its motions for dismissal of claim pursuant to N.C. Gen. Stat. §1A-1, Rule 12(b)(6) and cancellation of notice of lis pendens in this matter.

In the Amended Complaint filed October 27, 2008 ("Amended Complaint"), Miller & Long Co. Inc. ("M&L") asserts two separate claims of relief against Preserve: a claim for recovery of the quantum meruit value of work performed by M&L on the basis of unjust enrichment and a claim for imposition of a constructive trust or equitable lien upon certain real property of Preserve. Both of these claims may be properly dismissed for failing to state a claim upon which relief may be granted under any legal theory. However, the sole focus of this expedited motion is the latter claim which, in conjunction with an improperly filed lis pendens, presents a potentially devastating chilling effect on credit and prohibits Preserve from fulfilling its contractual obligations to third parties. Preserve shall wait to address the validity of the former claim at a later date in the normal course of this litigation.

I. MOTION TO DISMISS -- M&L's Fifth Claim of Relief: Imposition of constructive trust on real property.

"When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. A complaint may be dismissed pursuant to Rule 12(b)(6) where (1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim." *Copper v. Denlinger,* COA07-205 (2008) (internal citations omitted).

Paragraph 98 of M&L's Amended Complaint urges the Court to "impose a constructive/equitable trust" on certain real property currently owned by Preserve, identified as Buildings 4 and 5 of a condominium development located in Brunswick County, North Carolina (the "Property").

This asserted claim for relief is not recognized or supported by legal authority and therefore must be dismissed.

A. Factual Allegations.

Taken as true for purposes of this motion, the Amended Complaint asserts that M&L performed work on the Property and ultimately filed a claim of lien on the Property for payment of amounts owed to it; that M&L's claim of lien was subordinate to a duly recorded deed of trust securing a construction loan from Wachovia Bank, N.A. ("Wachovia") to the owner of the Property at the time, Intracoastal Living, LLC ("Intracoastal"); that Intracoastal defaulted on the construction loan and thereafter Wachovia foreclosed on its deed of trust (the "Wachovia Deed of Trust") extinguishing M&L's claim of lien; that Preserve purchased the Property at the

foreclosure sale receiving title *via* a trustee's deed free and clear of M&L's claim of lien; and that certain individual owners of Preserve were also members of Intracoastal.

B. No Lien on Real Property Here.

i. Preserve Did Not Acquire Property by Fraud, Breach of Duty or Inequitable Circumstance.

The North Carolina Supreme Court in *Wilson v. Crab Orchard Development Co., Inc.*, 276 NC 198, 171 SE 2d 873 (1970) defined a constructive trust as:

> "a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder to title to, or of an interest in, property which such holder ***acquired through*** fraud, breach of duty or some other circumstance making it inequitable for him to retain [title] against the claim of the beneficiary of the constructive trust...." *Id* at 757 (emphasis added).

After discussing a number of circumstance where fraud was not presumed, or where relationships were insufficient, or where breaches of promises where not sufficiently plead, the Supreme Court noted that "[a] Rule 12(b)(6) motion asks whether the pleadings allege a valid claim and all of the elements necessary to support the claim." There, the court found that the plaintiff had sufficiently alleged that the defendant had made a "false promise ... prior to the legal conveyance which caused the plaintiff-grantor to convey the land" to the defendant. *Id.* at 758.

As noted above, the focus of this motion to dismiss must remain on the ***manner*** by which the defendant ***acquired*** the property. Thus, a constructive trust of any sort,[1] let alone one seeking to impose an equitable lien on real property, requires that the defendant acquire the property through fraud, breach of duty or some other inequitable circumstance that exists and is specific between the parties. As noted in *Patterson v. Strickland*, 133 NC App. 510, 515 SE 2d 915

[1] Even where a lien is placed on funds, said lien does not reach future profits. *Frederic M. Gee v. Edward R. Eberle*, 279 Pa. Super.101, 420 A.2d 1050 (PA 1980). Thus, M&L's claim that the "[a] constructive trust on the property is necessary in order to prevent, the continued and unchecked sale of units...," is utterly misplaced.

(1999), "a constructive trust arises when one obtains the legal title to property in violation of a duty he owes to another."

Here, none of the *Wilson* prerequisites exist. Preserve did not have a fiduciary or confidential relationship with M&L. It did not acquire the property through fraud. Indeed, M&L does not even argue that the foreclosure proceeding here was invalid. Nor did Preserve acquire title through some other inequitable circumstance—such as promising to pay M&L if M&L would remove a valid lien so that Preserve could buy the property and then, once in possession of title, refusing to make payment as promised.

When a plaintiff fails to allege facts that are necessary to make out a valid claim, the claim must be dismissed. *Copper v. Denlinger,* COA07-205 (2008). Since M&L has not alleged any of the *Wilson* requirements, it has failed to allege facts that are necessary to make out a valid claim, and its fifth claim for relief must be dismissed.

ii. No Allegations of Fraud, Breach of Duty or Inequitable Circumstance.

Interestingly, M&L asks this Court to take judicial notice of certain allegations made in complaints, and even proposed complaints, in actions outside the present action. There is no legal basis for this Court to take judicial notice of naked assertions and certainly no legal basis for permitting M&L to transport allegations made by another plaintiff in another case by way of its brief into its complaint in this matter. Nonetheless, even with the support of these outside pleadings, M&L still fails to allege the *Wilson* requirements. Simply put, there are no allegations in any complaint that Preserve acquired the Property by fraud, breach of duty to M&L or through some inequitable circumstance involving M&L. As noted above, dismissal of a claim is appropriate where the plaintiff fails to allege facts to support the claim.

In this action, M&L merely concludes that it is entitled to an equitable lien on the Property but utterly fails to allege any facts that are necessary to make out such a claim. It is well settled, however, that "[w]hen analyzing a 12(b)(6) motion, the court should not presume legal conclusions of law to be true." *Holleman v. Aiken*; 2008 NC 105.271 *citing Acosta v. Byrum,* 180 N.C. App. 562, 567, 638 S.E.2d 246, 250 (2006). Accordingly, M&L's fifth claim for relief must fail.

iii. New Cases Cited by M&L also Focus on Manner of Acquisition.

The cases that M&L cites in its response share *Wilson's* focus on the manner by which the defendant acquired title.[2] Those cases plainly show that a lien on real property is appropriate only where the defendant acquired title through fraud or through a breach of a fiduciary or confidential relationship or through an inequitable circumstance that specifically existed between M&L and the defendant.

In *Rhue v. Rhue*, 658 SE 2d 52 (NC 2008), which M&L now cites, the court expressly found that the plaintiff there "had presented ample evidence for the jury to infer that a confidential relationship, both personal and business, existed between the parties...." The parties there had been married, separated and then reconciled. Over the course of their 26 year relationship, the plaintiff showed that she had provided monetary contribution for the acquisition of multiple tracts of real property valued in excess of $1.245 million, in addition to providing household and other services to the relationship. Throughout, the defendant promised that "he would provide for her", that they would "grow old together" and that he was buying the property so that they would have it when they retired. *Id.* at 58. On these facts the court found that "[i]t

[2] The cases M&L initially cited in its Memorandum of Law in Support of Motion for Leave of Court to Amend Complaint permitted, under certain limited circumstances, an equitable lien on funds, as opposed to an equitable lien on real property.

would be inequitable for the defendant to benefit from plaintiff's reliance on his promise that the property was to be used for their mutual benefit." *Id.*

In *Norman v. Nash Johnson & Son's Farm Inc.*, 140 NC App. 390, 537 SE 2d 248 (2000), another case cited by M&L in its response, M&L correctly recites the case's factual background, but ignores its salient difference. In *Norman* the defendant had a fiduciary duty ***to the plaintiffs*** which the defendant breached. When the defendant profited from the breach of that duty, the court permitted the claim for a construct trust to go forward. Said the court, "[h]ere, there is ample evidence both that the defendants owed a 'special duty' ***to the plaintiffs***, and that plaintiffs have suffered a loss different in kind and degree from the individual defendant shareholders." *Id.* (emphasis added). There was no such duty existing between M&L and Preserve in our case, nor is one even claimed.

Thus, neither *Rhue* nor *Norman* lend support to M&L's unprecedented claim for an equitable lien on the real property here.

C. Fundamental Distinction between Equitable Lien on Funds and Equitable Lien on Land.

i. Embree v. Rafcor.

In its initial Memorandum of Law in Support of Motion for Leave of Court to Amend Complaint filed August 5, 2008, M&L relies heavily upon the decision of the North Carolina Supreme Court in *Embree v. Rafcor*, 330 N.C. 487, 411 S.E.2d 916 (N.C. 1992) and a handful of cases from jurisdictions outside of North Carolina. In doing so, however, M&L ignores a fundamental distinction between imposing an equitable lien or constructive trust on ***personal*** property as opposed to ***real*** property.

The *Embree* Court addressed the issue of "...whether a contractor who alleges it satisfactorily completed the construction project is entitled to equitable relief in order to reach

the ***balance of loan funds withheld*** by a construction lender..." *Id.* at 488 (emphasis added). The Court noted that the plaintiff asserted that it had completed construction of the project and that the defendant construction lender was unjustly enriched by refusing to disburse available loan funds despite its knowledge that plaintiff was still owed money for its work. *Id.* at 491. The Court further noted, by way of footnote, that the construction lender's foreclosure extinguished any subordinate lien that the plaintiff may have had on the subject real property. *Id.* at 501. In addressing the plaintiff's attempt to obtain an alternative remedy, the Court held that the balance of the loan funds withheld by the construction lender constituted a "trust fund" on which plaintiff could claim an "equitable lien." *Id.* at 491.

Accordingly, once the plaintiff had lost its lien rights to the real property due to the foreclosure it shifted its focus to the construction lender and the undistributed construction loan funds. Therefore, *Embree* does not endorse a theory by which a subcontractor may maintain a lien on land following a lawful foreclosure of a senior lien or deed of trust. As such, *Embree* does not support M&L's claim in this action.

ii. Other Cited Cases.

M&L cites several cases from other jurisdictions as further support for its misplaced effort to assert an equitable lien on real property. Those cases, like *Embree*, involved a contractor or subcontractor whose statutory lien rights on real property had either expired or had been extinguished by a lawful foreclosure and a construction lender who retained undisbursed construction loan funds. Also as in *Embree* the plaintiffs were permitted to assert a lien on the undisbursed construction loan funds. None of the cases, however, support the proposition that a lien on the real property could be countenanced.

In *Gee v. Eberle,* 279 Pa. Super. 101, 420 A.2d 1050 (Pa. 1980) the court held that a subcontractor may be entitled to a constructive trust on funds retained by lender, but only to the extent of any unjust enrichment actually proven. In *Irwin Concrete v. Sun Coast Properties,* 33 Wn. App. 190, 653 P.2d 1331 (1982) the subcontractor was allowed to recover payment from the lender who foreclosed on property where that lender knew about and silently acquiesced to subcontractor's continuation of work after the default by the borrower that gave rise to foreclosure. In *Emerald Designs, Inc. v. Citibank,* 18 Fla. Law W.D. 2434, 626 So.2d 1084 (Fla. App. 1993) the court permitted an equitable lien on undisbursed construction loan funds where the lender foreclosed yet retained those funds. Finally, in *Spring Construction v. Harris,* 562 F.2d 933 (4th Cir. 1977) the court held that the undisbursed construction loan funds could constitute an identifiable *res* upon which contractor could claim an equitable lien.

Thus, M&L again ignores the vital distinction between those cases and the claim for relief it asserts here. In each of those cases where the plaintiff's lien rights to the ***real*** property had been extinguished by foreclosure or otherwise lost the equitable lien only attached to ***personal*** property in the form of undistributed construction loan funds.

Here, M&L availed itself of its statutory lien rights afforded by Chapter 44A of the North Carolina General Statutes. Its lien on the Property was later extinguished by a valid foreclosure of the Wachovia Deed of Trust. M&L's Amended Complaint contains no allegation that this foreclosure was in any way defective. It does not suggest that the foreclosure should be set aside. More importantly, M&L expressly admits in Paragraph 40 of the Amended Complaint that the foreclosure in fact extinguished its prior claim of lien on the real property.

In keeping with the decisions in *Embree, Gee, Irwin, Emerald Designs* and *Spring Construction,* M&L's efforts at equitable recovery here are improperly directed at the Property

and, instead, should be directed elsewhere. Yet, in persisting with its claim to a lien on the Property *despite* the extinction of any such lien *via* lawful foreclosure, M&L urges this Court to employ its equitable powers to take the extraordinary step of setting aside or ignoring an admittedly lawful foreclosure by imposing an "equitable" lien on the Property. Such relief stands in stark contrast to the very case law upon which M&L relies.

II. CANCELLATION OF NOTICE OF LIS PENDENS

The filing of a notice of *lis pendens* "is authorized only in actions affecting title to real property." *Parker v. White,* 235 N.C. 680 at 687 (1952) (citing N.C. Gen. Stat. §1-116). "In determining whether a cause of action affects title to real property within the meaning of G.S. § 1-116(a)(1), the nature of the action must be analyzed by reference to the facts alleged in the body of the complaint rather than by what is contained in the prayer for relief." *George v. Administrative Office of the Courts,* 142 N.C. App. 479, 542 S.E.2d 699 (2001) (citing *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 166 S.E.2d 849 (1969)). "Actions which are considered to fall within the lis pendens statute include actions to set aside deeds or other instruments for fraud, to require specific performance, or to correct a deed for mutual mistake, and other like cases..." *Id.* at 479. "[T]he courts of this state have consistently held that the lis pendens statute does not apply to an action the purpose of which is to secure a personal money judgment even though such a judgment, if obtained and properly docketed, is a lien upon the land of the defendant named in the complaint." *Id.* at 479 (internal citations omitted).

In the action before this Court, as noted above, M&L does not allege a legal defect in the foreclosure of the Wachovia Deed of Trust. It does not seek to set aside or modify the deed that transferred title to Preserve. The only allegations within the Amended Complaint purporting to impact the title to the Property are asserted by way of M&L's prayer for imposition of an

ethereal equitable interest in title *despite* a lawful foreclosure and conveyance of clear title to Preserve. As previously set forth herein, this particular claim of relief is not supported by law and must be dismissed. None of M&L's remaining allegations or claims purport to affect title as is required in order to justify the filing of a notice of *lis pendens.* The nature of M&L's action is not one affecting title to real property but is rather one seeking to secure a monetary judgment. Accordingly, the notice of *lis pendens* was filed by M&L without authorization or justification and constitutes an unlawful cloud on title and acts as an unlawful restraint on Preserve's lawful rights of alienation with respect to the Property.[3] Given the pressing and onerous nature of this unlawful restraint of Preserve's rights and in order to prevent any unnecessary injury or burden on Preserve's lawful rights to convey or otherwise deal with the Property, M&L's notice of *lis pendens* must be cancelled immediately.

III. CONCLUSION

For the reasons stated herein, Preserve respectfully prays this Honorable Court to dismiss M&L's claim for a constructive trust as set forth in its Fifth Claim for Relief and to order that the lis pendens which the plaintiff has filed as to the Property be cancelled.

This the 21st day of November, 2008.

ANDRESEN & ARRONTE, PLLC

/s/Kenneth P. Andresen
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[3] In further support of the detrimental impact of the lis pendens, see Affidavit of Andrew S. Whiteley a copy of which is attached hereto as Exhibit A.

STATE OF NORTH CAROLINA

COUNTY OF BRUNSWICK

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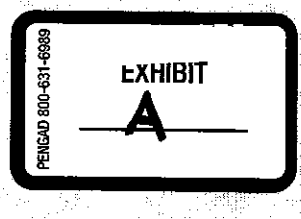
Defendants.



AFFIDAVIT OF ANDREW S. WHITELEY

COMES NOW Andrew S. Whiteley, after being sworn and says:

1. I am over eighteen years of age, am a resident of Wake County, North Carolina and make this affidavit of my personal knowledge.

2. I am a partner in a corporate entity organized and existing under the laws of the State of North Carolina known as Landworx Development, LLC ("Landworx"), which has been engaged by Preserve Holdings, LLC ("PH") to assist in the completion, marketing and sales of the condominium project in Oak Island, North Carolina known as "The Preserve".

3. I have become aware of a lis pendens that has been filed as to the real property at The Preserve by the plaintiff captioned above. The filing of the lis pendens has created a great deal of additional financial stress on PH. Already, since the filing of the lis pendens on November 3, 2008 the closings of the sales of two condominium units

have had to be postponed as a result of the cloud on title imposed by the lis pendens. The attorneys for the title insurance companies involved in these closing transactions have refused to proceed with the closings unless and until the title defect created by the lis pendens has been resolved so as to ensure that the purchasers acquire clean title. Moreover, additional condominium sales are at various stages of completion and will similarly become jeopardized if the lis pendens remains on title to the property.

4. Additionally, I have been closely involved with the refinancing effort for the project at The Preserve and know that a refinancing is targeted in the very near future. A refinancing of The Preserve project is essential in order for a completion of the project's construction and additional sales to occur. Such refinancing will not occur, in my opinion, as long as the lis pendens remains on title to the property. Should the refinancing not occur, in my opinion, the entire remainder of the project is in jeopardy of again going into foreclosure by the holder of the current deed of trust secured by the property.

Further your affiant sayeth not.

This the 11th day of November 2008.

Andrew S. Whiteley

STATE OF NORTH CAROLINA
COUNTY OF Wake

Sworn to and subscribed before me
this the 11 day of November 2008

Notary Public

LARRY D. McBENNETT NOTARY PUBLIC WAKE COUNTY, N.C.

My Commission Expires: 2-20-09

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Defendants.

CERTIFICATE OF COMPLIANCE WITH RULE 15.8

NOW COMES defendant Preserve Holdings, LLC ("Preserve"), by and through counsel, and hereby certifies that **PRESERVE HOLDINGS, LLC'S REVISED MEMORANDUM IN SUPPORT OF MOTION TO DISMISS and MOTION TO CANCEL LIS PENDENS** filed in this matter on November 24, 2008, complies with Rule 15.8 of the Amended General Rules of Practice and Procedure for the North Carolina Business Court.

This the 21th day of November, 2008.

ANDRESEN & ARRONTE, PLLC

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Attorneys for Preserve Holdings, LLC

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **PRESERVE HOLDINGS, LLC'S REVISED MEMORANDUM IN SUPPORT OF MOTION TO DISMISS and MOTION TO CANCEL LIS PENDENS** by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 24th day of November, 2008.

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