

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

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

MILLER & LONG, INC.,)
Plaintiff)
v.)
INTRACOASTAL LIVING, LLC, SUPERIOR)
CONSTRUCTION CORPORATION, and)
PRESERVE HOLDINGS, LLC,)
Defendants)

ORDER

THIS CAUSE, designated a complex business case by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to N.C. Gen. Stat. § 7A-45.4(b), and 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, came before the court on Defendant Preserve Holdings, LLC’s Motion to Dismiss and Cancel Lis Pendens (the “Motion”), pursuant to the provisions of Rule 12(b)(6), North Carolina Rules of Civil Procedure (“Rule(s)"); and

THE COURT, having considered the briefings of the parties and the ends of justice, CONCLUDES that:

I.

PROCEDURAL AND FACTUAL BACKGROUND

Appropriate matters of record and the Amended Complaint reflect the following:

1. This controversy arises out of construction of 42.5-acre, multiple-building condominium project (the “Preserve Project”) undertaken in Brunswick County by an entity known as Intracoastal Living, LLC (“Intracoastal”), as owner.

2. Intracoastal contracted with Defendant Superior Construction Corporation (“Superior”) to act as general contractor for the Preserve Project. Superior then contracted with Miller & Long Co., Inc. (“M&L”) to act as a concrete subcontractor on the Preserve Project.

3. When the Preserve Project began, Intracoastal entered into a construction loan agreement with Wachovia Bank (“Wachovia”), wherein Wachovia was to loan money to Intracoastal for use specifically in construction of the Preserve Project. The loan was secured by a deed of trust on the Preserve Project. Ultimately, Intracoastal defaulted on the Wachovia loan.

4. Neither Intracoastal nor Superior has satisfied all of the claims and judgments of the subcontractors on the Preserve Project, including those contended to be owed to M&L. It is contended that there exists a substantial debt owing from Intracoastal to Superior.

5. Among others, one James M. Chirico, Jr. (“Chirico”), and his wife, were affiliated with Intracoastal¹ during development of the Preserve Project.

6. On or about October 9, 2007, more than one year prior to the filing of the Amended Complaint, Chirico formed Defendant Preserve Holdings, LLC (“Preserve”).

7. As a result of the default by Intracoastal on the construction loan, Wachovia initiated foreclosure proceedings involving the Preserve Project. The foreclosure included buildings 4 and 5, and certain condominium units in buildings 2 and 3 of the Preserve Project. On or about January 16, 2008, buildings 4 and 5 of the

¹ Amd. Compl. ¶ 18. It is unclear, upon a comparison of the Amended Complaint and the various Briefs filed in support of and opposition to the Motion, whether Plaintiff contends Chirico and his wife individually were (a) members of Intracoastal or (b) members of an entity known as Cape Fear Trading Group VI, LLC, which itself was a member of Intracoastal. For purposes of the instant Motion, the court concludes the difference is not of consequence.

Preserve Project, and certain condominium units in buildings 2 and 3, were bid in by Wachovia at foreclosure. Subsequently, on or about January 28, 2008, Preserve purchased the same property from the selling trustee by way of an upset bid.

8. Buildings 2 and 3 of the Preserve Project (the "Property") are the focus of Plaintiff's Motion.

9. On October 27, 2008, Plaintiff M&L filed an Amended Complaint, which asserts seven separate claims for relief ("Claims") against the various Defendants in this action. Only two of the Claims are against moving Defendant Preserve: (a) the Fourth Claim for Relief, which is a claim for recovery of the quantum meruit value of the work performed by M&L as subcontractor on the Property, and (b) the Fifth Claim for Relief, which is a claim for imposition of a constructive trust or equitable lien upon the Property. The Motion does not address the Fourth Claim for Relief. Consequently, only the Fifth Claim for Relief is before the court for determination.

10. On November 3, 2008, M&L filed its Notice of Lis Pendens, pursuant to the provisions of N.C. Gen. Stat. § 1-116, contending that the Amended Complaint seeks to affect title to the Property.

11. On November 11, 2008, Defendant Preserve filed its Motion, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule(s)"). Preserve's Motion seeks (a) dismissal of M&L's Fifth Claim for Relief, and (b) cancellation of the Notice of Lis Pendens.

12. On November 17, 2008, Plaintiff M&L filed its response to the Motion. Preserve filed its reply brief on November 18, 2008. Upon its own motion, the court held a telephonic status conference with regard to briefings and issues raised in the

Motion. During the conference, all parties agreed to submit revised briefs pursuant to an expedited briefing schedule. On November 21, 2008, Preserve filed a Revised Motion to Dismiss and Motion to Cancel Lis Pendens. On November 25, 2008, Defendants Superior and Western Surety Company filed a joint memorandum in opposition to the Motion. On December 3, 2008, M&L filed a revised response to the Motion. On December 5, 2008, Preserve filed a revised reply brief. The Motion is now fully briefed and ripe for determination.

II.

THE MOTION TO DISMISS

1. In substance, as it relates to the instant Motion, the Plaintiff's Amended Complaint alleges a claim for breach of contract against Superior for work done on the Preserve Project in Brunswick County. Among other things, the Complaint contends, in its Fifth Claim for Relief, that Plaintiff is entitled to a constructive trust or equitable lien on the Property.

2. Preserve is a North Carolina limited liability company formed by Chirico in the fall of 2007 for the purpose of buying part of the Preserve Project out of foreclosure. Chirico was a member of Intracoastal, the entity that owned the Preserve Project prior to foreclosure; and some of the same members of Intracoastal who were responsible for Intracoastal's default on its debt to Wachovia were active in forming Preserve.² M&L contends, therefore, that Preserve was not an innocent third-party purchaser at foreclosure, and that it is subject to the relief sought by the Fifth Claim for Relief.

3. In its Rule 12 Motion, Preserve contends that under the facts asserted by M&L in the Amended Complaint, there can be no constructive trust or equitable lien

² This is alleged by Plaintiff M&L upon information and belief. Amd. Compl. ¶ 94.

imposed on the real property purchased by Preserve because the Amended Complaint does not allege facts supportive of a legal conclusion that the Preserve Project was acquired by fraud, breach of duty or inequitable circumstance. It therefore contends that the Fifth Claim for Relief should be dismissed as a matter of law.

4. In North Carolina, a constructive trust is defined as:

. . . [a] duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of 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.

Wilson v. Crab Orchard Development Co., 276 N.C. 198, 211 (1970). Without the presence of these elements, there can be no constructive trust.

5. There is no allegation of fraud or breach of duty owed to M&L contained in the Fifth Claim for Relief, and M&L does not appear to make any contention in that regard. Rather, M&L contends that its claim for a constructive trust is valid. It argues that the circumstances here, with Chirico and perhaps others being members of both Intracoastal and Preserve, make it inequitable for Preserve to own and possibly profit from the Property. In *Rhue v. Rhue*, 658 S.E.2d 52 (N.C. App. 2008), the Court of Appeals held that a constructive trust arises from a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty, or some other circumstance making it inequitable to retain.

6. However, here there is no allegation that Preserve has any sort of fiduciary or confidential relationship with M&L. Although M&L claims that Preserve's purchase of the Preserve Project was inequitable, it is clear from the Amended

Complaint that the Preserve Project was lawfully purchased at a foreclosure sale with a valid upset bid.

7. M&L's reliance on *Norman v. Nash Johnson & Son's Farm, Inc.*, 140 N.C. App. 390 (2000), to support the argument that an equitable lien exists via a breach of fiduciary duty is unpersuasive. In *Norman*, the court held that the named defendant actually owed a fiduciary duty to plaintiff at the time the property was acquired. As a result of this fiduciary relationship, a claim for constructive trust was permitted because the plaintiff suffered a loss specifically due to that relationship. Here, the loss to M&L does not stem from the breach of a fiduciary duty owed to M&L by Preserve, but a breach of contract by Intracoastal. Consequently, *Norman* does not support M&L's argument as to a constructive trust or equitable lien.

8. Therefore, because the *Wilson* requirement of the existence of either fraud, breach of fiduciary duty or other inequitable circumstance does not exist, M&L has no claim to a constructive trust on the Preserve Project. Likewise, there are no allegations that would support an equitable lien.

9. Accordingly, to the extent Preserve's Motion seeks dismissal of M&L's Fifth Claim for Relief, the Motion should be granted.

IV.

CANCELLATION OF NOTICE OF LIS PENDENS

1. Preserve seeks cancellation of the Notice of Lis Pendens filed by M&L. In support of its position, Preserve argues that the filing of a notice of lis pendens is authorized only in actions affecting title to real property, and is not appropriate here because monetary damages, not title to property, are central to M&L's claim.

2. To have an appropriately filed notice of lis pendens, the claim must relate to actions affecting title to real property. *Parker v. White*, 235 N.C. 680, 687 (1952). Appropriate lis pendens actions include, among others, actions to set aside deeds or other instruments for fraud and specific performance. *George v. Administrative Office of the Courts*, 142 N.C. App. 479 (2001). A lis pendens, however, does not properly apply to actions brought for the purpose of securing a personal money judgment, even though a contended lien on land is set forth in the complaint. *Id.* at 479. In M&L's Complaint and lis pendens notice, there is no defect alleged in the transfer of title to Preserve.

3. The court previously concluded that M&L's claim for a constructive trust or equitable lien is not supported by the Amended Complaint. Since there also is no extant issue with regard to a defective transfer of title to the Preserve, there remains no basis in law or equity for M&L's Notice of Lis Pendens. All that remains is M&L's action to secure a monetary judgment, and this cannot be allowed to affect the title in question.

4. Accordingly, to the extent Preserve's Motion seeks cancellation of M&L's Notice of Lis Pendens, the Motion should be granted.

NOW THEREFORE, based upon the foregoing CONCLUSIONS, it hereby is ORDERED, ADJUDGED, and DECREED that the Motion is GRANTED. Consequently,

1. The Fifth Claim for Relief of the Amended Complaint hereby is DISMISSED.

2. The Notice of Lis Pendens filed by Plaintiff Miller & Long, Inc. hereby is STRICKEN.

3. The Clerk of Superior Court of Brunswick County shall strike the Notice of Lis Pendens from the Record of Lis Pendens kept by the Office of the Clerk pursuant to N.C. Gen. Stat. § 2-42(6).

This the 8th day of January, 2009.

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