

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
08-CVS-22640

REGIONAL PROPERTY  
DEVELOPMENT CORPORATION  
and LANCASTER INDUSTRIAL  
PARK, LLC,

Plaintiffs,

v.

MARK CARPENTER, ANDREW  
JACOBSON, STEVE JACOBSON,  
SCOTT COOK, and REGIONS BANK,

Defendants,

And

REGIONS BANK AND SCOTT COOK,

Third-Party Plaintiffs,

v.

LAWRENCE J. SHAHEEN and J.  
MICHAEL SHAHEEN, Individually,

Third-Party Defendants

**OPPOSITION to REGIONS BANK'S  
MOTION FOR ENTRY OF DEFAULT  
by DEFENDANTS CARPENTER, A.  
JACOBSON and S. JACOBSON**

Defendants Mark Carpenter, Andrew Jacobson and Steve Jacobson (collectively, the "Individual Members") file this response in opposition to Regions Bank's Motion for Entry of Default against Lancaster Industrial Park, LLC ("Lancaster"). Lancaster cannot be in default in this matter for the simple reason that it is not a party.

Pursuant to Lancaster's Operating Agreement, attached to the original complaint and incorporated by reference, management of Lancaster's affairs was vested in its

managers. (Operating Agreement, § 4.1) As evidenced by Article IV of that document, Lancaster has two managers. At all times relevant, one of those managers was Regional, and the other was one of the Individual Members.<sup>1</sup> Pursuant to Section 4.3(g) of the Operating Agreement, only the managers “acting jointly” may cause Lancaster to commence litigation.

Brett Dressler and his firm, Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., initially purported to represent Lancaster in filing the complaint and first amended complaint in this matter. Regional purported, in paragraph 3 of the amended complaint, to bring claims on behalf of Lancaster as its “Managing Member,” a role nowhere to be found in the Operating Agreement. It did not recite the consent of Carpenter as one of the two managers. Rather, it specifically alleged that Regional alone brought the action on behalf of Lancaster as its “Managing Member.” The Individual Members moved to dismiss claims filed by Lancaster as unauthorized.

Similarly, the fact that Dressler and his firm were not authorized to represent Lancaster was not lost on Regions Bank or its counsel. Regions and co-defendant Cook also moved to dismiss Lancaster’s claims arguing: “[The] Complaint fails to state a claim against Regions and Cook on the grounds that Regional Property Development Corp. (“Regional”) has no authority to act on behalf of Lancaster Industrial Park, LLC (“Lancaster”) and accordingly lacks standing to bring this suit.” (Motions to Dismiss,

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<sup>1</sup> See also the Operating Agreement’s definition of Manager or Managers as “[Regional] and Mark E. Carpenter, collectively, and any other persons or entities who may become Managers pursuant to the terms of this Agreement.”

Alternative Motion to Stay, Answer Subject to Motions, Counterclaims and Third Party Complaint for Indemnity on Behalf of Scott Cook and Regions Bank, p. 2)<sup>2</sup>

On January 20, 2009, Regional filed a joint response to the defendants' motions to dismiss. In that response -- in the first sentence of that response -- Regional admitted that it lacked the authority to sue on behalf of Lancaster: "Regional concedes that it does not have the authority to file suit on behalf of Lancaster in its Managerial capacity." This absence of authority, raised by each of the defendants, has never been contested by Regional. In its March 23, 2009 Order on the motions to dismiss, p. 3, the Court noted: "Plaintiffs concede they may not pursue individual claims on behalf of Lancaster and specifically disavow any such claims." The Court allowed Regional leave to amend its complaint to correct deficiencies in its derivative allegations. Regional did so, filing a Second Amended Complaint on April 1, 2009 that omitted any direct claims on behalf of Lancaster.

Notwithstanding this procedural history, including the complete agreement among the parties that Lancaster had not authorized the filing of claims on its behalf, Regions argues that Lancaster is in default for not replying to its purported counterclaim.

Having successfully asserted that Regional was without authority to file suit on behalf of Lancaster, Regions should be judicially estopped from asserting that Lancaster is properly a party to this litigation and subject to entry of default on the

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<sup>2</sup> Regions and Cook also asserted a counterclaim against Regional for interference with contract alleging Regional lacked authority to cause Lancaster to sue. (See paragraph 53 of Region and Cook's counterclaims.)

counterclaim. Ironically, the counterclaim against Lancaster for which Regions now seeks entry of default is premised on Lancaster's filing of suit against Regions, which Regions contends is a breach of contract. (See Counterclaim, First Claim for Relief) However, if the filing of the lawsuit was unauthorized by Lancaster, as all parties concede, its filing cannot give rise to claims against Lancaster.

Moreover, any resulting judgment against Lancaster, whether by default or otherwise, would be void. (See, e.g., *Howard v. Boyce*, 254 N.C. 255, 262, 118 S.E.2d 897, 903 (1961) "It is generally held that, where a court has entered judgment against a party without having acquired jurisdiction, either by failure to serve process upon him or because of the institution of a suit entirely without authority, relief may be obtained by motion in the cause at the same or a subsequent term, provided there has been no ratification, laches or other interfering principle. . . . [W]here a party, by unauthorized act of an attorney, appears of record as plaintiff, it is necessary that relief be obtained by motion in the cause.")

Lancaster is not a party to this litigation. It did not appear voluntarily by commencing the action, and it has not been brought into the matter through issuance of a third-party summons. Regions Bank's motion should be denied.

WHEREFORE, Mark Carpenter, Andy Jacobson and Steve Jacobson request that the Court deny Regions Bank's Motion for Entry of Default.

Dated this 20th day of April 2009.

/s/ A. Todd Capitano

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**CERTIFICATE OF RULE 15.8 COMPLIANCE AND OF SERVICE**

I hereby certify that this document complies with Local Rule 15.8. I further certify that I have electronically filed the foregoing document on April 20, 2009 using the North Carolina Business Court Electronic Filing System, which will send notification of such a filing to each of the parties in this lawsuit. I further certify that the foregoing document was served upon the plaintiffs in this action by facsimile transmission at the number indicated below.

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/s/ A. Todd Capitano  
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