

NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 19339

HILB ROGAL & HOBBS COMPANY and
THE MANAGING AGENCY GROUP,
INC.,

Plaintiffs,

v.

DONALD SELLARS,

Defendant.

ORDER

Before the Court is the Plaintiffs' Motion to Reconsider Portions of the Order and Judgment entered in this case on 10 May 2010, which the Court construes as a motion to amend the judgment pursuant to Rule 59 of the North Carolina Rules of Civil Procedure.

After considering the Court file, the Motion to Reconsider, and the briefs of the parties, the Court **DENIES** the Motion. The Court will not address Plaintiffs' Motion further, save for Plaintiffs' arguments as to Defendant's counterclaim.

In its 10 May 2010 Order and Judgment, the Court ruled in favor of Defendant on his counterclaim that Plaintiffs failed to pay Defendant's 2002 salary in full, based on a formula set out in Defendant's 2001 employment and incentive plan. Before arriving at that result, the Court concluded that it had misread this aspect of Defendant's counterclaim when it considered the parties' competing motions for summary judgment filed earlier in the case. Accordingly, the Court set aside that portion of the Court's 20 April 2009 summary judgment order dismissing Defendant's counterclaim with respect to his 2002 salary and, based on the evidence presented at trial, entered judgment in Defendant's favor.

Plaintiffs take issue with the merits of the Court’s final judgment on the counterclaim; alternatively, they contend that, given the Court’s *sua sponte* reversal of its earlier summary judgment order, “fundamental fairness counsels the Court to take additional evidence on this newly relevant issue[.]” (Pls.’ Reply 2 n.2.) The Court disagrees.

In the first place, the Court could amend its earlier summary judgment ruling on the counterclaim because it had not yet entered a final judgment. N.C.R. Civ. P. 54(b) (If, in an action between multiple parties or involving more than one claim, a summary judgment order on a counterclaim does not determine “there is no just reason for delay,” and no substantial right is affected by the summary judgment order, then, “in the absence of entry of such a final judgment, **any order or other form of decision is subject to revision at any time before the entry of judgment** adjudicating all the claims and the rights and liabilities of all the parties.”) (emphasis added). *See also Erdman v. Nationwide Ins. Co.*, 582 F.3d 500 (3d Cir. 2009) (on substantive grounds, Third Circuit affirmed federal district court’s reversal of its own order granting summary judgment on one of plaintiff’s federal employment law claims); *United States v. Deaton*, 209 F.3d 331, 337 (4th Cir. 2000) (dismissing appeal of reversal of grant of summary judgment); *Currin v. Bristol*, No. COA06-632, 2007 N.C. App. LEXIS 820, at *5 (N.C. Ct. App. 2007) (“Because the trial court’s partial summary judgment order and its denial of the motion for reconsideration did not fully resolve all of plaintiff’s claims against defendants and left undetermined the amount of damages owed to plaintiff, this order is interlocutory.”); *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (2005) (order granting partial summary judgment was interlocutory); G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 56-14 (3d ed. 2007) (“Since partial summary judgment is not a final order, the court may reverse its ruling as late as the time of trial.”).

Second, Plaintiffs cannot claim unfair surprise, as the parties tried the counterclaim and submitted proposed findings of fact and conclusions of law based (at least in part) on Defendant's theory that he had not been paid his full salary in 2002.

Third, Plaintiffs do not explain what additional evidence would assist the Court in resolving the counterclaim in their favor. Plaintiffs' principal objection to the Court's decision on the counterclaim is that Defendant's conduct in continuing to accept his salary in 2002 constituted an accord and satisfaction as to Defendant's claim for additional compensation. (Pls.' Reply 2-3.)

In its 10 May 2010 Order and Judgment, the Court rejected Plaintiffs' legal analysis, at least with respect to Defendant's acceptance of an additional \$50,000.00 bonus payment in March 2002. Plaintiffs insist, however, that the accord and satisfaction occurred not when Defendant accepted the bonus payment, but instead "each time [Defendant] accepted his 2002 salary checks." (Pls.' Reply 3.) In the Court's view, this is a factual distinction without a difference because (as the Court noted in its Order and Judgment) New York law recognizes an accord and satisfaction from the acceptance of a check offered in settlement "only when the person receiving the check has been clearly informed that acceptance of the amount offered will settle or discharge a legitimately disputed unliquidated claim." *Merrill Lynch Realty/Carll Burr, Inc. v Skinner*, 473 N.E.2d 229, 232 (1984).¹

In this case, Plaintiffs simply failed to show that (1) Defendant's acceptance of compensation in 2002 (whether in the form of salary or bonuses) was intended to settle all of Defendant's claims regarding his pay, and (2) Defendant was informed that accepting such

¹ *Carlton Credit Corp. v. Atlantic Refining Co.*, 176 N.E.2d 837 (N.Y. 1961), relied on by Plaintiffs (*see* Pls.' Reply 3), is not to the contrary. In that case, the Court of Appeals of New York affirmed the dismissal of an action on a disputed debt where a creditor accepted and negotiated (under protest) a check accompanied by a letter from the debtor informing the creditor that the check was being tendered as full payment on a disputed debt. *Id.*

compensation would have this result. In any event, even if the Court has misapplied the law, all of the evidence Plaintiffs need to press their contention on appeal is in the record.

Accordingly, the Court declines to revisit this issue, or any other that it decided as part of its 10 May 2010 Order and Judgment. Plaintiffs' Motion to Reconsider is therefore **DENIED**.

This the 6th day of July, 2010.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge