

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 12469

REGIONS BANK,

Plaintiff

vs.

REGIONAL PROPERTY
DEVELOPMENT CORPORATION,

Defendant

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S AMENDED MOTION TO
DISMISS**

There are four main players in this case. First, Lancaster Industrial Park is a development company. Second, Regional Property is a Member/Manager of Lancaster. Third, Mark Carpenter is also a Member/Manager of Lancaster. Fourth, Regions Bank is a bank that held a note from Lancaster secured by real property that Lancaster owned. The primary thrust of Regional's claim is that Regions aided Carpenter in unfairly acquiring the Regions note thereby causing injury to Regional. Regions obviously cannot dispute these factual allegations in the current procedural setting.

This is not a lawsuit about whether Regions had a right to sell its note to Carpenter or to anybody else for that matter. Under the right circumstances, Regions undoubtedly could have sold the note to Carpenter without any liability. The issue then is not *that* Regions sold the note to Carpenter, but rather *how* it sold the note to him. The manner in which it sold the note provided substantial assistance to Carpenter's successful effort to acquire the note unfairly and in violation of his

fiduciary duties to Regional. As a result, Regional seeks to hold Regions liable for its part in the transaction as an aider and abetter.

Regions primary argument for dismissal is that North Carolina courts have never expressly recognized a cause of action for aiding and abetting a breach of fiduciary duty “under these circumstances.” See Regions Brief, p. 3. The issue, however, is not whether a North Carolina appellate court has ever expressly addressed a case like the present one; rather, at best the issue is whether North Carolina recognizes an aiding and abetting claim in any setting. The Business Court is no stranger to this issue, having faced it more than once in the last several years. See e.g., Battleground Veterinary Hosp. v. McGeough, 2007 NCBC 33 (No. 05-CVS-18918); see also Sompo Japan Ins. Inc. v. Deloitte & Touche, LLP, 2005 NCBC 2 (No. 03 CVS 5547). In both Battleground and Sompo, the Business Court addressed the merits of the parties’ respective aiding and abetting claims. Indeed, neither the Business Court nor any other North Carolina court has held that a common-law cause of action for aiding and abetting does not exist, despite the United States Supreme Court’s effective reversal of Blow v. Shaughnessy. 88 N.C.App. 484 (1988). Respectfully, the facts alleged in this case hardly present the opportunity to hold for the first time that a common-law cause of action for aiding and abetting predicated on section 876 of the Second Restatement of Torts does not exist.

The foundation of Blow was grounded in the restatement of torts and the common-law as much as it was grounded in the Federal case law once recognizing an aiding and abetting claim in the context of Federal securities violations. The Supreme Court’s abolishment of such a claim in the limited context of statutory securities

violations did not effectively eliminate all aiding and abetting claims of any nature under state law. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994). Moreover, the Blow court specifically looked to the restatement for guidance in developing the general parameters of an aiding and abetting claim. Even prior to Blow, North Carolina courts relied upon section 876 of the Second Restatement of Torts to support claims against joint tort feasons outside of the securities law context. See e.g., Boykin v. Bennett, 253 N.C. 725 (1961)(holding all defendants liable for death of passenger as a result of negligence in racing automobiles on a public highway); see also McMillan by and through McMillan v. Mahoney, 99 N.C.App. 448, 451 (1990)(minors shooting an air gun “acted in concert” giving rise to potential joint liability). Contrary to Regions’ claim that no binding precedent supports a claim for aiding and abetting, the North Carolina Supreme Court adopted the very restatement of torts section that provides the support for the fundamental claim itself regardless of the context in which the claim may be brought. Perhaps then the better question is why would the Court disavow the restatement in the context of fiduciary duty claims simply because that claim does not exist in the limited context of securities violations? In the absence of appellate precedent disavowing section 876, Regional would respectfully suggest that the trial courts are bound to accept claims predicated on the adopted section of the Second Restatement of Torts.

Regions’ second argument for dismissal is under the separate and distinct injury doctrine. The doctrine provides that “shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that results in the

diminution or destruction of the value of their stock.” Energy Investors Fund, L.P. v. Metric Constructors, Inc., 351 N.C. 331, 335 (2000). This doctrine does not apply because Lancaster, the parent company, was not injured as a result of Regions’ conduct. The sole injury, which was to Regional, arose when Carpenter acquired the note in violation of his fiduciary duties. By unfairly acquiring the note without notice to Lancaster or the other Member/Managers, Carpenter leveraged his position against Regional after calling the note due. Thus, Regional was the only entity to suffer any harm in the series of transactions. Lancaster still owed the money that was once due to Regions; therefore, it suffered no harm. Regional, on the other hand, suffered significant harm because it was forced to yield to the demands of Carpenter (who is a lawyer), or risk having him foreclose on the property thereby wiping out Regional’s interest altogether.

The purpose of the separate and distinct injury doctrine is to prevent members or shareholders of a company from raising a claim that belongs to the company itself absent special circumstances. Application of the doctrine in this case would be pointless because here the company simply has no claim. Instead, Regions helped a fiduciary *of* the company gain an unfair advantage over another member *of* the company. The resulting harm was essentially a power shift among members of the company. The harm was not an injury to the company *itself*. For these reasons, the doctrine does not apply and the Court should deny Regions’ motion to dismiss.

This the 11th day of January, 2008.

s/Brett Dressler _____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Plaintiff's Amended Motion to Dismiss has this day been served via electronic mail addressed as follows:

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This the 11th day of January, 2008.

s/ Brett Dressler _____
Brett Dressler