

STATE OF NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CvS-5938

ESSA COMMERCIAL REAL)
ESTATE, INC.)
)
Plaintiff,)
)
v.)
)
FIVE TREES, LLC, KEITH)
CANDIOTTI, and MARK WALKER)
)
Defendants.)

**PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS**

Plaintiff Essa Commercial Real Estate, Inc. ("Plaintiff" or "ECRE"), by and through its undersigned counsel, hereby respectfully submits this brief in opposition to the motions to dismiss of Defendants Five Trees, LLC ("Five Trees"), Keith Candiotti ("Candiotti") and Mark Walker ("Walker") (hereinafter, referred to collectively as "Defendants") pursuant to Rules 9(b), 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. For the reasons set forth herein, Plaintiff respectfully requests that the Court deny the motions to dismiss of Defendants.

STATEMENT OF THE FACTS

In or about the fall of 2003, Jeff and Fred Rubenstein (hereinafter, collectively referred to as "the Rubensteins") approached ECRE, a North Carolina corporation providing commercial real estate brokerage, development, management, consulting and marketing services within Guilford County, for assistance in acquiring and developing real property located at 2410 and 2414 Battleground Avenue in Greensboro, North Carolina. Pl. Comp. ¶ 6¹. To procure such assistance, Fred Rubenstein entered into a Project Consulting Agreement, Listing Agreement, and Exclusive Representation Agreement (collectively referred to hereinafter as "the November

¹ Hereinafter, references designated Pl. Comp. ¶ __ are to Paragraphs contained in the Complaint filed by Plaintiff on or about April 27, 2007. References designated Pl. Am. Comp. are to the proposed Amended Complaint.

2003 Agreements”) on or about November 4, 2003, which agreements were subsequently modified on or about April 5, 2004 to expand upon the original project to include additional properties located on Battleground Avenue, Branchwood Drive and Lawndale. Pl. Comp. ¶ 8, 9 and 13.

Candiotti and Walker subsequently agreed to partner with the Rubensteins in undertaking and completing the commercial center. Pl. Comp. ¶ 14. Candiotti and Walker represented to ECRE that they had the financial ability and willingness to undertake and complete the construction, development and management of the commercial center and to fulfill the terms of the previous agreements between ECRE and the Rubensteins. Pl. Comp. ¶ 15. Thereafter, at the request of the Rubensteins, Candiotti, Walker and Five Trees, ECRE diligently and steadfastly expended efforts towards the planning, completion and success of the commercial center by, among other things and without limitation, communicating with the Rubensteins, Candiotti and Walker, consulting with engineers, architects, contractors and subcontractors regarding cost effective means to construct the development, and assisting in efforts to secure bank financing for the development. Pl. Comp. ¶ 16, 17, 20.

Upon information and belief, the Rubensteins, Candiotti and Walker formally incorporated Five Trees with the North Carolina Secretary of State in or about November 5, 2004. Pl. Comp. ¶ 18. In or about January 2005, Defendants represented to ECRE that Five Trees had accepted the obligations of a new agreement with ECRE. Pl. Comp. ¶ 25 and 37. Despite numerous months of hard work by ECRE and representations, however, ECRE was subsequently informed that it had no contract with Five Trees and that it would not be paid for services rendered. Pl. Comp. ¶ 25 and 26.

The parties have since spent considerable time in litigation. In or about March 23, 2005, Five Trees filed suit against ECRE in the Superior Court of Guilford County, North Carolina, which claim was subsequently dismissed without prejudice prior to an answer or counterclaim being filed by ECRE. Thereafter, in or about November 4, 2005, ECRE filed suit against Five Trees in the Superior Court of Guilford County, which claim was subsequently dismissed without prejudice. In addition, ECRE asserted various claims against the Rubensteins in arbitration proceedings. At the conclusion of such proceedings, the Arbitrator determined that the Rubensteins had breached their contracts with ECRE and entered an award in favor of ECRE, which award was confirmed by the Superior Court of Guilford County, North Carolina.

Plaintiff commenced this action against Five Trees, Candiotti and Walker on April 27, 2007, asserting claims for damages arising out of breach of contract, unjust enrichment, unfair and deceptive trade practices and for recovery of an award rendered in arbitration and confirmed by the Superior Court of Guilford County, North Carolina against members of Five Trees. On June 13, 2007, Defendants designated the matter as a complex business case pursuant to N.C. Gen. Stat. § 7A-45.4. Thereafter, Defendants filed motions to dismiss Plaintiff's claims. In response to Defendants' motions, simultaneously herewith, Plaintiff filed and served a Motion to Amend Complaint, together with this brief. (A copy of Plaintiff's Motion to Amend is attached hereto as Exhibit A and incorporated by reference.)

ARGUMENT

I. **PLAINTIFF'S COMPLAINT AND PROPOSED AMENDED COMPLAINT ALLEGE SUFFICIENT DETAILS TO SUPPORT A CLAIM FOR FRAUD.**

Rule 8 of the North Carolina Rules of Civil Procedure provides that pleadings shall include a short and plain statement of the plaintiff's claim(s) so as to give the parties and the

court notice of the occurrences to be proven and for which relief is requested. N.C. Gen. Stat. § 1A-1, Rule 8. This requirement is intended to allow for the resolution of controversies on the merits, following opportunity for discovery, rather than resolution through technicalities of pleadings and, as such, has been liberally construed. *See generally, Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Where fraud is alleged, however, more particularity must be given to the averments set forth in the complaint. See N.C. Gen. Stat. § 1A-1, Rule 9(b). Specifically, the plaintiff's complaint must allege that defendant made a false representation or concealed a material fact, which was reasonably calculated or intended to deceive the plaintiff, and that the plaintiff reasonably relied upon such representation and was deceived, resulting in damage to the plaintiff. Contrary to the assertion of Defendants, while the particularity of Rule 9(b) may be generally satisfied by showing the time, place and contents of a fraudulent representation, no blanket requirement for such exists. *See Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). Indeed, as Defendants' own case law recognizes, "while the facts constituting the fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used." *Carver v. Roberts*, 78 N.C. App. 511, 513, 337 S.E.2d 126,128 (1985).

In the case at hand, Plaintiff's Complaint details a chronology of events and specifically alleges that Defendants (i.e., Five Trees, Walker and Candiotti) falsely represented that, among other things, they would honor and uphold the Agreements entered into by the Rubensteins and that Five Trees had entered into a new agreement with ECRE. Pl. Comp. ¶ 25, 37. Plaintiff's Complaint further alleges that such representations were made as part of and in furtherance of a scheme to use ECRE's services (for which they had not fully paid) and to eliminate ECRE from

the retail center so that Defendants could keep all of the profits for themselves and avoid payments to ECRE. Pl. Comp. ¶ 24, 25. These allegations, particularly when read in connection with the remaining assertions contained in the Complaint, sufficiently give notice to Defendants of the claims and facts levied against them as contemplated by the General Assembly and North Carolina judiciary.

Defendants' further argue, however, that Plaintiff's Complaint should be dismissed because it fails to specifically allege that the misrepresentations were made with the intent to deceive Plaintiff. Defendants once again seek to impose obligations upon Plaintiff greater than that required. "Fraudulent intent need not be specifically alleged if there are facts alleged from which fraudulent intent may be reasonably inferred." *Carter*, 78 N.C. App. at 513, 337 S.E.2d at 128. Fraudulent intent can clearly and easily be inferred from the allegations contained in Plaintiff's Complaint, particularly as it relates to the Scheme formulated and undertaken by Defendants. Nevertheless, Plaintiff's Complaint *does* specifically assert that such misrepresentations were made by Five Trees with the intent to deceive Plaintiff (Pl. Comp. ¶ 38) and Plaintiff has moved to amend its Complaint to clarify that such misrepresentations were made by Defendants with the intent to deceive Plaintiff (Pl. Am. Comp. ¶ 38).

II. DEFENDANTS' MOTIONS TO DISMISS SHOULD BE DENIED, AS PLAINTIFF'S CLAIMS FOR RELIEF ARE NOT BARRED BY THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL OR ONE-SATISFACTION AND PLAINTIFF POSSESSES STANDING TO ASSERT ITS CLAIMS FOR DAMAGES AGAINST DEFENDANTS.

In considering a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, a court must determine whether the allegations of the complaint, treated as true and liberally construed, are sufficient to state a claim for relief under any theory of law. *See Structural Components Int., Inc.*

v. City of Charlotte, 154 N.C. App. 119, 124, 573 S.E.2d 166, 170 (2002). Indeed, “dismissal is not warranted unless it appears beyond doubt that plaintiff could prove no set of facts which would entitle him to relief.” *Castle Worldwide, Inc. v. Southtrust Bank*, 157 N.C. App. 518, 521, 579 S.E.2d 478, 481 (2003). Furthermore, in ruling upon a motion to dismiss, a court may consider only such evidence as contained in or asserted in the pleadings.

In their briefs, however, Defendants have attempted to circumvent this limitation by attaching various exhibits. In effect, Defendants have argued that Plaintiff’s claims are subject to dismissal pursuant to Rule 12(b)(6) due to claimed collateral estoppel and res judicata, and that because such claims are subject to dismissal, Plaintiff lacks standing pursuant to Rule 12(b)(1). Such argument is simply an attempt by Defendants to present the Court with documents not otherwise appropriate for consideration in resolving a motion to dismiss.

Regardless, Plaintiff does not object to consideration by this Court, for purposes of determining the issues of res judicata and collateral estoppel only², of the pleadings, depositions and testimony from the arbitration proceeding or previous litigation between ECRE, Five Trees and the Rubensteins. ECRE objects, however, to the inclusion or consideration of Exhibit H to the brief filed by Defendant Five Trees on the grounds that it was manufactured by previous defense counsel and lacks verification or authenticity. Furthermore, ECRE objects to the inclusion or consideration of Exhibit F to the brief filed by Defendant Five Trees on the grounds that such exhibit lacks verification and is irrelevant.

² Consideration of matters outside the pleadings for issues beyond that of res judicata and collateral estoppel would convert Defendants’ motions into summary judgment. At this point, Plaintiff has not had the opportunity to conduct any discovery with regard to Candiotti and Walker, and additional information is needed from Five Trees. Hence, to consider summary judgment, at this stage, would be inappropriate. *See generally, Burge v. Integon General Insurance Company*, 104 N.C. App. 628, 630, 410 S.E.2d 396, 398 (1991)(generally, summary judgment should not be granted until after sufficient time for discovery).

- A. The doctrines of res judicata and collateral estoppel do not apply to the case at hand, and Defendants' motions to dismiss should be denied.

Defendants contend that Plaintiff's claims are barred by the doctrines of collateral estoppel and res judicata and, as a result, should be dismissed. Neither the doctrine of collateral estoppel nor the doctrine of res judicata, however, serves to bar or prohibit the claims of Plaintiff against Five Trees, Candiotti or Walker.

Collateral estoppel prohibits the litigation of issues when: (a) in a prior lawsuit, a final judgment on the merits was rendered, (b) identical issues were involved, (c) the issues were actually litigated in the previous lawsuit and were necessary to the judgment, and (d) the issue was actually determined. *See Youse v. Duke Energy Corporation*, 171 N.C. App. 187, 192-93, 614 S.E.2d 396, 401 (2005). In the case at hand, collateral estoppel does not prohibit ECRE's claims against Five Trees Candiotti or Walker, as the Arbitrator never undertook to determine or determined whether there was a contract between these Defendants and ECRE, whether ECRE was entitled to relief from these Defendants under the theory of quantum meruit, or whether such these Defendants made fraudulent misrepresentations to ECRE resulting in damages, nor were such issues necessary to the judgment rendered by the Arbitrator against the Rubensteins. Indeed, the Arbitrator looked solely at the conduct of the Rubensteins in rendering an award against them, and the Arbitration Award, contrary to the contention of Defendants, does not address the role of or render a decision affecting, concerning or directly involving Five Trees, Candiotti or Walker.

Similar to collateral estoppel, res judicata bars the litigation of a second suit based on the same cause of action between the same parties or those in privity with them. Specifically, res judicata requires the asserting party to show that: (a) a final judgment on the merits was reached

in the previous suit, (b) the same cause of action was involved in the previous suit, and (c) both the party asserting res judicata and the party against whom res judicata is asserted were either parties or stand in privity with parties to the previous suit. *See Kaminsky v. Sebile*, 140 N.C. App. 71, 80-81, 535 S.E.2d 109, 115-16 (2000). “Privity requires that a plaintiff and a party in a different suit be so identified in interest as to represent the same legal right. Privity is not established by the mere presence of a similar interest in a claim, nor by the fact that the previous adjudication may affect the subsequent party’s liability.” *Id.* Defendants, however, cannot show that Plaintiff’s claims are barred by the doctrine of res judicata, as the causes of action at issue in the arbitration proceeding differed from that at hand and Defendants were not parties to the arbitration and did not stand in privity with the Rubensteins.

Defendants are simply attempting to use the doctrines of res judicata and collateral estoppel as both a sword and a shield, just as Five Trees did in the initial lawsuit filed by ECRE. There, Five Trees, in its Answer and Amended Answer (copies of which are attached hereto as Exhibits B and C, respectively), denied any and all responsibility for the actions and Agreements of the Rubensteins, as well as any liability owed to ECRE under the Arbitration Award or otherwise. Indeed, with one breath, Defendant Five Trees argued that it had no agreements with ECRE and that it could not be held liable for such, while arguing with the next breath that ECRE cannot recover from them under the Agreements because it has already recovered from or received a judgment against the Rubensteins.

Notably, in the prior lawsuit filed by ECRE against Five Trees (which was voluntarily dismissed without prejudice), the court denied Five Trees’ motion for summary judgment based upon the grounds of res judicata and collateral estoppel. So, too, should this Court deny the motion to dismiss of Defendants.

- B. Plaintiff possesses standing to pursue its claims against Defendants for the recovery of damages it sustained as a result of the wrongful conduct of these Defendants.

Defendants further argue that Plaintiff's claims should be dismissed in accordance with the principle that a plaintiff cannot recover more than one-satisfaction for the same injury, even if caused by different parties.

While Plaintiff contends that it is entitled to recover from Defendants the Arbitration Award, Plaintiff's Complaint and proposed Amended Complaint also clearly establish that it seeks to recover from Five Trees, Candiotti and Walker for services it provided under and in addition to the Agreements with the Rubensteins, as well as for the fraudulent misrepresentations and unfair and deceptive trade practices of Five Trees, Candiotti and Walker. Moreover, the initial Complaint, Amended Complaint and Second Amended Complaint filed by Five Trees against ECRE (copies of which are attached hereto as Exhibit D, E and F, respectively), the Answer and Amended Answer filed by Five Trees in proceedings brought by ECRE (copies of which are attached hereto as Exhibit B and C), and testimony from Candiotti and Jeff Rubenstein (copies of which are attached hereto as Exhibits G, and H, respectively), show that ECRE provided services to Defendants at the specific request of Defendants (*i.e.*, Five Trees, Walker and Candiotti) and that Defendants agreed to pay ECRE for such services. In addition, ECRE has never recovered for the injuries it sustained as a result of the unfair and deceptive trade practices of or the fraudulent misrepresentations made to it by Five Trees, Candiotti and/or Walker.

Indeed, having sustained injuries as alleged in its Complaint and proposed Amended Complaint, ECRE possesses proper standing to seek recovery for its damages resulting from the wrongful conduct of Defendants.

CONCLUSION

For the reasons stated in Plaintiff's Complaint, Plaintiff's proposed Amended Complaint, and this brief, Plaintiff respectfully requests that Defendants' Motions to Dismiss be denied.

This the 6th day of August, 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS** was duly served upon all parties listed below in accordance with the provisions of Rule 5 of the North Carolina Rules of Civil Procedure by depositing it in the United States Mail, first-class postage prepaid, addressed as follows:

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This the 6th day of August, 2007.

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