

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

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.)

DEFENDANTS' REPLY BRIEF IN
SUPPORT OF MOTION TO DISMISS

NOW COME Defendants Five Trees, LLC ("Five Trees"), Keith Candiotti ("Dr. Candiotti") and Mark Walker ("Dr. Walker") (collectively, "Defendants"), by and through their undersigned counsel, and submit the following Reply Brief to Plaintiff's Brief in Opposition to Defendants' Motions to Dismiss ("Response Brief").

FACTS¹

In trying to distinguish the present litigation from the Arbitration, the Response Brief overstates Defendants' involvement in the failed effort to develop property located on Battleground Avenue in Greensboro, North Carolina (the "Project"). In the fall of 2003, Fred Rubenstein engaged Plaintiff Essa Commercial Real Estate, Inc.'s ("Essa") to help locate property that could be developed on Battleground Avenue. (Complaint and Proposed Amended Complaint at ¶¶ 6-11). Defendant Keith Candiotti ("Dr. Candiotti")

¹ Citations to allegations contained in Essa's Complaints or Proposed Amended Complaint are not intended and should not be deemed an acknowledgement or admission by Defendants of the truth of such allegations. Portions of relevant testimony from the Arbitration are attached to this Reply Brief, as indicated. Given that the entire transcript from the Arbitration is 1042 pages, the entire transcript has not been made an exhibit. However, the entire transcript is being provided to the Court on a CD contemporaneously with the service of this Reply Brief.

first met Essa's President, Carl Essa ("Mr. Essa"), in May or June, 2004, and thereafter agreed to invest in the Project. (**Exhibit I**, Candiotti at p. 504; **Exhibit J-1**, Essa at p. 140). Around Thanksgiving of 2004, Dr. Candiotti contacted Mark Walker ("Dr. Walker"), who agreed to invest in the Project. (**Exhibit L**, Rubenstein at pp. 928-29). On November 5, 2004, Defendant Five Trees, LLC was formed. (Complaint and Proposed Amended Complaint at ¶18). Dr. Candiotti, Dr. Walker and the Rubensteins are the only members of the LLC.

On December 9, 2004, Five Trees obtained a loan and purchased property on Battleground Avenue. (**Exhibit K**, Grossnickle at p. 823). However, the bank only agreed to finance the cost of the land acquisition; the bank refused to make a construction loan unless Five Trees had signed leases with tenants that would occupy the finished development. (**Exhibit J-1**, Essa at p. 175; **Exhibit K**, Grossnickle at pp. 832, 836-37). Given the lack of funding, Essa was instructed to stop development efforts until a construction loan could be obtained. (**Exhibit J-1**, Essa at p. 175). On February 14, 2005, Essa sent Fred Rubenstein a termination notice. (**Exhibit J-3**, Essa at pp. 718; Complaint and Proposed Amended Complaint at ¶ 26). Essa sued the Rubensteins for the work he performed on the Project, which resulted in a five day arbitration proceeding between Essa and the Rubensteins (the "Arbitration"). The services Essa allegedly performed for the Project, the agreements governing those services, the party responsible for payment, and Essa's damages arising out of the Project were all litigated and ruled upon in the Arbitration.

Consideration of the Arbitration testimony is appropriate. Essa does not object to this Court's consideration of testimony from the Arbitration for purposes of res judicata

and collateral estoppel. (Essa's Response Brief at p. 6). Additionally, Essa has relied upon testimony from the Arbitration in the section of its Response Brief addressing North Carolina's one-satisfaction doctrine. (Essa's Response Brief at p. 9).

1. **All Services Essa Provided Related to the Project Are Covered by its April 5, 2004 Project Agreement with the Rubensteins.**

Essa allegedly provided services pursuant to six separate written contracts. (Complaint and Proposed Amended Complaint at ¶ 17). Essa's own admissions establish that the only agreement under which it provided services and could possibly seek recovery was the April 5, 2004 Project Agreement between it and the Rubensteins (the "2004 Project Agreement"). Essa has fully recovered under that agreement through the Arbitration. (Arbitration Award, Exhibit B).²

The six contracts Essa identifies are: On November 4, 2003, Essa and Fred Rubenstein entered into a (1) Project Agreement, (2) Representation Agreement and (3) Listing Agreement (Complaint and Amended Complaint at ¶¶ 8-9), and on April 5, 2004, Essa and the Rubensteins entered into a new (4) Project Agreement, (5) Representation Agreement and (6) Listing Agreement (Complaint at ¶ 15; Amended Complaint at ¶ 13). Essa testified at the Arbitration that it is not entitled to compensation from the Rubensteins under either of the Listing Agreements or either of the Representation Agreements because Essa did not obtain any executed leases and the Rubensteins did not purchase any property. (**Exhibit J-1**, Essa at pp. 50-53; **Exhibit J-2**, Essa at pp. 281,

² Exhibits A through H were attached to and filed with Five Trees, LLC's Brief in Support of Motion to Dismiss ("Five Trees' Initial Brief"). Exhibits A through H have not been re-filed. For the Court's convenience a copy of this brief with hyperlinks to all exhibits and transcripts references will be provided on CD.

284-85; **Exhibit J-3**, Essa at pp. 407, 422, 740, 866).³ Additionally, Essa has been compensated for the termination of the Listing Agreements and Representation Agreements as a result of the termination fee it recovered through Arbitration. (**Exhibit J-3**, Essa at p. 738; Arbitration Award, Exhibit B at p. 5. ¶¶ 4-5).

With respect to the Project Agreements, Essa has admitted that the 2004 Project Agreement replaced the November 4, 2003 Project Agreement. (**Exhibit J-2**, Essa at pp. 371-72). Thus, the only agreement under which Essa could seek compensation is the 2004 Project Agreement. Mr. Essa testified to the following regarding the 2004 Project Agreement:

A. It was always made clear to Jeff and Fred Rubenstein that our contract is with them.

(**Exhibit J-1**, Essa at p. 129).

Q. Your contract, the April project consulting agreement, is with whom?

A. Fred and Jeff Rubenstein.

Q. What were you doing about that, and did that concern you?

A. No. I worked with Fred and Jeff all the way through. Fred and Jeff was Five Trees or Three Trees or One Tree or however many trees it was at that point.

(**Exhibit J-1**, Essa at p. 168).

Mr. Essa further testified that it was up to the Rubensteins to let Defendants know about Essa's fees and any arrangements regarding payment of those fees:

That communication along with other communications to Dr. Walker related to a payment plan that – Jeff and Fred Rubenstein were

³ Essa did assist in the purchase of one piece of property on Battleground Avenue, but admits that it received its commission. (**Exhibit J-1**, Essa at pp. 44-46; **Exhibit J-3**, Essa at p. 407). The allegations of the Complaint and Proposed Amended Complaint clearly indicated that Essa is not seeking recovery of a real estate commission from Defendants under the Representation Agreement.

liable for or responsible for letting all partners know of any and all liabilities from the beginning. I made it a – I was – I thought I was being very – I made it very clear to Fred and Jeff Rubenstein in the beginning that all the partners that they are bringing on – we can't re-create the wheel and answer calls or questions of every partner that has a question, that they need to get with the partners and give them all the liabilities, all the responsibilities, and communicate with them directly, and it was in their court to do just that.

I felt that all the partners would have known about the \$1,352,700 [due under the 2004 Project Agreement] because it was their [the Rubensteins'] responsibility to let them know of all the liabilities attached to this project.

(**Exhibit J-3**, Essa at pp. 398-99). The \$1,352,700 amount referenced by Mr. Essa is the total amount Essa would have been paid if the Project had been successfully completed.

(**Exhibit J-1**, Essa at pp. 108-10; **Exhibit J-2**, Essa at pp. 203-04; Arbitration Award, Exhibit B at p. 3, ¶ 2).

In the Arbitration, Essa expressly admitted that all the work it did on the Project was pursuant to the 2004 Project Agreement with the Rubensteins. (**Exhibit J-1**, Essa at pp. 154-55; **Exhibit J-2**, Essa at pp. 286-89, 371; **Exhibit J-3**, Essa at p. 494). Money received by Essa from Dr. Candiotti and Dr. Walker was applied to amounts owed under Essa's 2004 Project Agreement with the Rubensteins. (**Exhibit J-1**, Essa at pp. 181-82; **Exhibit J-3**, Essa at p. 764). In fact, Mr. Essa testified as follows:

Q. Now, this partnership or LLC or corporate entity, whatever it was, had the entity signed any contract with Essa Commercial Real Estate at this time?

A. No.

Q. So the contract, or the work that you were doing was performed pursuant to the contract with whom?

A. Fred and Jeff Rubenstein.

(**Exhibit J-1**, Essa at pp. 154-55).

As stated above, Essa has taken the position that it did not even have an obligation to tell Defendants about the work it was doing and fees it was charging because it was up to the Rubensteins to inform their investors of all liabilities associated with the Project. (**Exhibit J-3**, Essa at pp. 398-99). There is only one Project at issue in this lawsuit, which is the same Project that was at issue in the Arbitration. Essa sought to recover in the Arbitration the entire amount it would have been due for completion of the Project. (**Exhibit J-2**, Essa at pp. 203-04). Based upon its own admissions, Essa cannot seriously contend that it was doing work for Defendants separate and apart from the work it was doing for the Rubensteins.

2. All of Essa Damages Arising Out Of The Project Were Determined In The Arbitration.

In the Arbitration, Essa sought to recover the full amount due under the 2004 Project Agreement if the Project had been completed, a termination fee, reputation damages and uncompensated expenses. (**Exhibit J-2**, Essa at pp. 200-05). The termination fee was included to compensate Essa for lost income under the Representation Agreement and Listing Agreement in the event the Project Agreement was terminated. (**Exhibit J-3**, Essa at p. 738). Essa also sought a claim for unjust enrichment in the Arbitration. (Arbitration Complaint, Exhibit D at ¶¶ 29-33).

All of these damages were based upon the services allegedly provided by Essa in relation to the Project. Mr. Essa testified at the Arbitration that it was his belief that the Rubensteins had transferred their obligations for the Project to Five Trees. (**Exhibit J-2**, Essa at pp. 186-87; Complaint and Proposed Amended Complaint at ¶¶ 19). He further stated that in his opinion the 2004 Project Agreement was assigned to Five Trees, although he has never seen any assignment agreement to that effect. (**Exhibit J-2**, Essa

at pp. 186-87). Essa seeks to recover from Defendants for the exact same services provided on the exact same Project that Essa sought recovery for in the Arbitration. North Carolina prohibits such a result for a variety of reasons.

ARGUMENT

I. ESSA HAS FAILED TO STATE ANY REASON WHY ITS LAWSUIT SHOULD NOT BE DISMISSED AS A RESULT OF ITS ELECTION TO SEEK RECOVERY FROM THE RUBENSTEINS.

Essa's Response Brief does not contain any argument in opposition to the dismissal of its lawsuit based upon the election of remedies doctrine. As indicated by the above facts, the work Essa did was performed pursuant to its contract with the Rubensteins. (**Exhibit J-1**, Essa at pp. 154-55). According to Essa, it was the Rubensteins' responsibility to provide Defendants with any and all information regarding Essa's fees and other liabilities associated with the Project. (**Exhibit J-3**, Essa at pp. 398-99). Thus, Essa has alleged that it treated the Rubensteins as the principals for all other investors, including Defendants.

Under North Carolina law, the principal and the agent are not jointly liable. Howell v. Smith, 261 N.C. 256, 134 S.E.2d 381 (1964). Therefore, a party seeking damages cannot hold both liable, but must elect from which it will seek recovery. Id. The election must be made when the suit is filed. Walston v R.B. Whitley & Co., 226 N.C. 537, 541 (1946). By filing suit against the Rubensteins and obtaining a judgment against them, Essa has elected its remedy and cannot now seek recover against Defendants in this lawsuit. See Pete Wall Plumbing Co. v. Harris, 266 N.C. 675, 686, 147 S.E.2d 202, 209 (1966).

II. ESSA'S LAWSUIT IS BARRED BY THE ONE SATISFACTION DOCTRINE BECAUSE ESSA'S ALLEGED INJURY IN THIS LAWSUIT IS IDENTICAL TO THE INJURY IT ASSERTED IN THE ARBITRATION.

Essa does not cite any authority to support its opposition to the dismissal of its lawsuit pursuant to North Carolina's one satisfaction doctrine. Rather, Essa attempts to argue that by simply alleging that it seeks to recover for service provided under and in addition to the agreements with the Rubensteins, it has somehow stated a claim. (Essa Response Brief at p. 9). Essa conveniently ignores long standing North Carolina law which prohibits more than one satisfaction for the same injury. See Sun Chemicals Trading Corp. v. SGS Control Services, Inc., 159 Fed. Appx. 459, 2005 WL 3403622 (4th Cir. Dec. 13, 2005) (unpublished) citing Holland v. Southern Public Utilities Co., Inc., 208 N.C. 289, 292, 80 S.E. 592, 593-94 (1935) and Chemimetals Processing, Inc. v. Schrimsher, 140 N.C. App. 135, 138, 535 S.E.2d 594, 596 (2000).

Essa has suffered one injury – alleged monetary loss for services provided related to the Project. It is not surprising that Essa's Response Brief fails to identify an injury different than the injury for which it sought recovery in the Arbitration. Essa sought recovery in Arbitration for all losses it could have possibly sustained as a result of the Project. (**Exhibit J-1**, Essa at pp. 108-10; **Exhibit J-2**, Essa at pp. 200-05; **Exhibit J-3**, Essa at p. 738). Mr. Essa repeatedly testified that Essa was seeking recovery of \$1,352,700 in the Arbitration, which was the total amount Essa would have been paid if the Project had been successfully completed. (**Exhibit J-1**, Essa at pp. 108-10; **Exhibit J-2**, Essa at pp. 203-04; Arbitration Award, Exhibit B at p. 3, ¶ 2). All services Essa provided for the Project were covered by the 2004 Project Agreement with the Rubensteins. (**Exhibit J-1**, Essa at pp. 154-55; **Exhibit J-2**, Essa at pp. 286-89, 371;

Exhibit J-3, Essa at p. 494). As far as Essa was concerned the Rubensteins and Five Trees were one and the same for purposes of the Project and payment of Essa's fees. (**Exhibit J-1**, Essa at p. 168). Thus, Essa has not suffered any injury that was not addressed by the Arbitration.

Essa's failure to recover on its fraud and unfair trade practice claims in the Arbitration does not change the fact that it has sustained but one injury. See Sun, 159 Fed. Appx. at 464 ("under North Carolina law plaintiffs are not entitled to more than one satisfaction for the same injuries, regardless of how many claims or bases of liability they may assert, or how many defendants they may pursue."). Additionally, the conduct that Essa contends support its fraud and unfair trade practices claims in this case is identical to the conduct Essa asserted in the Arbitration. See Chemimetals, 140 N.C. App. at 139, 535 S.E.2d at 596 (when all actions in the course of events leading to alleged financial loss were concurrent, fact that different parties may have been guilty of separate wrongdoing does not change the fact that only one injury occurred).

Essa obtained a judgment through the Arbitration for all injuries it sustained as a result of services provided for the Project. Essa further compromised its judgment through a settlement with the Rubensteins. (Settlement Agreement at Exhibit F). North Carolina law prohibits Essa from recovering in this lawsuit for the same injury. This lawsuit must, therefore, be dismissed.

III. DEFENDANTS AND THE RUBENSTEINS WERE IN PRIVITY FOR PURPOSES OF RES JUDICATA AND ESSA HAS ASSERTED IDENTICAL CLAIMS IN THIS LAWSUIT AND THE ARBITRATION.

Essa's Response Brief incorrectly claims that Defendants are not in privity with the Rubensteins and that the claims in this lawsuit and the Arbitration are not the same.

(Response Brief at p. 8). As to the claims, the Complaint and Proposed Amended Complaint are virtual carbon copies of Essa's Arbitration Complaint, with the exception of the identity of the Defendants. (Comparison at Exhibit H). Essa asserted the exact same claims in the Arbitration that it attempts to assert in this lawsuit. (Comparison, Exhibit H at ¶¶ 27-48). Essa simply dropped its claim for declaratory relief from this lawsuit and added a claim to recover from Defendants for the judgment entered through Arbitration. (Comparison, Exhibit H at ¶¶ 22-25, 50-54).

Essa, not Defendants, is attempting to take inconsistent positions with respect to the issue of privity and Defendants relationship with the Rubensteins. (Response Brief at p. 8). For purposes of res judicata, privity is defined as "a mutual or successive relationship to the same rights of property." Leary v. Virginia-Carolina Joint Stock Land Bank, 215 N.C. 501, ___, 2 S.E.2d 570, 573 (1939). Essa has taken the position that the Rubensteins transferred their interest in the Project to Five Trees and that Five Trees accepted the Rubensteins' responsibility for the Project. (**Exhibit J-2**, Essa at pp. 186-87; **Exhibit J-3**, Essa at pp. 720-21; Complaint and Proposed Amended Complaint at ¶ 19).⁴

Having taken the position that the Rubensteins were the representatives or principles for Defendants and that Defendants' are responsible to Essa as a result of the assignment of the Rubensteins' obligations related to the Project, Essa cannot honestly argue that the Defendants and the Rubensteins were not in privity. (**Exhibit J-1**, Essa at pp. 154-55; **Exhibit J-3**, Essa at pp. 398-99). Essa is attempting to assert in this lawsuit

⁴ Defendants have consistently denied any liability to Essa based upon the actions of the Rubensteins or anyone else.

the identical claims that it asserted in the Arbitration against the Rubensteins. The Arbitration is res judicata, and this lawsuit must therefore be dismissed.⁵

IV. ESSA IS COLLATERALLY ESTOPPED FROM BRINGING THIS LAWSUIT BECAUSE THE ARBITRATION DETERMINED ALL DAMAGES ESSA SUFFERED.

An arbitration that determines the plaintiff's damages will collaterally estop the plaintiff from further litigating that issue. Murakami v. Wilmington Star News, Inc., 137 N.C. App. 357, 362, 528 S.E.2d 68, 71 (2000). The Arbitration between Essa and the Rubensteins determined all damages to which Essa was entitled based upon the services provided related to the Project. (See above at p. 6). Essa is collaterally estopped from seeking those same damages from Defendants in this lawsuit. Essa cannot support its contention that the Arbitration did not resolve the issues of whether a contract exists between Essa and Defendants or whether Essa has asserted a claim for quantum meruit or fraud. (Response Brief at p. 7).

The Arbitration Award expressly concluded that the "existence of a valid written agreement between the parties precludes the Plaintiff's claim for unjust enrichment." (Arbitration Award, Exhibit B at p. 4, ¶ 3). Given that all services Essa performed were admittedly covered by the 2004 Project Agreement (**Exhibit J-1**, Essa at pp. 154-55; **Exhibit J-2**, Essa at pp. 286-89, 371; **Exhibit J-3**, Essa at p. 494), Essa cannot now assert another claim for quantum meruit for the same services by simply changing defendants. See Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986) (no satisfactory rationalization exists for permitting one who has

⁵ Essa's reference to the denial of Five Trees summary judgment motion in a prior action is irrelevant. As Essa admits, that lawsuit was voluntarily dismissed without prejudice. Therefore, any summary judgment orders in that action are rendered moot. See Teague v. Randolph Surgical Assoc., P.A., 129 N.C. App. 766, 501 S.E.2d 382 (1998) (voluntary dismissal without prejudice of prior action rendered trial court's denial of summary judgment motion moot).

had his day in court to reopen identical issues by merely switching adversaries). As to Essa's fraud claim, the arbitrator held that the Rubensteins' breach of contract did not, as a matter of law, constitute fraud. (Arbitration Award, Exhibit B at p. 4, ¶ 4). Essa's fraud claim against Defendants is based upon the same conduct that the arbitrator determined did not constitute fraud when allegedly committed by the Rubensteins. (Comparison, Exhibit H at ¶¶ 35-43). Essa is collaterally estopped from bringing the claims asserted in this lawsuit, as all of these claims were addressed in the Arbitration.

V. ESSA'S FRAUD CLAIM MUST BE DISMISSED FOR LACK OF PARTICULARITY.

The only allegations of fraudulent conduct Essa can identify is that Defendants falsely represented that they would uphold the agreements the Rubensteins entered into and that Five Trees had entered into a new agreement with Essa. (Reply Brief at p. 4). As the arbitrator found, these allegations relate merely to a breach of contract, which does not give rise to a claim for fraud as a matter of law. (Arbitration, Exhibit B at p. 4, ¶4); see also, Lewis v. Southern Mills, 53 F.Supp. 443, 450 (D.C.N.C. 1944) (mere breach of contract will not warrant claim for fraud). Additionally, while no specific formula may exist for pleading fraud, mere generalities and conclusory allegations are insufficient. Coley v. NCNB, 41 N.C. App. 121, 126, 254 S.E.2d 217, 219 (1979).

Neither Essa's Complaint nor Proposed Amended Complaint identify any specific person that allegedly made misrepresentations to Essa or any time, place or circumstances of any alleged misrepresentation. Id. ("a plaintiff must identify the particular individuals who dealt with him when he alleges he was defrauded by group or association of persons"). Both the Complaint and Proposed Amended Complaint contain nothing more than mere generalities and conclusory allegations. Essa's dispute over this

Project has been going on for years, with most witnesses having been questioned under oath. If Defendants had engaged in any conduct that could support a claim for fraud, which they have not, Essa would certainly be able to allege it with specificity at this point.

Moreover, Essa's own testimony indicates Defendants did not engage in any fraudulent conduct. With respect to the contention that Five Trees entered into a new agreement with Essa, Mr. Essa testified that he sent a consulting agreement to Dr. Walker's attorney, but that "no one agreed to this, so I had nothing to fall back on other than the April 2004 project consulting agreement." (**Exhibit J-3**, Essa at pp. 403-04). With respect to the Rubensteins' agreement with Essa, Mr. Essa testified that he always made clear that Essa's agreement was with the Rubensteins. (**Exhibit J-1**, Essa at p. 129). Essa's purported fraud claim in its Complaint and Proposed Amended Complaint fail to meet the requirements of Rule 9(b) and is contradicted by Essa's own testimony. Essa's fraud claim must be dismissed.

CONCLUSION

Based upon the foregoing arguments and authorities, Plaintiff's Complaint must be dismissed in its entirety.

Respectfully submitted, this the 20th day of August, 2007.

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CERTIFICATION OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court, I hereby certify that Defendants' Reply Brief in Support of Motion to Dismiss complies with the word limitation of Rule 15.8.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Defendants' Reply Brief in Support of Motion to Dismiss** was duly served upon counsel for Plaintiff 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 and by electronic mail by filing with the North Carolina Business Court:

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