

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 4182

WALTERS & ZIMMERMAN, PLLC and)
BAMBI FAIVRE WALTERS,)
)
Plaintiffs,)
)
v.)
)
SCOTT P. ZIMMERMAN,)
)
)
)
Defendant.)

**DEFENDANT’S REPLY IN
SUPPORT OF MOTION TO
DISMISS**

NOW COMES DEFENDANT, Scott P. Zimmerman (“Mr. Zimmerman”) through counsel, pursuant to Business Court Rule 15.7 and submits this Reply in Support of Defendant’s Motion to Dismiss.

Plaintiffs’ Response Brief in Opposition to Defendant’s Motion to Dismiss (the “Response”) goes well beyond the allegations in the Amended Complaint at issue. The law requires that Mr. Zimmerman rely solely on the allegations of the Amended Complaint, taken as true. Raritan River Steel Co. v. Cherry, Bekaert & Holland, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988) (“A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint.”); Branch Banking & Trust Co. v. Lighthouse Financial Corp., 2005 NCBC 3, ¶ 8 (N.C.Super. July 13, 2005). Accordingly, the Court should not consider matters outside the complaint. Schlieper v. Johnson, 2007 NCBC 29, ¶ 27 (N.C.Super., Aug. 31, 2007). Copies of the documents attached to the Complaint are properly before the Court on a Rule 12(b)(6) motion, however. Id. at ¶ 15, n. 1. Notwithstanding these restrictions, when considering a motion to dismiss the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint. Lighthouse, 2005 NCBC at ¶ 8.

In their Response, Plaintiffs offer much in the way of factual allegations that are not properly before the Court on a motion to dismiss pursuant to Rule 12(b)(6). However, Plaintiffs offer several legal arguments to which Mr. Zimmerman responds in this Reply.

I. PLAINTIFFS WALTERS LACK STANDING TO BRING THIS LAWSUIT

In his Brief in Support of Defendant’s Motion to Dismiss Mr. Zimmerman argued that Plaintiff Walters lacked standing to bring this action on behalf of Walters & Zimmerman PLLC based on the fact that 1) she was not a member of the PLLC; 2) even if she were considered as “manager,” she has no authority absent ratification by the PLLC to seek the extraordinary relief she seeks in the Amended Complaint; and 3) even if she were a member, she has not met the prerequisite requirements for filing a derivative lawsuit under N.C. Gen Stat § 57C-8-01. Mr. Zimmerman replies as follows to Plaintiffs’ Response.

A. All Members of a PLLC Need Not Be Licensed Professionals

In an attempt to rebut the fact that she has no standing to bring this lawsuit on her own behalf or on behalf of the now dissolved law firm Walters & Zimmerman, PLLC, Plaintiff Walters appears to be attacking the validity of the very PLLC on whose behalf she purports to act. Although she appropriately does not seek a declaratory judgment on the membership of Walters & Zimmerman, PLLC, Plaintiff Walters now apparently contests the validity of the Articles of Organization filed with the Secretary of State’s office that specifically identify two corporate law firms as members. (Am. Compl. Ex. A.). Plaintiff Walters seems to argue that the PLLC could not properly have been comprised of the two corporate entities Bambi Faivre Walters, PC and Scott P. Zimmerman, PLLC, even though they were the only members identified in the Articles of Organization. Instead she contends that the PLLC must be comprised only of human beings who are also licensed to practice law.

Plaintiff Walters does not deny that under Chapter 57C, members of a PLLC may include “persons,” who are defined to include a “domestic or foreign professional corporation” or a “domestic or foreign limited liability company” in Section 57C-1-03(17). Instead she mistakenly cites N.C. Gen. Stat. § 57C-2-01(c) for the proposition that all members of a PLLC must be human beings and professional license holders. That section includes no such requirement.

Section 57C-2-01 does require that members of a limited liability company engaged in rendering professional services shall be treated in the same manner as shareholders of a professional corporation. N.C. Gen. Stat. § 57C-2-01(c). Although Chapter 55B, which governs professional corporations, generally requires shares of stock in professional corporations to be owned by professional license holders, N.C. Gen. Stat. § 55B-6(a1) provides that persons who have professional licenses must own at least 51% of the *issued shares* of capital stock of a professional corporation. Another provision provides that 100% of the shares of a professional corporation may be issued to another professional corporation such that the stock can be distributed to one or more shareholders of the distributing corporation under Chapter 355 of the Internal Revenue Code. N.C. Gen. Stat. §55B-6(b).

Regardless, Plaintiff Walters has not alleged in the Amended Complaint, nor can she allege, that Walters & Zimmerman, PLLC ever issued shares or was ever required to issue shares of any sort to its members or to professional license holders who are principals of the members. Plaintiff Walters similarly has not alleged, nor can she allege, that there was any contribution of capital to Walters & Zimmerman, PLLC by any member or licensee.

In recognition that professional corporations are a special entities governed by other licensing bodies, N.C. Gen. Stat §55B-6(a) also includes a requirement that professional corporations obtain a certification from an appropriate licensing board, in this case the North

Carolina State Bar, that the transferee of capital stock is a “licensee.” N.C. Gen. Stat. §55B-2 (4) (licensing board for attorneys is the Council of the North Carolina State Bar). Licensing boards, too, may regulate the use of corporate names. N.C. Gen. Stat. §55B-5.

Plaintiff Walters cannot claim that Walters & Zimmerman, PLLC ran afoul of the rules of the applicable licensing agency. A copy of the North Carolina State Bar’s required certification of Walters & Zimmerman, PLLC is included in Exhibit A to the Amended Complaint. The State Bar-approved letterhead of Walters & Zimmerman, PLLC, also attached to the Amended Complaint specifically stated that it was a professional corporation “formed by Bambi Faivre Walters P.C. and Scott P. Zimmerman PLLC.” (Am. Compl. Ex. D). This Court should reject Plaintiff Walters’ new position, adopted more than a year after dissolution of the PLLC, which is contrary to representations made in the Articles of Organization and to the public by way of the PLLC’s letterhead.

B. Plaintiff Walters Lacks Standing to Bring this Action on Behalf of Walters & Zimmerman, PLLC

Even if the Court accepts Plaintiff Walker’s position that she individually and not Bambi Faivre Walters, PC was a member of Walters & Zimmerman, PLLC, she lacks standing to bring this action in the name of the PLLC. The Amended Complaint correctly does not allege that there was voting stock or capital contributions, much less any written documentation that Plaintiff Walters had a greater vote in the management of the PLLC than any other member. Nor does it allege a written operating agreement of any sort.

Instead, Plaintiff Walters appears to argue that because she was identified as manager on the Articles of Organization, she has the authority to bring an action seeking injunctive relief and monetary damages against an individual principal of one of the two members of the PLLC. As set forth in the Defendant’s Brief in Support of Defendant’s Motion to Dismiss, even if Plaintiff

Walters were manager of Walters & Zimmerman, PLLC, filing this action is well beyond the power of managers as set out in N.C. Gen. Stat. § 57C-3-23 and Crouse v. Mineo, ____ N.C. App. ____, 658 S.E.2d 33, 37-38 (2008) (manager’s duties did not include causing the LLC to bring a lawsuit on its own behalf against another member).

As such, actions of managers beyond those set forth in N.C. Gen Stat. §§57C-3-22 to 23 must be “ratified by the limited liability company.” Id. N.C. Gen. Stat. § 57C-3-23. The requirement of this ratification is separate and apart from the “ratification of a majority of the managers” set out in N.C. Gen. Stat. § 57C-3-20(b) which refers to what is required for management decisions to be made by multiple managers of a LLC. The ratification by a LLC or PLLC required to take action beyond the scope of the authority of a manager must come from the company—and therefore a majority of its members. The statutory revision of N.C. Gen. Stat. §57C-3-23 by S.L. 2001-487, § 62(l)¹ confirms this interpretation. Originally the second sentence of N.C. Gen. Stat. § 57C-3.23 stated that “[a]n act of a manager that is not apparently for carrying on the usual course of the business of the limited liability company does not bind the limited liability company unless authorized in fact or ratified by *the managers of* the limited liability company.” (Emphasis added). The 2001 revision deleted “the managers of” following “ratified by” in that sentence, suggesting that the General Assembly intended that acts beyond the usual course of business be ratified by the limited liability company as a whole.

Moreover, corporate officers or agents cannot ratify unauthorized acts or contracts they enter into or perform themselves so as to bind the corporation. See, e.g., Sheatz v. Markley, 249 F. 315 (3d Cir. 1918); Mack Realty Co. v. Beckley Hardware & Supply Co., 107 W. Va. 290, 148 S.E. 122 (1929). In other words, one who takes an unauthorized action has no more right to

¹ The relevant portion of this Session Law is attached hereto as Exhibit A.

ratify it than he or she has to make it. See, e.g., Marqusee v. Insurance Co. of North America, 211 F 903, 906 (2d Cir. 1914). Therefore, corporate directors, officers or managers cannot ratify their own unauthorized acts even though they happen to constitute a majority of the directors, officers, managers, or shareholders. Belle Isle Corp. v. MacBean, 29 Del. Ch. 261, 49 A.2d 5 (1946); Chesapeake Const. Corp. v. Rodman, 256 Md. 531, 261 A.2d 156 (1970). See also, 2A Fletcher Cyc. Corp. § 761. Plaintiff Walters has not and cannot allege that the now-dissolved Walters & Zimmerman, PLLC ratified her unilateral acts to sue the principal of one of the two members.

Even if the Court accepted as true the unsupported allegation that Plaintiff Walters is entitled to 51% of *net profits* (Am. Compl. ¶ 11), this fact would not create in Plaintiff Walters the ability to unilaterally ratify her own actions on behalf of Walters & Zimmerman, PLLC. She has not alleged that she had any greater vote in the PLLC or that, in fact, net profits were shared in the manner she sets forth. Plaintiff Walters identification as manager does not entitle her to take the extraordinary actions she has taken in this lawsuit.

C. Plaintiff Walters Has Failed to Meet the Requirements of a Derivative Suit

In his Brief in Support of Defendant's Motion to Dismiss, Mr. Zimmerman points out that a derivative suit is the only available course of action for a member to bring an action without the consent of a majority of members of the LLC. Even if Plaintiff Walters were a member, which she is not, she has failed to meet the requirements of a derivative suit in her Amended Complaint. Although she requests that the Court review the Amended Complaint as well as matters outside the pleadings to assess whether she has met those prerequisites, she cannot point to any place in the Amended Complaint where those pleading requirements are met.

Accordingly, all the claims on brought by Plaintiff Walters on her behalf or on behalf of Walters & Zimmerman, PLLC must fail.

II. PLAINTIFF WALTERS LACKS STANDING TO ASSERT A CLAIM FOR ACCOUNTING OR DISTRIBUTION.

Plaintiff Walters purports to assert a claim for accounting and a liquidating distribution against Mr. Zimmerman. This claim must fail. As discussed above, Plaintiff Walters, individually, is not a member of Walters & Zimmerman, PLLC. Therefore she does not have the rights under the provisions of the North Carolina General Statutes upon which these claims rely.

Each of the claims in this action rise or fall upon the question of Plaintiff Walters' standing individually or on behalf of Walters & Zimmerman, PLLC. If, however, the Court wishes to consider claims without regard to the standing issue, those claims should still be dismissed.

III. MR. ZIMMERMAN DOES NOT HAVE INDIVIDUAL LIABILITY.

Plaintiffs' claims against Mr. Zimmerman must also fail because he was not a member of Walters & Zimmerman, PLLC. Even if the court adopts Plaintiff Walters' new position regarding her individual membership in Walters & Zimmerman, PLLC, this position does not control Mr. Zimmerman's membership or lack thereof. Section 55B-6(a1) of the North Carolina General Statutes provides that "any person" may own up to 49% of the stock of a professional corporation. Section 57C-1-03(17) defines a "person," in relevant part, as a "domestic or foreign professional corporation" or a "domestic or foreign limited liability company."

As asserted above, Plaintiff Walters has not and cannot allege that stock was ever issued by Walters & Zimmerman, PLLC or that capital contributions were made. Nonetheless, taking Plaintiffs assertion in their Response that the other member of Walters & Zimmerman, PLLC had 49% "ownership" at face value, (Plfs' Resp. in Opp. at 7-8), the statute does not preclude

that owner from being a member of a PLLC. As such, Scott P. Zimmerman, PLLC is a valid member of Walters & Zimmerman, PLLC and Plaintiffs' claims are improperly asserted against Mr. Zimmerman individually.

IV. THE NORTH CAROLINA UNFAIR AND DECEPTIVE TRADE PRACTICES ACT DOES NOT APPLY TO THIS ACTION.

In addition to the bases for dismissal set forth above, and in the alternative to those grounds, Plaintiffs' claim for a violation of the North Carolina Unfair and Deceptive Trade Practices Act fails to state a claim. Plaintiffs' Response does not directly address the argument that their claims are not "in or affecting commerce" as required by N.C. Gen. Stat. § 75-1.1, but instead she summarily cites Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905 (2003). In Compton, however, the lawsuit was brought by real estate brokers against an owner in a partnership, and the court ruled that a Chapter 75 claim could go to the jury where there was factual evidence of constructive fraud. For reasons stated in the Brief in Support of Defendant's Motion to Dismiss, the claim for constructive fraud in the Amended Complaint identifies no specific duty breached by Mr. Zimmerman, and fails to identify what if any damage resulted from any such breach. Thus, that claim, too, should be dismissed.

Moreover, in Compton the court found the defendant's acts were "in or affecting commerce" because those actions involved the sale of a business. 157 N.C. App. at 20, 577 S.E.2d at 917. Plaintiffs allege neither the sale of a business to a third party nor any other conduct outside of the internal management activities and accounting relating to Walters & Zimmerman, PLLC. As such, for reasons set forth in the Brief in Support of Defendant's Motion to Dismiss, this claim fails due to the failure to satisfy the "in or affecting commerce" requirement.

Plaintiffs' Response also summarily states without citation or explanation that the exception related to the provision of professional services does not apply. (Plfs' Resp. in Opp. at 10). Beyond that, Plaintiffs' purport to "restate all paragraphs of Plaintiffs' Amended Complaint." For the reasons stated in Mr. Zimmerman's Brief in Support of his Motion to Dismiss, Chapter 75 is inapplicable to the case at bar and should be dismissed.

V. PLAINTIFFS' CLAIM FOR MISAPPROPRIATION OF TRADE SECRETS FAILS TO STATE A CLAIM.

Notwithstanding the bases for dismissal set forth above, and in the alternative to those grounds, Plaintiffs' claim for misappropriation of trade secrets must fail for the reasons set forth in Mr. Zimmerman's Brief in Support of his Motion to Dismiss. Plaintiffs' Response regarding this claim makes references and allegations regarding the basis for this claim well beyond the allegations of the Amended Complaint. The Response fails to cite any allegations of the Amended Complaint to support this claim. To the contrary, the purported trade secrets Plaintiffs seek to protect as set forth in the Amended Complaint are, in essence, client records, attorney notes, billing records and invoices, none of which are actually owned by Plaintiff. (Am. Compl. ¶ 119). Accordingly, Plaintiffs' claim must fail and should be dismissed.

VI. PLAINTIFFS' CONSTRUCTIVE FRAUD/BREACH OF FIDUCIARY DUTY ALLEGATIONS REGARDING U.S. PATENT AND TRADEMARK OFFICE POWERS OF ATTORNEY FAIL TO STATE A CLAIM.

In addition to the bases for dismissal set forth above, and in the alternative to those grounds, Plaintiffs' claim for constructive fraud/breach of fiduciary duty regarding the U.S. Patent and Trademark Office Power of Attorney, must fail. Plaintiffs' Amended Complaint and Response claim that Mr. Zimmerman committed fraud or breached a duty to Walters & Zimmerman, PLLC but the pleadings and the Response fail even to identify what duty was owed.

The apparent basis for this claim is that Mr. Zimmerman took action pursuant to a power of attorney executed by a third party. There is no allegation Mr. Zimmerman acted beyond the authority provided by the third party and no identification of what duty Mr. Zimmerman owed to Plaintiff Walters with regard to powers of attorney. Although the Amended Complaint makes allegations about Mr. Zimmerman's identification of his law firm on patents, the powers of attorney at issue have nothing to do with the publication of a firm name on the first page of an issued patent. As set forth in Section 1309 of the Manual of Patent Examining Procedure, attached hereto as Exhibit B, anyone who pays the base patent fee may choose to include on the patent the names of patent agents, lawyers or a law firm, or may leave that space blank. Plaintiff Walters has not identified in this claim any duty owed to her or to Walters & Zimmerman, PLLC that has been breached.

More importantly, even if Plaintiff Walters can appropriately identify the breach of a duty owed to herself or Walters & Zimmerman, PLLC, which she has not done in the Amended Complaint, she has not identified any harm to herself resulting from the listing of an "unauthorized law firm" on a client's patent pursuant to that client's power of attorney. Accordingly, this claim in Plaintiffs' Amended Complaint should be dismissed.

VII. PLAINTIFFS' CLAIM FOR CONVERSION FAILS TO STATE A CLAIM.

Notwithstanding the bases for dismissal set forth above, and in the alternative to those grounds, Plaintiffs' claim for conversion must fail. Plaintiffs' Response regarding this claim makes references and allegations regarding the basis for this claim well beyond the allegations of the Amended Complaint. It fails to cite allegations of the Amended Complaint to support this claim. Therefore, this claim must fail for the reasons set forth in Mr. Zimmerman's Brief in Support of his Motion to Dismiss.

VIII. CONCLUSION

Accordingly, for the reasons set forth herein and those in Mr. Zimmerman's Brief in Support of his Motion to Dismiss, Mr. Zimmerman respectfully requests that his Motion be granted and Plaintiffs' Amended Complaint be dismissed.

This the 23rd day of May 2008.

/s/ Denise Smith Cline

N.C. State Bar No. 10837

SMITH MOORE LLP

2800 Two Hannover Square

Post Office Box 27525

Raleigh, NC 27611

Telephone: (919) 755-8700

Facsimile: (919) 755-8800

E-mail: denise.cline@smithmoorelaw.com

/s/ Travis A. Crump

N.C. Bar No. 32643

SMITH MOORE LLP

300 North Greene Street, Suite 1400

Post Office Box 21927

Greensboro, North Carolina 27420

Telephone: (336) 378-5200

Facsimile: (336) 378-5400

E-mail: travis.crump@smithmoorelaw.com

Attorneys for Scott P. Zimmerman

CERTIFICATE OF SERVICE

This is to certify that the foregoing document was served electronically and by depositing a copy of same in the United States mail, first-class, postage prepaid, addressed as follows:

Bambi Faivre Walters
Bambi Faivre Walters, PC
P.O. Box 5743
Williamsburg, VA 23188
Attorney for Plaintiffs

This the 23rd day of May, 2008.

/s/ Travis A. Crump
Travis A. Crump