SKILLESTAD v. FNB UNITED CORP.

08-CVS-4338

SUPERIOR COURT OF NORTH CAROLINA, GASTON COUNTY

February 14, 2009

Reporter
2009 NCBC Motions LEXIS 226 *

MARK SKILLESTAD, Plaintiff, vs. FNB UNITED CORP., et al., Defendants.

Type: Motion

Counsel

[*1] Louis L. Lesesne, Jr., NC State Bar No. 6723, Essex Richards, P.A., Charlotte NC, Attorney for Plaintiff .

Title

PLAINTIFF'S BRIEF OPPOSING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS [1]

Text

This matter is before the Court on defendants' motion for judgment on the pleadings, pursuant to Rule 12(c), N.C. Rules of Civil Procedure. Plaintiff has submitted the affidavit of plaintiff Mark Skillestad in connection with the motion, and he requests that the Court consider the motion as a motion for summary judgment, under Rule 56, N.C. Rules of Civil Procedure, as explicitly provided for and allowed in Rule 12(c). [2] Plaintiff believes that the affidavit provides the Court with the appropriate information as to what actually occurred. But regardless of whether the Court accepts the affidavit, the discussion which follows shows that the motion should be denied. Defendants apparently resist having the Court consider such materials, notwithstanding its being explicitly recognized by Rule 12(c). Defendants apparently want the Court to limit its consideration to the allegations in the Complaint and **[*2]** Answer. [3] **[*3]**

Nature of the Case

Plaintiff alleges a breach of contract against the defendant FNB United Corp. and failure to pay wages under the N.C. Wage Act, *G.S. § 95-25.2* et seq. against both FNB and defendant Miller, pursuant to a change of control agreement. [4]

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[1] Counsel certifies that this brief complies with the requirements of BCR 15.8.

[2] Defendants' motion is also procedurally defective, because defendants filed their motion simultaneously with their Answer. Rule 12(c) motion may be filed only "[a]fter the pleadings are closed but within such time as not to delay the trial..." N.C.R. Civ. P. 12(c). A Rule 12(c) motion cannot be filed simultaneously with an answer. *Weaver v. Saint Joseph of the Pines, Inc., 187 N.C. App. 198, 204, 652 S.E.2d 701, 706 (2007)*. See also Robertson v. Boyd, 88 N.CApp. 437, 440, *363 S.E.2d 672, 675 (1988)* and also *Yancey v. Watkins, 12 N.C.App. 140, 141, 182 S.E.2d 605, 606(1971)*.

[3] Plaintiff submits that limiting consideration to the allegations in the pleadings avoids the very reason that this case is before the Business Court. The parties' joint motion, asking that this case be designated as an "exceptional case" under Rule 2.1 of the General Rules of Practice, explicitly referred to the specific issues raised by defendants' treatment of plaintiff s change of control agreement after March 15, 2006. Paragraph 4 of the motion sets out the parties' contentions and makes it clear that defendants contend that its board of directors lacked the authority to modify the contract beyond that date and that the contract was not modified. Indeed, that is the crux of the case. Further, the parties' motion, in paragraph 7, invoked the court's jurisdiction specifically because of the complexity of the issues presented by actions taken subsequent to March 15, 2006:

> Accordingly, this case likely will require the Court to construe complex issues of North Carolina's law governing corporations (Chapter 55, North Carolina General Statutes). This is one of the categories of the Business Court's presumptive jurisdiction. See *N.C. Gen. Stat. § 7A-45.4(a)* (2008). The case may also involve difficult issues of contract interpretation.

[4] Defendant Miller is within the definition of "employer" and therefore liable under the Wage and Hour Act because he has acted "directly or indirectly in the interest of any employer in relation to an employee." *G.S. § 95-25.2(5)*.

Facts [5]

Plaintiff was employed on March 15, 2000 by an entity then known as First Gaston Bank of North Carolina (hereinafter "First Gaston"), as its chief credit officer. In 2000 he executed **[*4]** a Change of Control Agreement. SkiUestad Affidavit, P 2; Exhibit A. to SkiUestad Affidavit. [6] The agreement ran for a three-year period, to March 14, 2003, with the possibility of a three year extension. The agreement was in fact extended on February 25, 2003, to March 15, 2006. SkiUestad Affidavit, P 4; Exhibit B. The agreement also anticipated that it could be modified or amended by a writing signed by the parties and referencing the original agreement. Exhibit A, P 7(g).

The agreement provided that should there be a change of control at First Gaston, and that should plaintiffs employment either be terminated or his responsibilities reduced within 36 months thereafter, he would be entitled to the specified severance payment. Exhibit A, P 2(a).

On April 27, 2006, the parties executed an amendment to Exhibit A, in order to bring it into compliance with *§ 409A of the Internal Revenue Code*. It **[*5]** explicitly referenced Exhibit A and expressed the desire to amend the Agreement. SkiUestad Affidavit, P 5; Exhibit C.

On April 28, 2006, Integrity Financial Corp., the holding company which owned First Gaston, merged with FNB. SkiUestad Affidavit, PP 6-7. The merger fit the definition of a change of control, as defined in paragraph 2(b) of Exhibit A. SkiUestad Affidavit, P 6. Exhibit A obligated FNB to assume the obligations of the Agreement. Exhibit A, P 5(b).

After the merger. Plaintiffs position was reduced, from being chief credit officer to being one of five senior credit officers, reporting to the chief credit officer, rather than directly to the CEO. SkiUestad Affidavit, P 8.

On May 17, 2006, during a meeting of the board of directors of First Gaston, the outside board members met in executive session and voted to extend Plaintiffs employment contract "by at least 6 months." Exhibit D. At that time, notwithstanding the merger. First Gaston remained a separately chartered bank, maintaining its own Board of Directors and operating as a separate bank. SkiUestad Affidavit, P 7. Defendant Miller, who is currently and who was at the time president and chairman of the board of FNB, **[*6]** the parent company of First Gaston Bank, was present at that meeting. Exhibit D.

The same day, Mr. Miller sent Plaintiff a letter. Exhibit E, (which plaintiff did not receive until June 7, 2006, Skillestad Affidavit, P 3), in which Mr. Miller exphcitly acknowledged that plaintiff was "a party to an existing employment agreement." The reference was to Exhibit A, as amended on April 27, 2006 by Exhibit C and by the Board on May 17, 2006. There was no other employment agreement. Skillestad Affidavit, P 12. Mr. Miller there recognized plaintiffs right to resign at that point. [7] Had plaintiff exercised his rights at that time, he would apparently have been paid the severance due under Exhibit A. Plaintiff relied on Mr. Miller's assurances that the agreement would remain in place, and he forewent his right to receive severance at that time and instead continued to work for the bank. Skillestad Affidavit, P 13.

[*7]

Following plaintiffs receipt of Exhibit E on June 7, 2006, he immediately sent a letter to Mr. Miller, Exhibit F, the very same day, in which he explicitly communicated his understanding that as a result of the Board's action on May 17, 2006, the agreement, as modified, was still in place, that Plaintiff was relying on his assurances to that effect, and that he would immediately exercise his rights under the agreement if necessary to protect himself Plaintiff refrained from exercising his rights at that time in reliance on his understanding of the Board's action. Skillestad Affidavit, P 13.

Plaintiff and Mr. Miller met on June 14, 2006 to discuss the issue further. Mr. Miller again recognized and assured Plaintiff that the agreement continued in force. Skillestad Affidavit, P 16. Plaintiff followed up that meeting with an e-mail confirming the discussion. SkiUestad Affidavit, P 16; Exhibit G.

Plaintiff explicitly relied on Mr. Miller's assurances in Exhibit E and in the June 14, 2006 conference not to

[5] The facts are recited from the Complaint and from the Affidavit of Mark Skillestad, which is being filed simultaneously with plaintiffs brief.

[6] Subsequent citations to exhibits to SkiUestad Affidavit will simply be referenced by the exhibit designation.

[7] That right arose as a result of plaintiff s responsibilities having been reduced. Exhibit A, P 2(a).

invoke the agreement at that time. Plaintiff reasonably believed that, as chairman and president of the defendant, Mr. Miller had the authority to speak on behalf of the defendant **[*8]** with regard to the status of the agreement, as amended. SkiUestad Affidavit, P 17.

On January 24, 2008, plaintiffs direct supervisor met with him to "seek your resignation." SkiUestad Affidavit, P 20. Even though Plaintiffs termination occurred within 36 months after the April 28, 2006, merger, and even though the merger itself occurred prior to September 15, 2006 (the end of the six-month period specified by the Board of Directors in Exhibit D), FNB has refused to pay him the amounts specified in paragraph 2(a)(i) of Exhibit A, contending that the Agreement expired on March 15, 2006, SkiUestad Affidavit, P 20.

Argument

I.

STANDARD UNDER RULE 12(c) FOR REVIEWING DEFENDANTS' MOTION

Rule 12(c) provides:

> **(c) Motion for Judgment on the Pleadings**. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present **[*9]** all material made pertinent to such a motion by Rule 56.

As an initial matter, it may be helpful to set out the standards applicable to a motion under Rule 12(c) and under Rule 56.

A.

General Standards Under Rule 12(c).

Motions for judgment on the pleadings are not favored by law, and the trial court must view the facts and permissible inferences in the light most favorable to the nonmovant and move liberally construe the nonmovant's pleadings. *RGKInc. v. United States Fidelity and Guaranty Co., 292 N.C. 668, 774, 235 S.E.2d 234, 238 (1977)*; *Flexlite Electrical v. Gilliam, 55 N.C. App. 86, 88, 284 S.E.2d 523, 524 (1981)*; *Huss v. Huss, 31 N.C.App. 463, 466, 230 S.E.2d 159, 162 (1976)*. A motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. Toomer v. Branch Banking & Trust Co., Ill N.C. App. 58, 66, *614 S.E.2d 328, 334*, disc. rev. denied, *360 N.C. 78, 623 S.E.2d 263 (2005)*. "Since a judgment on the pleadings is a summary procedure with **[*10]** the decision being final, these motions must be carefully examined to ensure that the non-moving party is not prevented from receiving a full and fair hearing on the merits." *Garrett v. Winfree, 120 N.C. App. 689, 691, 463 S.E.2d 411, 413 (1995)* (citation omitted).

When a party moves for judgment on the pleadings, he admits, for purpose of the motion: (1) the truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary. *Gammon v. Clark, 25 N.C.App. 670, 671, 214 S.E.2d 250, 250 (1975) citing Erickson v. Starling, 235 N.C. 643, 656, 71 S.E.2d 384, 393 (1952)*; *Huss v. Huss, supra, 31 N.C.App. at 466, 230 S.E.2d at 162*.

> "The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Shellhorn v. BradRagan, Inc., 38 N.C.App. 310, 316, 248 S.E.2d 103, 108 (1978)*, **[*11]** cert, den., *295 N.C. 735 249 S.E.2d 804 (1978)*, quoting *Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)*. This rule requires that the Court take the defendants' efforts to define the contract as being denied.

B.

Rule 56 Standards Applied To Motions Under Rule 12(c).

Unless the Court excludes plaintiffs affidavit. Rule 12(c) provides that the Court treat the motion as one for summary judgment under Rule 56. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a

judgment as a matter of law." Rule 56(c), N.C. Rules of Civil Procedure.

"There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Harrison v. City ofSanford, 111 N.C.App. 116, 118, 627 S.E.2d 672, 675*, disc, review denied, *361 N.C. 166, 639 S.E.2d 649 (2006)*; Handa v. Munn, 182 N.CApp. 515, 517, *642 S.E.2d 540, 542 (2007)*. **[*12]** "The moving party has the burden of establishing the lack of any triable issue," and "[a]ll inferences of fact from the proof offered at the hearing must be looked at in the light most favorable to the nonmoving party." *Nelms v. Davis, 179 N.C.App. 206, 208, 632 S.E.2d 823, 825 (2006)* (citation omitted).

In passing upon a motion for summary judgment, the court must view the evidence presented by both parties in the light most favorable to the nonmoving party. *Davis v. Town of Southern Pines, 116 N.C.App. 663, 449 S.E.2d 240 (1994)*, disc, review denied, *339 N.C. 737, 454 S.E.2d 648 (1995)*. "The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. His papers are meticulously scrutinized and all inferences are resolved against him. *Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976)*; *Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975)*." *Cheatham v. Hall, 64 N.C.App. 678, 680, 308 S.E.2d 457, 458 (1983)*.

II.

THE MOTION MUST BE DENIED IF THE COURT EXCLUDES PLAINTIFF'S AFFIDA VIT

This brief will first analyze the motion **[*13]** without taking into consideration plaintiffs Affidavit. Plaintiffs Complaint alleges that he and FNB were parties to an employment agreement by virtue of FNB's having acquired plaintiffs previous employer, that the contract provided that FNB was obligated to pay him severance in the event that it terminated his employment within 36 months of the occurrence of a change in control, that such a change of control occurred in April 2006, that following such merger, plaintiff became an employee of defendant FNB and continued as an employee until defendant FNB terminated plaintiffs employment on February 8, 2008, within 36 months of the change of control, entitling plaintiff to the severance provided in the agreement. Complaint, PP 5-7.

Defendants' Answer alleges that the agreement expired on March 15, 2006, Answer, P 5, and THIRD AFFIRMATIVE DEFENSE, *and* that it was not extended. Defendants' motion is premised on the Court accepting their characterization of what the contract consisted of, when the question of what the contract consisted of is very much *the* disputed issue of fact. Perhaps most startling is defendants' statement, in their Brief, at page 5: "No such modification occurred. **[*14]** " The Complaint disputes that statement, and the Court is required, under Rule 12(c), to accept plaintiffs allegations and to disbelieve the defendants' statements. Given the standards required in evaluating a Rule 12(c) motion, the Court must credit plaintiffs allegations and take defendants' claim as false, and deny the motion.

Defendants' motion rests on the disputed proposition that the original agreement was not modified, while plaintiff alleges that the agreement was modified, such that the resulting agreement was extended beyond April 28, 2006. Paragraph 7(g) of the Agreement recognizes that the Agreement may be amended or modified:

> (g) Amendment and Modifications. This Agreement may be amended or modified only by a writing signed by all parties hereto, which makes specific reference to this Agreement.

Defendants acknowledge that the agreement may be modified or amended, but simply state categorically that there was no such modification and that it expired on March 15, 2006. That position cannot be reconciled with the allegations in the Complaint that there was a contract which encompassed the merger in April 2006. The Court must credit that allegation and must **[*15]** discredit defendants' contention that there was no such contract. Defendants' contention that paragraph 7(g) was not invoked does not, simply by defendants' say so, become true. It is a disputed issue of fact, requiring that the motion be denied. The existence of such an issue is shown more clearly by plaintiffs affidavit, discussed in the following section of this brief. Defendants recognize that any contract can be modified or amended, and the same rules govern as govern any contractual question. It matters not whether one looks at the contract as being amended or whether one considers it as a new contract which incorporated the previous agreement. The same test applies in either case. The question of whether parties to a contract have agreed to modify its terms is a question of contract law, just as it is with respect to the original

formation of the contract. *Wheeler v. Wheeler, 299 N.C. 633, 637, 263 S.E.2d 763, 765 (1980)*; *Lenoir Memorial Hospital, Inc. v. Standi, 263 N.C. 630, 634,139 S.E.2d 901, 903 (1965)*; Brenner v. the *Little Red School House, Ltd., 302 N.C. 207, 215-216, 274 S.E.2d 206, 212 (1981)*. Defendants, may not, **[*16]** by their *ipse dixit*, eliminate a factual dispute about whether the agreement was modified.

III.

THE PLAINTIFF'S AFFIDA VIT SHOWS THAT THE ORIGINAL AGREEMENT WAS MODIFIED BY THE PARTIES TO INCL UDE THE APRIL 2008 MERGER.

Plaintiffs affidavit provides the Court with the facts as to what actually occurred in 2006 as the original agreement was expiring. Those facts make it even more clear that the motion should be denied, in that they manifest more specifically what the defendants did to modify the contract.

A.

A Modification Was Effected By the Parties' Actions during 2006.

Defendants' motion rests on the assumption that plaintiffs claim is based solely on the original contract from 2000, Exhibit A, and the extension in 2003, Exhibit B, and it ignores events occurring in 2006, events which resulted in the contract being amended by extending it beyond its original term, such that plaintiff was entitled, upon his employment being terminated, less than three years after the merger occurred, to receive the severance specified in Exhibit A. The agreement as modified by the parties adopted the underlying premises of the original agreement but extended its duration **[*17]** to a period that went well beyond April 28, 2006, the date of the merger.

Actions by First Gaston or FNB, including (a) the April 27, 2006 "Amendment," Exhibit C; (b) the May 17, 2006 First Gaston board meeting. Exhibit D; and (c) Mr. Miller's letter of May 17, 2006, Exhibit E, all furnish a factual basis for concluding that paragraph 7(g) of Exhibit A was properly invoked and that the agreement was extended beyond April 28, 2006.

Defendants contend that paragraph 7(g) was not properly invoked. [8] Their position ignores two realities. First, there is a writing signed by defendant Miller, on behalf of FNB, acknowledging on May 17, 2006, that the Agreement was still in effect and plaintiff had rights under the change of control agreement. Exhibit E. His letter, particularly when read in conjunction with the board minutes, supports the inference that there was a modification of the agreement, extending its duration past April 28, 2006.

[*18]

But even if the Court were to find that Exhibits D and E fail to meet the letter of paragraph 7(g), given that plaintiff did not sign either, that finding would not stand in the way of finding that there was an amendment. Our courts have repeatedly recognized that a contract may be modified without such formality, even where the original agreement contains language, like that present here, that only written modifications shall be binding and even where the letter of the agreement has not been satisfied. See . *W.E. Garrison Grading Co. v. Piracci Construction Co., Inc., 27 N.C.App. 725, 221 S.E.2d 512 (1975)*, rev. denied, *289 N.C. 296, 222 S.E.2d 695 (1976)*; *Son-Shine Grading, Inc. v. ADC Const. Co., 68 N.C.App. 417, 422, 315 S.E.2d 346, 349 (1984)*, disc. rev. den., *312 N.C. 85, 321 S.E.2d 900 (1984)*; *J. R. Graham & Son, Inc. v. Randolph County Bd of Ed, 25 N.C.App. 163, 167-168, 212 S.E.2d 542, 544-545 (1975)*.

In *Childress v. CW. Myers Trading Post Inc., 247 N.C. 150, 154, 100 S.E.2d 391, 394 (1957)*, quoted in *Camp v. Leonard, 133 N.C.App. 554, 562, 515 S.E.2d 909, 914 (1999)*, **[*19]** the Court said:

> The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived, *H. M. Wade Mfg. Co. v. Leftwich, 204 N.C. 449, 168 S.E. 517*; *Bizzler Co. v. Britton, 192 N.C. 199, 134 S.E. 488*. *This principle has been sustained even where the instrument provides for any modification of the contract to be in writing.* Allen Bros. v. *Raleigh Sa v. Bank, 180 N.C. 608, 105 S.E. 401*. *Whitehurst v. FCX Fruit & Vegetable Service, 224 N.C. 628, 32 S.E.2d 34, 39*.

[8] It is difficult to determine precisely how defendants purport to justify their position, since their motion and brief simply contain the bald assertion that the agreement was not modified.

(Emphasis added).

Burden Pallet Company, Inc. v. Ryder Truck Rental, Inc., 49 N.C.App. 286, 289-290, 271 S.E.2d 96, 98 (1980) involved a contract with language providing that it was not binding until signed at the party's corporate offices. The Court said that "the circumstances may, however, either amount to a waiver of this requirement or work an equitable estoppel against [the party claiming no contract]." *49 N.C.App. at 289, 271 S.E.2d at 98*, citing *Oliver v. U. S. Fidelity and Guaranty Co., 176 N.C. 598, 97 S.E. 490 (1918)* **[*20]** and 17 Am.Jur., Contracts, § 71. The Court relied on the fact that the agreement was prepared by the party now claiming no contract and that the same party acted on the contract as if it had been signed. It never notified the other party that the contract had never been signed, while the other party was relying on the contract as if it were signed. The Court said that such acts and conduct are substantial evidence that defendant waived its contract right to enforce that provision or should be equitably estopped from asserting that right. It went on to say:

> It would be unconscionable to allow the defendant to accept the benefits of the contract and to avoid its obligations thereunder by retaining the contract unsigned.

49 N.C.App. at 290, 271 S.E.2d at 98. See also *Fidelity & Casualty Co. of New York v. Angle, 243 N.C. 570, 576, 91 S.E.2d 575, 579 (1975)* (signature is not always essential to the binding force of an agreement; the object of a signature is to show mutuality or assent, which may be shown in other ways; and in the absence of a statute, it need not be signed, provided it is accepted and acted on, or is delivered and acted on. **[*21]**)

These documents suffice to show that the Agreement was in fact modified. Paragraph 7(g) simply requires a writing signed by the parties referring to the Agreement. Exhibits C, D, E and F meet this test.

There can be no doubt that the defendant bank explicitly agreed, either to amend the contract or to enter into a new contract which expired no earlier than September 15, 2006. Following the expiration of the term of the original contract, on March 15, 2006, FNB repeatedly showed its understanding, in writing, that the agreement had been modified, such that it remained in force as of April 28, 2006, when the merger occurred.

B.

FNB's Directors' Action Is Effective to Bind the Defendants.

The defendants apparently disclaim responsibility for the action taken by First Gaston's own board of directors, by taking the position that the board lacked the authority to extend the contract. Given the broad authority conferred on a corporation's board of directors by *G.S. § 55-8-01(b)*, to exercise "all corporate powers," such a position is farfetched. If a corporation's board of directors is powerless to modify the contract, there would be no entity with such authority.

It would **[*22]** be difficult to conceive of a more explicit action being taken by FNB's predecessor than the one taken by the First Gaston directors, at a time when First Gaston was plaintiffs employer. That board has the statutory authority to exercise "all corporate powers." *G.S. § 55-8-01(b)*.

> The board's minutes explicitly state:
>
> The outside members of the Board of Directors went into Executive Session. During this session, the board agreed to, on a motion by Ron Shoemaker, second by Pete Huntley, to extend Mark Skillestad's employment contract by at least 6 months. The contract expired March 15, 2006. All in favor, motion agreed to.

Exhibit D.

FNB has previously suggested to counsel that the Board's action is ineffectual because it was taken by the outside directors and not by the full board. *G.S. § 55-8-24* makes it clear that such a claim has no merit. This statute provides that, where a quorum is present for a directors meeting, the majority vote of those present "is the act of the board of directors, unless the articles of incorporation or bylaws require the vote of a greater number of directors." *G.S. § 55-8-24(c)*. The minutes show first, that *all* members of the **[*23]** Board were present, and second, that *all* outside members voted in favor of extending plaintiffs contract. Exhibit D. Absent a showing that the outside members of the Board make up less than a majority of the full Board, it follows that their vote constitutes the action of the Board under *G.S. § 55-8-24(c)*.

Defendants have never claimed that any board member who was not included in the vote and who would have been "disenfranchised" took issue with the vote, and it is now too late for any of them to object or for the

defendant to object in their place. Any such director would have been required, pursuant to G.S. § 55-8-24(d), to note his objection at once, and there is no suggestion that that has taken place.

In order for those members to have shown their dissent, they were obliged to object at the beginning of the meeting to holding it or transacting business at the meeting, or to have his dissent or abstention from the action taken is entered in the minutes of the meeting; or to file written notice of his dissent or abstention with the presiding officer of the meeting before its adjournment or with the corporation immediately after adjournment of the meeting. In the absence **[*24]** of any dissent being recorded, no non-voting members can be heard now to say that he or she objected to the action being taken. It follows that *all* of the board members are deemed to have assented to the board action. [9]

Even if there are technical defects in the way that the board acted, FNB is precluded from relying on those defects to defeat plaintiffs claim. Corporate irregularities cannot be used by the defendant to defeat the expectations of third parties. In Morris v. Y&B Corp., 198 N.C. 705, 153 S.E. 327, 332 (1930), our Supreme Court quoted Fletcher's Cyclopedia of Corporations, Vol. 3, § 1894 with regard to estoppel against a corporation relying on its own procedural defaults to avoid contracts with third parties:

> It is doubtless true that where a contract **[*25]** is executory, it cannot be specifically enforced nor can an action for damages for breach thereof be brought, where it was authorized at an irregular meeting of directors, unless it has been duly ratified, or the acts of the stockholders are such as to constitute an estoppel. But where the contract has been executed by the other party thereto, a different question arises. In such a case the rule laid down in a former chapter as to the effect of the informalities in executing a corporate contract governs, and it is held that the corporation which has received the benefits of the contract cannot set up that the directors' meeting which authorized it was irregular in some respects. The rule is that illegality or irregularity in a directors' meeting cannot be set up to defeat the rights of innocent third persons dealing with the corporation, since, in the absence of notice to the contrary, they have a right to assume that the proceedings were legal and regular-that notice was given, that a quorum was present, that the meeting was called in the mode prescribed by the charter or by-laws, etc.
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> ***
>
> In other words, one dealing with a corporation cannot be affected by a failure of the **[*26]** corporate agents to observe the rules and regulations enacted for the internal management of the corporate affairs, especially where such regulations are contained in by-laws as distinguished from those contained in statutes or the charter, on the theory already noticed in a preceding chapter that mere informalities cannot be availed of by the corporation where the other party to the contract has performed his part of the contract.

In the absence of any showing that plaintiff had some reason to know that the Board's vote was irregular or not authorized, FNB cannot rely on its own failure to comply with the statute or its internal organic documents in order to defeat the legitimate rights of a third party who has relied on the board's action.

C.

Defendant's President and CEO Had the Authority to Act on Behalf of FNB.

Similarly, when FNB's CEO and board chairman explicitly told plaintiff on May 17, 2006, that he was "party to an existing employment agreement," [10] and that he had the right to invoke the change of control agreement by resigning. Exhibit E, Mr. Miller in effect extended the agreement at least through that date, which was after the change of control occurred. **[*27]**

Mr. Miller clearly had authority to execute such agreements on behalf of FNB. As president, he was the

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[9] There is a presumption that a corporation's recorded minutes are correct, and defendants have not suggested any basis for upsetting that presumption. *Robinson on North Carolina Corporation Law* (7* Ed.), § 12.05.

[10] Mr. Miller's choice of words is even more significant, given that he is a lawyer. The Court can take judicial notice, under Rule 201, N.C. Rules of Evidence, that Mr. Miller is licensed as a lawyer by the North Carolina State Bar, as shown by the following link to the Bar's website: http://www.ncbar.com/members/member_detail.asp?Nav=lc&callID=2&ID=8418

"general manager of its corporate affairs. His contracts made in the name of the company in its general course of business and within the apparent scope of his authority are ordinarily enforceable." *Tuttle v. Junior Building Corp., 228 N.C. 507, 512, 46 S.E.2d 313, 317 (1948)* (citations omitted).

In *Foote & Davis v. Arnold Craven Inc., 72 N.C.App. 591, 596, 324 S.E.2d 889, 893 (1985)*, citing *Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 32, 209 S.E.2d 795, 800 (1974)* and *Burlington Industries v. Foil, 284 N.C. 740, 758, 202 S.E.2d 591, 603 (1974)*. **[*28]** the Court said:

> The president of a corporation is the head and general agent of the corporation and may act for it in matters that are within the corporation's ordinary course of business or incidental to it.

In short, both First Gaston's board and FNB's president and CEO explicitly informed plaintiff that the contract had been extended beyond the date of the merger, when the action of either one would have sufficed.

IV.

DEFENDANTS RA TIFIED THE AMENDMENT TO THE AGREEMENT.

Even if FNB were successful in avoiding responsibility for actions by the board and by Mr. Miller, by showing that both lacked authority to enter into the renewal of the contract with plaintiff, its subsequent actions constituted ratification of those actions. The doctrine of ratification holds that a party's action, even if done without authority, can become the action of the party by its subsequent actions. Our Supreme Court has stated the test for determining whether ratification has occurred thusly:

> In order to establish the act of a principal as a ratification of the unauthorized transactions of an agent, the party claiming ratification must prove (1) that at the time of the **[*29]** act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction … and (2) that the principal had signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify.

Carolina Equipment and Parts Co. v. Anders, 265 N.C. 393, 400-01, 144 S.E.2d 252, 258 (1965).

In *American Travel Corp. v. Central Carolina Bank, 57 N.C.App. 437, 442, 291 S.E.2d 892, 895*, disc, review denied, *306 N.C. 555, 294 S.E.2d 369 (1982)*the Court said:

> Ratification requires intent to ratify plus full knowledge of all the material facts. … [Ratification] may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act… or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act.

(internal citation omitted).

> In *Morris v. Y&B Corp., supra*, the Supreme Court stated, with regard to ratification:
>
> As to the question of ratification and estoppel, the following is found in 4 Fletcher Cyc. Corp., § 2178, p. 3378 et seq.: **[*30]** "If the officers of a corporation or other persons assume to act for the corporation without any authority at all, or if they exceed their authority or act irregularly, and the act is one which could have been authorized in the first instance by the stockholders, board of directors or subordinate officers, as the case may be, it may be expressly or impliedly ratified by them, and thus be rendered just as binding, except as to intervening rights of third persons, as if it had been authorized when done, or done regularly. In this respect, a corporation is subject to substantially the same rules as a natural person. A corporation 'is governed, like an individual, by the same principles as to the ratification of the acts of its agents and as to estoppel in pais.' Not only may acts in excess of the authority of a corporate officer or agent be ratified, but also informal or irregular action of corporate officers or agents. If an act or contract of a corporate officer or agent is beyond the scope of his authority, or is invalid because of informalities making the act or contract voidable but not void, the corporation has two courses open to it. If it desires not to be bound thereby, it may **[*31]** escape liability by promptly repudiating the act or contract, after notice thereof, and, if benefits have been received, returning them or otherwise placing the other party in statu quo. If it desires to ratify the contract, it may either expressly ratify it or impliedly ratify it by conduct.*** (Page 3389.) And knowledge upon the part of the corporation will be presumed from slight circumstances where it has had the benefit of the

> contract.*** (Pages 3403-3404.) But, as in the case of ratification by a natural person, it may by parol, or may be implied from the conduct of the corporation, or of officers having authority to ratify, in accepting the benefits, with knowledge of the facts, or otherwise treating or recognizing the contract or act as binding; and under some circumstances it may be implied from a mere failure to repudiate or disaffirm the same. As in case of a ratification by an individual, the ratification may be express or implied. If implied, it may result from (1) accepting and retaining the benefits of the act or contract, (2) silence or acquiescence, or (3) other affirmative acts showing an adoption of the act or contract. There need not be any formal action of the **[*32]** board of directors, and the ratification need not be express nor shown by vote or resolution of the board of directors.*** (Pages 3411-3415.) As a general rule, if a corporation, with knowledge of the facts, accepts or retains the benefit of an unauthorized contract or other transaction by its officers or agents, as where it receives and uses or retains money or property paid or delivered by the other party, or accepts the benefit of services, etc., it thereby ratifies the contract or other transaction, or will be estopped to deny ratification. This rule is based upon the doctrine of ratification in toto, under which a principal must either ratify the whole transaction or repudiate the whole. He cannot separate the transaction and ratify the part that is beneficial to him, repudiating the remainder; but if he, of his own election and with full knowledge, accepts and retains the benefits of an unauthorized transaction, he must also accept the part that is not beneficial and will be held to have ratified the whole."

When FNB, acting through its CEO and board chair, induced plaintiff in May 2006 not to exercise his rights under the amended agreement, and thereby accepted the benefit **[*33]** of his services over the following two years, it did so with knowledge of its agents' actions, and it has ratified that action.

V.

FNB IS LIABLE WHERE ITS AGENTS ACTED WITHIN THEIR APPARENT A UTHORITY.

Even if the board of FNB's predecessor in interest and FNB's president lacked authority to enter into an amended agreement with plaintiff, and even if they have not ratified that action, there is no reason that plaintiff should have been aware of those deficiencies. FNB is contractually obligated under the doctrine of apparent authority. A principal is liable upon a contract made by an agent acting in excess of his actual authority when the agent acts within the scope of his apparent authority, provided that the third person is without notice that the agent is exceeding actual authority. *Investment Properties of Asheville Inc. v. Allen, 283 N.C. 277, 285-286,196 S.E.2d 262, 267 (1973)*; *Foote &Davies, Inc. v. Arnold Craven, Inc., supra, 72 N.C.App. at 595, 324 S.E.2d at 892*. There exists no basis for imputing knowledge of such lack of authority to plaintiff, and he was entitled to rely on this apparent authority. Apparent authority "is that **[*34]** authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possess." *Zimmerman v. Hogg & Allen, 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974)*. Given that we are discussing actions by a corporation's chief executive and its board of directors, it would be difficult to consider a more clearcut example of apparent authority.

In *Foote & Davies, Inc. v. Arnold Craven, Inc., supra, 72 N.C.App. at 595, 324 S.E.2d at 892-893*, the Court said:

> Apparent authority includes authority to do whatever is usual and necessary to transact the business an agent is employed to transact. *Research Corporation v. Hardware Co., 263 N.C. 718, 721, 140 S.E.2d 416, 419 (1965)*, citing *Wynn v. Grant, 166 N.C. 39, 47, 81 S.E. 949, 953 (1914)*. The law of apparent authority usually depends upon the unique facts of each case, *Zimmerman v. Hogg & Allen, 286 N.C. 24, 32, 209 S.E.2d 795, 800 (1974)*, such as the ordinary course of business, the nature and reasonableness of the contract, the officer negotiating it, the size of the corporation, and the number of shareholders. **[*35]** Thus, in a case where the evidence is conflicting, or susceptible to different reasonable inferences, the nature and extent of an agent's authority is a question of fact to be determined by the trier of fact. 3 Am.Jur.2d, Agency, sec. 360, at 719 (1962). Where different reasonable and logical inferences may not be drawn from the evidence, the question is one of law for the court. *Id. at 720*. Such is the case here.

Given the fact that the actions taken both by the board and by the CEO were within the scope of what one would

expect from persons holding such roles, plaintiff was entitled to rely on these actions. In *Zimmerman v. Hogg & Allen, P.A., 286 N.C. at 32, 209 S.E.2d at 800*, the Court quoted at length from *Burlington Industries Inc. v. Foil, 284 N.C. 740, 758-59, 202 S.E.2d 591,603-04(1974)*:

> The business and affairs of a corporation are ordinarily managed by its board of directors. G.S. § 55-24(a). In general, the directors establish corporate policies and supervise the carrying out of those policies through their duly elected and authorized officers. Robinson § 70.
>
> The day-to-day business of a corporation is actually conducted **[*36]** by its officers, employees and other agents under the authority and control of its board of directors. Robinson § 98. Under G.S. § 55-34(b), the officers of a corporation have such authority and may perform such duties in the management of the corporation as provided either specifically or generally in the by-laws, or as may be determined by action of the board of directors not inconsistent with the bylaws.
>
> This Court has frequently held that the president of a corporation by the very nature of his position is the head and general agent of the corporation, and accordingly he may act for the corporation in the business in which the corporation is engaged. *Pegram-West v. Insurance Co., 231 N.C. 277, 56 S.E.2d 607 (1949)*; *Mills v. Mills, 230 N.C. 286, 52 S.E.2d 915 (1949)*; *Warren v. Bottling Co., 204 N.C. 288, 168 S.E. 226 (1933)*. The authority of the president to act for the corporation is limited to those matters that are incidental to the business in which the corporation is engaged; that is, to matters that are within the corporation's ordinary course of business. *Pegram-West v. Insurance Co., supra*; *Trust Company v. Transit Lines, 198 N.C. 675, 153 S.E. 158 (1930)*; **[*37]** *Brimmer v. Brimmer & Co., 174 N.C. 435, 93 S.E. 984 (1917)*.

The Court in *Foote & Davies* also said that the general rule is that a person dealing with an agent must know the extent of his authority does not apply when dealing with one who is a general agent, as the president of a corporation. In such case the burden is upon the principal to show that the other party had notice of a restriction upon the power of the general agent. *72 N.C.App. at 597, 324 S.E.2d 894*. It can hardly be said that where actions have been taken by the Board and by the president, chief executive officer and chairman of the Board, those actions are the action of the corporation.

Conclusion

For the reasons stated, the defendants' motion should be denied, whether based solely on the contents of the pleadings or whether based on the additional information shown in the plaintiffs affidavit.

/s/ Louis L. Lesesne, Jr.
Louis L. Lesesne, Jr.
NC State Bar No. 6723
Essex Richards, P.A.
1701 South Blvd.
Charlotte NC 28203-4727
704-377-4300
704-372-1357-Facsimile

llesesne@essexrichards.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that I have **[*38]** served the foregoing document on the defendants by e-mailing a copy thereof to their attorney at the following address:

Don. Cowan@elliswinters .com

Dated: February 14, 2009.

/s/ Louis L. Lesesne Jr.
Louis L. Lesesne, Jr.

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