

PAUL & FLORENCE THOMAS MEM. ART SCH., INC. v. ATWELL

12-CVS-359

NORTH CAROLINA SUPERIOR COURT, ASHE COUNTY

August 21, 2013

Reporter

2013 NCBC Motions LEXIS 168 *

THE PAUL AND FLORENCE THOMAS MEMORIAL ART SCHOOL, INC., Plaintiff, v. J. STANLEY ATWELL, as Successor Trustee of the Florence Thomas Living Trust, PETER PARISH, as Successor Trustee of the Thomas-Plummer Trust established by the Trust Agreement of the Florence Thomas Living Trust, as Restated and Amended, BETTY LOU THOMAS PLUMMER, Individually and as Executor to the Estate of Florence Thomas, Defendants and Third-Party Plaintiffs, vs. HELTON UNITED METHODIST CHURCH; HELTON UNITED METHODIST CHURCH CEMETERY; EMORY & HENRY COLLEGE; APPALACHIAN STATE UNIVERSITY; MELBA G. MILLER; ANN GRIFFITTS; PAULINE E. HART; GERALD W. MORTON; BETTY K. MORTON; and PATSY M. DOLINGER, Third-Party Defendants.

Type: Motion

Counsel

[*1] THE PAUL AND FLORENCE THOMAS MEMORIAL ART SCHOOL, INC., SPILMAN THOMAS & BATTLE, PLLC, Jeffrey D. Patton, N.C. State Bar No. 32920, Erin Jones Adams, N.C. State Bar No. 36858, Winston-Salem, NC.

Title

MEMORANDUM IN SUPPORT OF PLAINTIFF'S AMENDED AND RESTATED MOTION TO DISMISS THE SECOND AMENDED COUNTERCLAIM AND THIRD-PARTY COMPLAINT OF DEFENDANT PETER PARISH, AS SUCCESSOR TRUSTEE OF THE THOMAS-PLUMMER TRUST

Text

The Paul and Florence Thomas Memorial Art School, Inc. (the "Art School") submits this Memorandum in Support of Plaintiff's Amended and Restated Motion to Dismiss the Second Amended Counterclaim and Third-Party Complaint of Defendant Peter Parish, as Successor Trustee of the Thomas-Plummer Trust (the "Thomas-Plummer Trust").

I. FACTUAL OVERVIEW AND PROCEDURAL POSTURE

The Florence Thomas Living Trust was originally drafted in 1996, restated on May 7, 2002, amended in 2003, and amended again on or about August 13, 2004 (the "2004 Amendment") (collectively, the "Florence Thomas Living Trust"). (The Thomas-Plummer Trust's Second Amended Answer, Affirmative Defenses, Counterclaim, and Third-Party Complaint ("Thomas-Plummer Trust's Countercl.") at P 1.) The 2004 Amendment **[*2]** provided that a new entity to be known as "The Paul and Florence Memorial Art School" and to be situated in Ashe County was to be established after the death of Florence Thomas and funded with the remaining assets of the Florence Thomas Living Trust. (Thomas-Plummer Trust's Countercl. at PP 15-16.) The Florence Thomas Living Trust also established the Thomas-Plummer Trust for the benefit of Betty Plummer and her husband William Plummer over which Betty Plummer also served as Trustee. (Thomas-Plummer Trust's Countercl. at PP 2-3.)

Florence Thomas died on March 30, 2007, and Betty Plummer was named the Successor Trustee of the Florence Thomas Living Trust. (Thomas-Plummer Trust's Countercl. at PP 18, 21.) Pursuant to the terms of the Florence Thomas Living Trust, Grady Lonon, as attorney for Betty Plummer in her fiduciary capacities as Executor of the Florence Thomas Estate, Successor Trustee of the Florence Thomas Living Trust, and Trustee of the Thomas-Plummer Trust, incorporated The Paul and Florence Thomas Memorial Art School, Inc., on April 23,

2007.

(Thomas-Plummer Trust's Countercl. at PP 18, 22.) Betty Plummer, as Successor Trustee of the Florence Thomas Living Trust, overfunded [*3] the Thomas-Plummer Trust by \$ 584,200, in violation of the terms of the Trust. (Thomas-Plummer Trust's Countercl. at PP 22-24.) In derogation of the 2004 Amendment, Betty Plummer also used these funds to make payments to certain third-parties, the Third-Party Defendants, who are not beneficiaries under the 2004 Amendment. (Thomas-Plummer Trust's Countercl. at P 27.)

On August 28, 2012, the Art School initiated this civil action with the filing of its Complaint against Peter Parish, as Successor Trustee for the Florence Thomas Living Trust and the Thomas Plummer Trust,¹ and Betty Plummer, as Executor of the Estate of Florence Thomas, seeking a declaratory judgment and preliminary and permanent injunction as to their proposed use of the residuary funds from the Florence Thomas Living Trust to pay certain estate and death taxes. On November 26, 2012, the Thomas-Plummer Trust filed its Amended Answer, Affirmative Defenses, Counterclaim, and Third-Party Complaint² alleging a controversy as to the proper beneficiaries of the Florence Thomas Living Trust. Based on a theory of respondeat superior, the Thomas-Plummer Trust further asserted that the Art School is liable for the purportedly [*4] fraudulent conduct of Betty Plummer's attorney, Grady Lonon, including claims against the Art School for constructive fraud, breach of fiduciary duty, negligent misrepresentation, negligence, and violation of the North Carolina Uniform Trust Code. These claims arise entirely from the alleged acts of Grady Lonon while he served as Betty Plummer's personal counsel and while she was Executor of the Estate of Florence Thomas, Successor Trustee of the Florence Thomas Living Trust, and Trustee of the Thomas-Plummer Trust. Remarkably, yet telling, Peter Parish did not add Grady Lonon as a party to this civil action.

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¹Peter Parish was appointed Successor Trustee of the Florence Thomas Living Trust and Thomas-Plummer Trust by Betty Plummer. As of November 15, 2012, Peter Parish no longer served as Successor Trustee of the Florence Thomas Living Trust. He was replaced in this role by J. Stanley Atwell.

²The Thomas-Plummer Trust filed its initial responsive pleading to the Complaint on November 6, 2012.

On December 27, 2012, the Art School timely moved to dismiss the Thomas-Plummer Trust's Counterclaim and Third-Party Complaint. On January 25, 2013, the Art School further moved for Judgment on the Pleadings as to the Counterclaim and Third-Party Complaints filed by Peter Parish. On May 7, 2013, the Thomas-Plummer Trust subsequently amended its Counterclaim and Third-Party Complaint to add two affirmative defenses.³

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On May 7, 2013, this action was designated as exceptional under Rule 2.1 of the General Rules of Practice for the Superior and District Courts and assigned to the North Carolina Business Court. Pursuant to the Case

³On May 7, 2013, Peter Parish, as Successor Trustee of the Thomas-Plummer Trust, filed a motion styled "Motion by Defendant Peter Parish, Trustee of the Thomas-Plummer Trust for Leave to File His Second Amended Answer, Affirmative Defenses, and Third-Party Complaint." On this same date, before the Court had granted leave for the Thomas-Plummer Trust to amend its pleading, Peter Parish filed his proposed amended pleading styled "Second Amended Answer, Affirmative Defenses, Counterclaim and Third-Party Complaint of Peter Parish, Trustee of the Thomas-Plummer Trust." After this civil action was assigned to Business Court, pursuant to the Case Management Order entered on July 18, 2013, the parties had until July 31, 2013 to amend their pleadings or add third parties without any further involvement by the Business Court. On July 16, 2013, the Thomas-Plummer Trust again attempted to amend its pleading with a motion styled "Motion of Defendant Peter Parish, Trustee of the Thomas-Plummer Trust, for Leave to File His Third Amended Answer, Affirmative Defenses and Third-Party Complaint." Attached to this motion was an unsigned proposed amended pleading. The Thomas-Plummer Trust did not file this proposed amended pleading by the July 31, 2013 deadline. In an e-mail to all counsel in this case dated August 8, 2013, counsel for the Art School informed the Thomas-Plummer Trust that the failure to file its proposed amended pleading was in violation of and disrupting the Case Management Order and requested that it be done promptly. The Thomas-Plummer Trust did not respond to this correspondence and has failed to sign, serve and file its proposed amended pleading to date. Thus, the Art School's Amended and Restated Motion to Dismiss the Thomas-Plummer Trust's Counterclaim and Third-Party Complaint is directed at the only live, amended pleading the Thomas-Plummer Trust has filed in this civil action - the "Second Amended Answer, Affirmative Defenses, Counterclaim and Third-Party Complaint of Peter Parish, Trustee of the Thomas-Plummer Trust" filed on May 7, 2013. As the Thomas-Plummer Trust failed to file the proposed amended pleading that was attached to its July 16, 2013 motion for leave to amend by the July 31, 2013 deadline, it has been abandoned by the Thomas-Plummer Trust and properly disregarded by the Art School. In turn, the Art School requests that this proposed amended pleading be disregarded by this Court.

Management Order entered on July 18, 2013, the parties were provided until August 21, 2013 to withdraw or amend any pending motions. The Art School withdraws its prior pending motions against the Thomas-Plummer Trust and submits this Memorandum in Support of its Restated and Amended Motion to Dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, as the Thomas-Plummer Trust's Second Amended Counterclaim and Third-Party Complaint fails to state a claim upon which relief can be granted by this Court.

II. ARGUMENT

A. STANDARD FOR MOTION TO DISMISS

Pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, a motion to dismiss may be asserted where there is a lack of jurisdiction over the subject matter and where a party has failed to state a claim upon which relief can be granted. Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction and is properly challenged [*7] by a motion to dismiss for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted under Rule 12(b)(1). See [*Fairfield Harbour Property Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 715 S.E.2d 273, 280 \(N.C. App. 2011\)](#); see also [*Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 112, 574 S.E.2d 48, 51 \(2002\)](#) (internal citations omitted). In a motion to dismiss under Rule 12(b)(6), the question "is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." [*White v. Collins Building, Inc.*, 209 N.C. App. 48, 50, 704 S.E.2d 307, 309 \(2011\)](#) (citing [*Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 282, 669 S.E.2d 777, 778 \(2008\)](#)). "A claim should be dismissed for failure to state a claim upon which relief can be granted and where it appears that the nonmoving party is not entitled to relief under any set of facts which could be proven. This occurs where there is a lack of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or disclosure of some [*8] fact which will necessarily defeat the claim." *Id.* (internal citation and quotation marks omitted).

B. THE THOMAS-PLUMMER TRUST LACKS STANDING TO SEEK A DECLARATORY JUDGMENT TO DETERMINE THE PROPER

BENEFICIARIES OF THE FLORENCE THOMAS LIVING TRUST.

In a declaratory judgment action, standing means that a party "has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." [*Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer*, 209 N.C. App. 369, 379, 705 S.E.2d 757, 765](#), review denied, 365 N.C. 188, 707 S.E.2d 243 (2011). The Thomas-Plummer Trust does not have a sufficient stake in such controversy. As of the date the Thomas-Plummer Trust was fully funded by the Florence Thomas Living Trust in 2007, it was no longer a beneficiary of the Florence Thomas-Living Trust and unable to challenge its terms. Furthermore, when the Thomas-Plummer Trust filed its Counterclaim and Third-Party Complaint, no purported beneficiary of the Florence Thomas Living Trust had challenged its validity. The Thomas-Plummer Trust has further admitted that the Thomas-Plummer Trust was not affected by the [*9] 2004 Amendment. (Thomas-Plummer Trust's Countercl. at P 17.) Thus, the Thomas-Plummer Trust lacks standing to request a declaratory judgment to determine the "proper" beneficiaries of the Florence Thomas Living Trust.

C. THE THOMAS-PLUMMER TRUST'S DEMAND FOR DECLARATORY JUDGMENT AS TO THE PROPER BENEFICIARIES OF THE FLORENCE THOMAS LIVING TRUST SHOULD BE DISMISSED BECAUSE IT IS TIME-BARRED.

Any claim challenging the validity of the 2004 Amendment to the Florence Thomas Living Trust is barred by the limitations period set forth in N.C. Gen. Stat. § 36C-6-604. Effective January 1, 2006, North Carolina adopted the Uniform Trust Code, N.C. Gen. Stat. § § 36C-1-101 *et seq.* (the "UTC"), making its provisions applicable to trusts created *before* and judicial proceedings instituted *after* the effective date. N.C. Gen. Stat. § 36C-11-1106(a). In enacting the UTC, the North Carolina legislature put an end to any uncertainty concerning the limitations period for initiating claims arising out of the settlement of revocable trusts. N.C. Gen. Stat. § 36C-6-604 (West 2013) official comments, P 1.

Pursuant to the North Carolina UTC, "[a] person may commence a judicial proceeding [*10] to contest the validity of a trust that was revocable at the settlor's death

within the earlier of: (1) three years after the settlor's death, or (2) 120 days after the trustee sent the person a copy of the trust instrument and written notice...informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding." N.C. Gen. Stat. § 36C-6-604(a). The legislative commentary to this statute states as follows: "This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death;" and, "[t]he maximum possible time for bringing a contest is three years from the settlor's death." N.C. Gen. Stat. § 36C-6-604 (West 2013) official comments, PP 1, 4. A "contest" is an action to invalidate all or part of the terms of a trust or of property transfers to the trustee and can be based on a variety of grounds, *including lack of intent or capacity, undue influence, duress, or fraud*. N.C. Gen. Stat. § 36C-6-604 (West [*11] 2013) official comments, P 1. (emphasis added).

Notwithstanding N.C. Gen. Stat. § 36C-6-604, Peter Parish asks the court to apply the ten-year statute of limitations for constructive fraud because "constructive fraud" is not specifically stated in the official comment to Section 604; however, the official comment clearly indicates that these grounds are examples by stating "for example" before listing the grounds for a contest.⁴ Therefore, it is not intended to be an exhaustive list of grounds on which a contest may be based. Because the purpose of this statute is to provide finality to when a contest of a revocable trust may be brought and does not specify any exceptions, it necessarily includes constructive fraud.

The limitations period for the [*12] declaratory judgment claim by the Thomas-Plummer Trust in this case is simple. The settlor, Florence Thomas, died on March 30, 2007. (Thomas-Plummer Trust's Countercl. at PP 18.) Thus, March 30, 2010 was the latest date that anyone could have brought a claim challenging the validity of the Florence Thomas Living Trust. Any claim regarding the validity of the Florence Thomas Living Trust is barred by the limitations period set forth in the North Carolina UTC.

⁴Despite the fact that the Thomas-Plummer Trust lacks standing or has an interest in the proper beneficiaries of the Florence Thomas Living Trust, it continues to argue, inexplicably that the limitations period in N.C. Gen. Stat. § 36C-6-604 does not apply.

Thus, the Thomas-Plummer Trust's Counterclaims and Third-Party Complaint are time-barred and should be dismissed pursuant to Rule 12(b)(6).

D. THE THOMAS-PLUMMER TRUST'S COUNTERCLAIMS AND THIRD-PARTY COMPLAINT SHOULD BE DISMISSED BECAUSE THE REMAINING CLAIMS ARE BASED ON A THEORY OF RESPONDEAT SUPERIOR WHICH FAILS AS A MATTER OF LAW.

The Thomas-Plummer Trust's claims of constructive fraud, breach of fiduciary duty, negligent misrepresentation, negligence, and violation of the North Carolina Uniform Trust Code against the Art School, which are based on the theory of respondeat superior, fail as a matter of law. Each claim is based on an allegation of vicarious liability for the actions of Grady Lonon; and, there is no allegation [*13] of direct wrongdoing asserted against the Art School. The Thomas-Plummer Trust attempts to place fault on the Art School for the actions of Grady Lonon, when in fact, Grady Lonon was Betty Plummer's attorney in her fiduciary capacities as Executor of the Florence Thomas Estate, Successor Trustee of the Florence Thomas Living Trust, and Trustee of the Thomas-Plummer Trust. These claims must be dismissed because (1) the Thomas-Plummer Trust has failed to plead the necessary elements to establish an agency relationship, (2) the Thomas-Plummer Trust cannot sue the agent and the principal, and (3) the theory of respondeat superior fails as a matter of law.

1. Failure to Properly Plead the Existence of an Agency Relationship

Two elements are essential for an agency relationship to exist: (1) the agent must be authorized to act for the principal; and (2) the principal must exercise control over the agent. *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 533, 463 S.E.2d 397, 400 (1995). "[T]o be within the scope of [the agency], an [agent], at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing [*14] the duties of his employment." *Frazier v. Beard*, 1996 WL 33373366, *7 (N.C.B.C. Oct. 24, 1996) (quoting *B.B. Walker Co. v. Burns Int'l Sec. Servs., Inc.*, 108 N.C.App. 562, 424 S.E.2d 172, *disc. rev. denied*, 333 N.C. 536, 429 S.E.2d 552 (1993) (internal citations omitted). Specifically, "[a]s a general rule, a principal will be liable for its agent's wrongful acts under

the doctrine of respondeat superior when the agent's acts (1) is expressly authorized by the principal; (2) is committed within the scope of the agent's employment and in furtherance of the principal's business; or (3) is ratified by the principal." [*B.B. Walker Co., 108 N.C. App. at 565, 424 S.E.2d at 174.*](#)

The Thomas-Plummer Trust's claims of constructive fraud, breach of fiduciary duty, negligent misrepresentation, negligence, and violation of the North Carolina UTC, based on a theory of respondeat superior, merely state that "[a]t all times subsequent to Florence Thomas' death on March 30, 2007, Grady Lonon was acting in the course and scope of duties as an agent of the Art School." (Thomas-Plummer Trust's Countercl. at PP 33-65.) However, nowhere [*15] does the Thomas-Plummer Trust plead facts necessary to establish a prima facie case for an agency relationship. The Thomas-Plummer Trust fails to plead that Grady Lonon was authorized to act for the principal. The Thomas-Plummer Trust fails to assert that the Art School exercised control over Grady Lonon. The Thomas-Plummer Trust further fails to allege that the purported actions of Grady Lonon were committed in furtherance of Art School or in any way ratified by the Art School. Therefore, all of Peter Parish's remaining claims, which are based on a theory of respondeat superior, fail as a matter of law and should be dismissed with prejudice.

2. Intentional Acts Are Not Within the Scope of the Agency and Principal Relationship

The misdeeds which Grady Lonon is alleged to have committed are all intentional acts such that the Art School cannot be liable. "If an employee departs from that purposes to accomplish a purpose of his own, the principal is not vicariously liable." [*B.B. Walker Co., 108 N.C. App. at 566*](#) (internal citations omitted). In this regard, "intentional acts are rarely considered to be within the scope of an employee's employment." *Id.* (citing [*16] [*Brown v. Burlington Industries, Inc., 93 N.C.App. 431, 378 S.E.2d 232, disc. review allowed, 325 N.C. 270, 384 S.E.2d 513, cert. granted, 325 N.C. 704, 387 S.E.2d 55 \(1989\), disc. review allowed, 326 N.C. 356, 388 S.E.2d 769 \(1990\)*](#)). Since the acts of which the Thomas-Plummer Trust complains concern solely the purported intentional acts of Grady Lonon, the Art School cannot be liable as a matter of law and all claims based on the theory of respondeat superior fail.

3. The Thomas-Plummer Trust Cannot Sue the Agent and the Principal

As the Court is aware, the Thomas-Plummer Trust and other parties have filed a separate action against Grady Lonon based on the same factual allegations herein, namely, for malpractice. Inexplicably, in this action they assert that their own lawyer was an agent for the Art School, yet fail to ever make the distinction known. As noted in *Frazier*, "the general rule followed in North Carolina, is that the liabilities of agents and their undisclosed principals are alternative liabilities, not joint or joint and several. When a third party becomes aware of the agency and the identity [*17] of the previously undisclosed principal, the third party is put to an election to hold either the agent or the principal liable. He cannot pursue both." *See Id.* at *8 (citing [*Walston v. R.B. Whitley & Co., 226 N.C. 537, 540, 39 S.E.2d 375, 377 \(1946\)*](#); [*3 Am.Jur.2d Agency § 317*](#) (1986)). As the Thomas-Plummer Trust is pursuing a claim directly against Grady Lonon, it cannot also pursue one against the Art School.

4. The Agency Theory Fails as a Matter of Law

When only one inference can be drawn from the facts, then the question of whether an agency relationship existed between two parties is a question of law for the trial court. *See Jones v. Lake Hickory R.V. Resort, Inc., 162 N.C. App. 618, 625, 592 S.E.2d 284, 290 (2004)*. "North Carolina law has long recognized that an attorney-client relationship is based upon the principles of agency." [*Johnson, 120 N.C. App. at 532*](#) (citing [*State v. Ali, 329 N.C. 394, 403, 407 S.E.2d 183, 189 \(1991\)*](#)). Further, the timing of Grady Lonon's alleged wrongful acts are key to determining whether as a matter of law agency principles could apply. *See Frazier*, 1996 WL 33373366 [*18] at *7.

The Thomas-Plummer Trust admits in its Counterclaims and Third-Party Complaint that Grady Lonon was Betty Plummer's attorney in her capacity as Executor of the Florence Thomas Estate, Successor Trustee of the Florence Thomas Living Trust, and Trustee of the Thomas-Plummer Trust. (Thomas-Plummer Trust's Countercl. P 22.) This attorney-client relationship resulted in agency relationship between Betty Plummer and Grady Lonon. This "agency" issue is not a question of whether at any time Grady Lonon was an agent of the Art School for any purpose, but whether he was its agent in the course and scope of the actions alleged. Grady Lonon's representation of Betty Plummer in her fiduciary

capacities involved collecting, identifying, accounting for and distributing the assets of the Estate of Florence Thomas, the Florence Thomas Living Trust, and the Thomas-Plummer Trust. (Thomas-Plummer Trust's Countercl. P 22.) Therefore, any failure to direct proper distributions or correct improper distributions was within the scope of Grady Lonon's agency relationship with Betty Plummer.

The Art School is a beneficiary of the Florence Thomas Living Trust and was to be created upon the death [*19] of Florence Thomas. (Thomas-Plummer Trust's Countercl. P 16.) The Art School was incorporated by papers Grady Lonon filed as the attorney Betty Plummer, as Successor Trustee of the Florence Thomas Living Trust. (Thomas-Plummer Trust's Countercl. P 18.) The actions he or she took to overfund the Thomas-Plummer Trust and breach the Florence Thomas Living Trust, thereby depriving the Art School of its property as the residuary beneficiary, conferred no benefit on the Art School; and, the acts complained of occurred while Grady Lonon was engaged by and acting in the course and scope of his duties as attorney for Betty Plummer, Successor Trustee and Executor. As a matter of law, even if treated as true, the Thomas-Plummer Trust's allegations only allow for one inference to be drawn by the Court - that Grady Lonon was serving as attorney for Betty Plummer in her capacity as Executor and Successor Trustee when his actions resulted in an overfunding of the Thomas-Plummer Trust in breach of the Florence Thomas Living Trust; and the Thomas-Plummer Trust has not alleged that the Art School directed his actions in any manner.⁵ Instead, Grady Lonon's authority granted to him by Betty Plummer [*20] in her capacity as Executor and Trustee and his actions were taken in the course and scope of his duties as her attorney. As the Thomas-Plummer Trust's flawed theory of respondeat superior fails, so too must all remaining claims asserted against the Art School.

E. THE THOMAS-PLUMMER TRUST'S FRAUD CLAIM SHOULD BE DISMISSED BECAUSE HE HAS FAILED TO PLEAD IT WITH THE REQUISITE PARTICULARITY.

Under Rule 9 of the North Carolina Rules of Civil Procedure, fraud must be alleged with particularity. A claim based on constructive fraud should contain facts

and circumstances that (1) create the relation of trust and confidence and (2) lead up to and surround the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust. *See Sidden Mailman*, 137 N.C. App. 669, 677, 529 S.E.2d 266, 272 (2000) (citing *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981)). To properly [*21] allege constructive fraud, the pleading must contain an allegation of the particular representation made. *See Id.*

Here, the Thomas-Plummer Trust states that Grady Lonon was Betty Plummer's attorney, but fails to allege facts and circumstances where Grady Lonon, on behalf of the Art School, took advantage of his position of trust. The Counterclaim and Third-Party Complaint simply states that Grady Lonon failed to collect, identify, account for and distribute real properties belonging to the Estate of Florence Thomas and failed to properly direct and correct distributions. (Thomas-Plummer Trust's Countercl. at P 37.) The Thomas-Plummer Trust has failed to assert the necessary facts and circumstances where Grady Lonon took advantage of his position of trust or made any fraudulent representation. In the absence of meeting these basic pleading standards, the Counterclaim and Third-Party Complaint should be dismissed with prejudice.

F. THE THOMAS-PLUMMER TRUST'S CLAIMS FOR BREACH OF FIDUCIARY DUTY, NEGLIGENT MISREPRESENTATION, AND NEGLIGENCE SHOULD BE DISMISSED BECAUSE THEY ARE TIME-BARRED.

The Thomas-Plummer Trust's claims for breach of fiduciary duty, negligent misrepresentation, [*22] and negligence are time-barred and must be dismissed pursuant to Rule 12(b)(6). Because a claim for "breach of fiduciary duty is a species of negligence or professional malpractice," the claims for negligence and breach of fiduciary duty can be merged into a claim for professional malpractice which has a three year statute of limitation. *See BDM Investments v. Lenhil, Inc.*, 2012 WL 194383, at *14 (N.C.B.C. Jan. 18, 2012) (quoting *Heath v. Craighill, Randleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 244, 388 S.E.2d 173, 183 (1990)). A claim for professional malpractice is governed by *N.C. Gen. Stat. § 1-15(c)*, which provides that the three year statute of limitation begins to run at the time of the occurrence of the last act giving rise to the defendant, but that, "in no event shall an action be commenced more than four years from the last act of the

⁵This includes any allegations of "apparent authority."

defendant giving rise to the action." In this case, the last acts complained of by the Thomas-Plummer Trust occurred outside of the applicable limitations period for negligence and breach of fiduciary duty and must be dismissed.

Similarly, a claim for negligent misrepresentation is governed by a three [*23] year statute of limitation under [*N.C. Gen. Stat. § 1-52\(9\)*](#). BDM Investments, 2012 WL 194383, at *12. However, a claim for negligent misrepresentation "does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation, and second, the claimant discovers the misrepresentation." *Id.* (quoting [*Barger v. McCoy Hilliard & Parks*, 346 N.C. 605, 666, 488 S.E.2d 215, 224 \(1997\)](#)). Here, the actions complained of center around the improper distribution of assets which took place in 2007 and were known at that time when the Thomas-Plummer Trust received significantly more funds than the terms of the Florence Thomas Living Trust allowed. Therefore, the claims are in fact barred by the applicable statute of limitations.

G. THE THOMAS-PLUMMER TRUST'S CLAIMS FOR CONSTRUCTIVE FRAUD AND BREACH OF FIDUCIARY DUTY SHOULD BE DISMISSED BECAUSE NO FIDUCIARY DUTY EXISTED BETWEEN THE ART SCHOOL AND THE ESTATE.

A claim for constructive fraud and a claim for breach of fiduciary duty both require the existence of a fiduciary relationship. See [*Keener Lumber Company, Inc. v. Perry*, 149 N.C. App. 19, 27, 560 S.E.2d 817, 823 \(2002\)](#) [*24] and [*White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 155 \(2004\)](#). "In general terms, a fiduciary relation is said to exist '[w]herever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith with due regard to the interests of the one reposing the confidence.'" [*White at 294, 603 S.E.2d at 155*](#) (internal citations omitted). In this case, no fiduciary relationship between the Art School and Betty Plummer is alleged anywhere in the Thomas-Plummer Trust's Counterclaims and Third-Party Complaint. Instead, the Thomas-Plummer Trust's claims merely state that Grady Lonon "[w]hile acting in the course and scope of his duties as an agent of the Art School...secured a relation of trust and confidence with Third-Party Plaintiff Betty Lou

Plummer..." (Thomas-Plummer Trust Countercl. P at 35.) There is no case law in North Carolina that imputes the fiduciary relationship of an alleged "agent" to the principal when no such relationship existed between the principal and alleged victim on its own. Grady Lonon's [*25] fiduciary duty to Betty Plummer arose from his legal representation of Betty Plummer in her capacities as Executor and Trustee. Therefore, the constructive fraud and breach of fiduciary duty claims fail as a matter of law.

H. THE THOMAS-PLUMMER TRUST'S CLAIMS FOR NEGLIGENT MISREPRESENTATION AND NEGLIGENCE SHOULD BE DISMISSED BECAUSE THEY ARE BARRED BY THE THOMAS-PLUMMER TRUST'S OWN CONTRIBUTORY NEGLIGENCE.

In North Carolina, contributory negligence poses a complete bar to a negligence claim. See [*Crawford v. Mintz*, 195 N.C. App. 713, 717, 673 S.E.2d 746, 749 \(2009\)](#) (citing [*Swain v. Preston Falls East, L.L.C.*, 156 N.C. App. 357, 361, 576 S.E.2d 699, 702, \(2003\)](#)). To establish contributory negligence, a party must demonstrate (1) a want of due care on the part of the party claiming negligence, and (2) a proximate connection between that negligence and the injury." See *Id.* (citing [*Seay v. Snyder*, 181 N.C. App. 248, 251, 638 S.E.2d 584, 587 \(2007\)](#)).

In the Counterclaim and Third-Party Complaint, the Thomas-Plummer Trust alleges that Betty Plummer's attorney, Grady Lonon, failed to exercise due care in distributing the proper [*26] assets to the appropriate beneficiaries. By its own admission, the Thomas-Plummer Trust acknowledges that this purported breach of due care in distributing assets under the Florence Thomas Living Trust directly resulted in the overfunding of the Thomas-Plummer Trust. (Thomas-Plummer Trust Countercl. P 24.) The Thomas-Plummer Trust further admits that Grady Lonon was Betty Plummer's attorney, as Trustee of the Thomas-Plummer Trust, when these actions occurred. (Thomas-Plummer Trust Countercl. P 22.) Thus, the Thomas-Plummer Trust, by and through its agent, Grady Lonon, demonstrated a want of due care in the administration of the Florence Thomas Living Trust assets and failed to correct the overfunding of the Thomas-Plummer Trust or any improper distribution of its assets. This negligence on the part of the Thomas Plummer Trust and its agent caused any alleged injury from which Peter

Parish now seeks to recover.⁶ As a result, the Thomas-Plummer Trust is barred from any recovery under any claims of negligent misrepresentation and negligence. Therefore, such claims should be dismissed with prejudice.

[*27]

III. CONCLUSION

Based on the facts and law cited herein, the Art School respectfully prays that this Court grant the Art School's Amended and Restated Motion to Dismiss the Second Amended Counterclaim and Third-Party Complaint by Defendant Peter Parish, as Successor Trustee of the Thomas-Plummer Trust.

This 21st day of August, 2013.

THE PAUL AND FLORENCE THOMAS

MEMORIAL ART SCHOOL, INC.

By: SPILMAN THOMAS & BATTLE, PLLC

/s/ Jeffrey D. Patton

Jeffrey D. Patton

N.C. State Bar No. 32920

Erin Jones Adams

N.C. State Bar No. 36858

110 Oakwood Drive, Suite 500

Winston-Salem, NC 27103

Telephone: (336) 725-4710

Facsimile: (336) 725-4476

CERTIFICATION AS TO WORD LIMITATION

Pursuant to Rule 15.8 of the General Rules of Practice and Procedure of the North Carolina Business Court, the undersigned hereby certifies that this brief contains less than 7,500 words (as determined by the word count of Microsoft Word).

This the 21st day of August, 2013.

/s/ Jeffrey D. Patton

⁶ Additionally, the Thomas-Plummer Trust fails to plead plausible damages. The Thomas-Plummer Trust admits it was overfunded and received more money than it was entitled to receive which does not amount to damages.

Jeffrey D. Patton

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing **MEMORANDUM [*28] IN SUPPORT OF PLAINTIFF'S AMENDED AND RESTATED MOTION TO DISMISS THE SECOND AMENDED COUNTERCLAIM AND THIRD-PARTY COMPLAINT OF DEFENDANT PETER PARISH, SUCCESSOR TRUSTEE OF THE THOMAS-PLUMMER TRUST** was duly served on all parties of record via U.S. First-class Mail, postage pre-paid, and via electronic mail to the counsel of record that have electronic mail addresses listed below as follows:

Jamie L. Forbes

N. C. State Bar No. 27829

The Worth Law Firm

301 South Greene Street, Suite 300

Greensboro, N. C. 27401

jamielisaforbes@gmail.com

Attorneys for Peter Parish as Successor Trustee of the Thomas-Plummer Trust

John T. Kilby, Esq.

Kilby & Hurley Attorneys at Law

P. O. Box 24

West Jefferson, NC 28694

tammy@kbhattys.com

Attorney for Patsy M. Dolinger, Ann Griffiths, Pauline E. Hart and Melba Miller

Steve Phar, Esquire

N.C. State Bar. No. 13071

Kristina M. Varady

N.C. State Bar No. 42355

Pharr Law, PLLC

8 West Third Street, Suite 600

Winston-Salem, NC 27101

spharr@pharrlaw.com

kvarady@pharrlaw.com

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Attorneys for Emory & Henry College

Vance Barron, Jr.

N.C. State Bar No. 5499

Barron & Barry, LLP

P.O. Box 2370

Greensboro, [*29] NC, 27402

vance.barron@barronberry.com

Attorney for Peter Parish, as Successor Trustee for the Florence Thomas Living Trust

Micah D. Ball

N. C. State Bar No. 10238

Colombo, Kitchin, Dunn, Ball & Porter, LLP,

1698 East Arlington Boulevard

Greenville, NC 27858

mbalk@ck-attorneys.com

and

Thomas A. Worth

N.C. State Bar No. 10590

The Worth Law Firm

301 South Greene Street, Suite 300

Greensboro, N. C. 27401

tworth@worthlawfirm.com

Attorneys for Betty Lou Thomas Plummer, as Executor of the Estate of Florence Thomas

Gerald Morton

P.O. Box 16353

Bristol, VA 24209

(no electronic mail address available)

Appalachian State University

c/o North Carolina Attorney General

9001 Mail Service Center

Raleigh, NC 27699-9001

(no electronic mail address available)

Betty K. Morton

1199 Hayes Forest Drive, Apt. 209

Winston-Salem, NC 27106-3370

(no electronic mail address available)

David A. Jolly

N.C. State Bar # 17473

P.O. Box 38

Crumpler, North Carolina 29617

djolly@skybest.com

Attorney For Helton United Methodist Church And Helton Cemetery Association, Inc.

This 21st day of August, 2013.

/s/ Erin Jones Adams [*30]

Erin Jones Adams

N.C. State Bar No. 36858

Spilman Thomas & Battle, PLLC

110 Oakwood Drive, Suite 500

Winston-Salem, NC 27103

Telephone: (336) 631-1051

Facsimile: (336) 725-4476

eadams@spilmanlaw.com

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