

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 3392

RCJJ, LLC; DO GOOD REAL ESTATE,
LLC; DO GOOD REAL ESTATE OF
WILMINGTON, LLC and JOHNATHAN
JACKSON,

Plaintiffs,

vs.

RCWIL ENTERPRISES, LLC d/b/a Nest
Realty Wilmington and RYAN
CRECELIUS,

Defendants.

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
MOTION TO ENFORCE
SETTLEMENT AGREEMENT**

Defendants Ryan Crecelius ("Crecelius") and RCWIL Enterprises, LLC d/b/a Nest Realty Wilmington, (collectively, the "Defendants") through counsel, submit this memorandum in support of their motion for summary judgment or, in the alternative, partial summary judgment and motion to enforce settlement agreement.

FACTS

In March, 2010, Defendant Ryan Crecelius left Coldwell Banker to form Do Good Real Estate. The company's distinctive feature was that it donated a percentage of its commissions to charity. In early 2012, Crecelius and his long-standing friend, Johnathan Jackson ("Jackson"), had discussions about Jackson investing in the company. Jackson was living at the time in New York City. These discussions eventually led to an agreement that Jackson would join the company as an equal owner. (Exh. 6, pp. 19-23)¹

¹ All references are to the Summary Judgment Exhibits, a list of which along with the exhibits themselves is being filed separately. ("Exh. ___, p. ___"). Attachments to Crecelius's affidavit (Exh. 2) are identified by letter.

42-3) With the exception of Jankowski, and possibly one other, none of the agents even knew prior to August 25, 2014 what the name of Crecelius' new entity would be.

D. Plaintiff's Unfair and Deceptive Trade Practices Claims Should Be Dismissed

N.C. Gen. Stat. § 75-1.1 prohibits “unfair or deceptive acts or practices in or affecting commerce”. In order to prevail on such a claim, the plaintiff must show (1) defendant committed an unfair or deceptive act or practice (2) the action in question was in or affecting commerce and (3) the act proximately caused injury to the plaintiff. Dalton v. Camp, 353 N.C. 647, 656, 548 S.E. 2d 704, 711 (2001).

There are two components to Plaintiffs' claim. The first is the assertion that Crecelius took proprietary and trade secrets information of Do Good, i.e. HighRise to Nest Realty and used that information for competitive purposes. The second is that Crecelius made misrepresentations prior to execution of the Separation Agreement. (Complaint ¶¶ 112-119). Both aspects of the unfair and deceptive trade practice claim relate to pre-settlement conduct and, as such, are barred by the Separation Agreement. Regardless, these claims fail because the alleged actions were not “in or affecting commerce” within the meaning of N.C. Gen. Stat. § 75-1.1.

In White v. Thompson, 364 N.C. 47, 691 S.E. 2d 676 (2010), the Supreme Court addressed contentions by one partner against another, following the defection of the one partner from the business, that the departing partner had acted in derogation of the interests of the business by diverting work originally intended for the partnership to his new business and had done so in conspiracy with employees and the partnership's accountant. The Supreme Court held that this alleged conduct was not “in or affecting commerce” within the meaning of N.C. Gen. Stat. § 75-1.1, because it related solely to the internal operations of a single business or

market participant. Id. at 52-54. Reviewing the history of the statute and previous court decisions, including Dalton, the Supreme Court concluded that the purpose of the statute was to address interactions between market participants, i.e. interactions between businesses and interactions between businesses and consumers, not the internal conduct of individuals within a single business. The underlying allegations in White v. Thompson are, of course, strikingly similar to the allegations in the instant case, i.e. while still an owner of the business, the departing owner diverted an asset to his new business for competitive purposes and engaged in deceptive conduct. Consequently, Plaintiffs' unfair and deceptive trade practice claims should be dismissed. See also McKee v. James, supra, 2014 NCBC 73, ¶¶ 78-81 (allegations that fellow business owner engaged in misrepresentations and other conduct which rendered company "broke and destitute" not actionable under N.C. Gen. Stat. § 75-1.1).

Further, with respect to that portion of its unfair and deceptive trade practice claims which relate to the alleged misappropriation of a trade secret, i.e. HighRise, Plaintiffs are unable to demonstrate that they suffered any injury, which is an indispensable component of a N.C. Gen. Stat. § 75-1.1 claim. See Dalton, supra, 353 N.C. at 656, 548 S.E. 2d at 711. Tellingly, their damages expert does not assign any damage to the alleged transfer of proprietary and trade secret information. (Exh. 56)

Even if the teachings of White v. Thompson did not bar Plaintiffs' unfair and deceptive trade practices claim, for the reasons set forth elsewhere, Plaintiffs have failed to show that Crecelius' alleged activity was deceptive. The allegations about Crecelius' retention of certain databases are essentially breach of contract allegations and there are no "aggravating circumstances" which would support transforming the contract claim into an unfair and deceptive trade practice claim. See, Medfusion; McKee.