

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DURHAM DIVISION

MICHAEL R. HOLLERBACH)
)
Plaintiff,)
)
v.) Civil Action No. 86-928-D
)
THOMAS F. FAY and)
MARGARET M. FAY)
)
Defendants.)

MEMORANDUM OPINION

This matter is before the Court on the defendants' motion for summary judgment, pursuant to Fed. R. Civ. P. 56(b).

Mr. and Mrs. Fay contend that Mr. Hollerbach is not a proper party to this litigation. They argue that he did not act as general contractor as agreed to in the parties' construction contract; nor did he incur any damages since he was not personally obligated for the bills submitted by subcontractors.

In response, the plaintiff asserts that the Fays are procedurally barred from raising these issues at this late date. Although the plaintiff correctly notes that the defendants have failed to comply with Local Rule 206, the Court finds that consideration of the motion "will not cause delay to the proceedings." Therefore, the motion is not barred under the Local Rules. Similarly, Rules 8(c) and 9(c), Fed. R. Civ. P., do not act to defeat this motion. Although the defendants' defense is arguably one that should have been pled in their answer under Rule 8(c) and 9(c), the defense can be raised by a summary

judgment motion. See DelCostello v. International Brotherhood of Teamsters, 588 F. Supp. 902 (D.C. Md. 1984), aff'd on other grounds, 762 F.2d 1219 (4th Cir. 1985); 5 Wright and Miller, Federal Practice & Procedure § 1277, at 328-29.

Summary judgment, however, is appropriate only where "it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979)(citation omitted). The burden is on the moving party to "'show' that there 'is no genuine issue as to any material fact' and that he 'is entitled to judgment as a matter of law.'" Id. (citation omitted). "In determining whether this showing has been made, [the Court] must assess the evidence as forecast in the documentary materials before the [Court] in the light most favorable to the party opposing the motion." Id. (citation omitted).

In the instant case, the facts are not "perfectly clear" and are in fact contradictory. The defendants claim that Mr. Hollerbach assigned their contract to another party; Mr. Hollerbach claims he did not. (Hollerbach aff. at 3-4) The defendants argue that Mr. Hollerbach bore no financial responsibility for the payment of the various subcontractors working on the house. Yet Mr. Hollerbach states that he "bore ultimate responsibility on every contract." (Hollerbach aff. at 3) These factual disputes and others must be resolved to unravel the complex issues of receivership and contract law posed in the defendants' motion.

Consequently, the defendants' motion for summary judgment is denied. The defendants are invited, of course, to renew their motion at the close of evidence or after the jury returns its verdict.

Let the Clerk send a copy of this memorandum opinion to all counsel of record.

4/28/88
DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE