UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
	)	
Cornerstone Residential Development Corporation,	)	Case No. 97-52476C-7W
	)	
Debtor.	)	
	)	
A. Gregory Rosenfeld,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 99-6034
	)	
Lee Beason and Centura Bank,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This adversary proceeding came before the court on March 29, 2001, for hearing upon a motion by Centura Bank for summary judgment. John A. Meadows appeared on behalf of the plaintiff and Christine L. Myatt appeared on behalf of Centura Bank.

FACTS

The depositions and other materials submitted by the parties in support of and in opposition to the motion, read in the light most favorable to the plaintiff, reflect the following undisputed facts. Prior to its bankruptcy, Cornerstone Residential Development Corporation ("Cornerstone") was a North Carolina corporation located in Hickory, North Carolina. Cornerstone was operated and managed by its president and sole shareholder, Todd Sides. The primary business of Cornerstone was the construction

and sale of residences. In some instances, Cornerstone purchased the existing residences from its new-home customers and held these "trade homes" until they could be sold. In purchasing such homes, Cornerstone intended to resell the trade homes for a profit.

During 1997, Cornerstone had a banking relationship with Centura Bank which included a substantial line of credit. Cornerstone's primary contact at Centura Bank was Lee Beason, a loan officer at Centura Bank. By approximately June or July of 1997, Cornerstone was at the limit of its line of credit and additional advances from Centura Bank were not available. Cornerstone had a number of projects underway at that time and the unavailability of further credit from Centura Bank created a cash flow problem for Cornerstone, which prompted Cornerstone to look elsewhere for funding.

During 1997, the plaintiff also had a banking relationship with Centura Bank. Plaintiff's personal banker at Centura was Mr. Beason. Mr. Beason had been plaintiff's personal banker at two previous banks while Mr. Beason was employed at those banks, going back to 1991. The two men regarded each other as friends, as well as business associates. In addition to banking matters, Mr. Beason and the plaintiff had discussions concerning possible investments and on occasion had exchanged stock tips.

In the Spring of 1997, Mr. Beason mentioned Cornerstone to the plaintiff as an investment opportunity that he ought to consider.

Thereafter, Mr. Beason arranged two meetings attended by Mr. Sides, the plaintiff and Mr. Beason for the purpose of discussing Cornerstone as a possibility for an investment by the plaintiff. At these meetings the nature of Cornerstone's business was discussed, including the trade homes program. The plaintiff also was furnished with various documents, including a list of Cornerstone homes under contract with the projected profit for each home, a list of homes under construction with the anticipated gross profit for each, and a list of trade homes available for purchase from Cornerstone customers and the estimated profit available with each trade home. The plaintiff was offered an opportunity to purchase a trade home or to invest or loan money directly to Cornerstone. Both Mr. Sides and Mr. Beason participated in making a presentation to the plaintiff that was favorable to Cornerstone and which encouraged the plaintiff to invest in or loan money to Cornerstone. However, plaintiff was told by Mr. Sides and Mr. Beason that Cornerstone had "maxed out" on its line of credit at Centura and needed funding from another source because Cornerstone was unable to obtain further loans from Centura or any other banks. Following these two meetings, the plaintiff had a couple of telephone conversations with Mr. Sides before deciding to advance funds to Cornerstone.

The funds that plaintiff advanced to Cornerstone came from a loan that the plaintiff obtained from Catawba Valley Bank. The

Catawba Valley Bank loan was arranged by Mr. Beason on behalf of the plaintiff, using copies of documents that plaintiff earlier had submitted to Centura Bank. Although the loan was closed on August 4, 1997, after Mr. Beason had been terminated by Centura Bank, the arrangements for the loan were made by Mr. Beason while he was still employed at Centura Bank.

The plaintiff decided to structure his relationship with Cornerstone as a loan. On August 8, 1997, plaintiff made his first loan to Cornerstone in the amount of $100,000.00, pursuant to a promissory note that obligated Cornerstone to repay $115,000.00 on September 15, 1997, consisting of principal of $100,000.00 and interest of $15,000.00. On August 28, 1997, plaintiff loaned Cornerstone an additional $200,000.00 pursuant to a promissory note that obligated Cornerstone to repay $220,000.00 on September 25, 1997, consisting of principal of $200,000.00 and interest of $20,000.00. After receiving a $30,000.00 payment from Cornerstone on September 9, 1997, and a $25,000.00 payment on September 26, 1997, the plaintiff obtained from Cornerstone a September 29, 1997 renewal note that called for a payment of $300,000.00 on October 27, 1997. The last payment received by the plaintiff was in the amount of $4,000.00 which was made in December of 1997.

On December 27, 1997, an involuntary bankruptcy petition was filed against Cornerstone. Thereafter, an order for relief was entered in the bankruptcy court and a Chapter 7 trustee was

appointed for Cornerstone. No further payments were made to the plaintiff after the $4,000.00 payment in December of 1997.

This adversary proceeding was filed on October 1, 1999. The plaintiff alleges claims for securities fraud, fraud, unfair trade practices, breach of fiduciary duty and, as to Centura Bank, a claim alleging negligent retention and supervision of Mr. Beason as an employee of Centura. In the motion for summary judgment, Mr. Beason seeks summary judgment as to all of the claims alleged by the plaintiff.

DISCUSSION

A. Summary Judgment Standard.

Under Rule 56 of the Federal Rules of Civil Procedure, which is incorporated into Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)); In re Specialty Concepts, Inc., 108 B.R. 104 (W.D.N.C. 1989); In re Caucus Distribs., Inc., 83 B.R. 921 (Bankr. E.D. Va.

1988).

In order to carry this burden, a party moving for summary judgment must show through affidavits, depositions or admissions all facts required to support each element of the claim or defense and that none of those facts are disputed. Moore's Federal Practice, § 56.13. p. 56-134 (3d ed. 1998)(movant must make a prima facie case for summary judgment by establishing (1) the apparent absence of any genuine dispute of material fact and (2) movant's entitlement to judgment as a matter of law on the basis of the undisputed facts). In determining whether the evidence is sufficient to establish the claim, the court must apply the substantive evidentiary standard that would be applicable at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1968).

The evidence must be viewed in the light most favorable to the nonmoving party, and inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. In re Graham, 94 B.R. 386 (Bankr. E.D. Pa. 1988); In re Trauger, 101 B.R. 378 (Bankr. S.D. Fla. 1989). However, the existence of a factual dispute is material and precludes summary judgment only if the disputed fact is determinative of the outcome under applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The party seeking summary judgment bears the

initial responsibility of informing the court of the basis of its motion, and also must identify those portions of the record that it believes demonstrates the absence of a genuine issue of material fact. Only after the movant has sustained the initial burden of production does the burden shift to the nonmovant to show the court that there is a genuine issue for trial. However, once this is done, the opposing party must set forth the specific facts showing there is a genuine issue for trial. Only when the entire record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, can the court find there is no genuine issue for trial. In re Trauger, 101 B.R. at 380 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 2513, 89 L.Ed.2d 538 (1986)).

B. Application of the Standard.

1. Claims for fraud, securities fraud, unfair trade practices and breach of fiduciary duty.

The claims against Centura for fraud, securities fraud, unfair trade practices and breach of fiduciary duty are based upon allegedly improper acts or omissions of Mr. Beason. It is not alleged that any other employee of Centura did anything giving rise to these claims. The specific conduct of Mr. Beason relied upon as giving rise to these derivative claims occurred during two meetings between Mr. Beason and the plaintiff. Taking the evidence in the light most favorable to the plaintiff, the first such meeting

occurred at some point while Mr. Beason was employed at Centura. The second meeting occurred on August 1, 1997 after Mr. Beason's employment had been terminated and at a time when he no longer was an employee of Centura.

Centura's liability for the claims that are based upon the conduct of Mr. Beason depends upon whether Centura may be held liable for the conduct of Mr. Beason under the doctrine of respondeat superior. Under the doctrine of respondeat superior, for one defendant to be held vicariously liable for the actions of another, an employer-employee relationship must exist. Gordon v. Garner, 127 N.C. App. 649, 493 S.E.2d 58 (1997); Thomas v. Poole, 45 N.C. App. 260, 262 S.E.2d 854 (1986). Proof simply of employment, however, is not a sufficient basis for imposing liability upon an employer based upon the misconduct of an employee. Instead, in order for the employer to be liable, it must be shown that the employment relationship existed and that the employee's act was (1) expressly authorized by the principal; (2) committed within the scope of the employee's employment and in furtherance of the employer's business--impliedly authorized by the principal; or (3) ratified by the employer. B.B. Walker Company v. Burns International Security Services, Inc., 108 N.C. App. 562, 565, 424 S.E.2d 172, 174 (1993) (citing Medlin v. Bass, 327 N.C. 587, 398 S.E.2d 460 (1990)).

Plaintiff does not contend that the acts of Mr. Beason were

either expressly authorized or ratified by defendant Centura. Rather, plaintiff argues that Mr. Beason was acting within the course and scope of his employment and in furtherance of defendant Centura's business when the alleged wrongful acts occurred.

To the extent that plaintiffs' claims for fraud, securities fraud, unfair trade practices and breach of fiduciary duty are based upon acts or omissions by Mr. Beason at the August 1, 1997 meeting, there is no legal basis for holding Centura liable for such conduct under the doctrine of respondeat superior because at that time, Mr. Beason no longer was an employee of Centura. Hence, any conduct occurring at the August 1, 1997 meeting necessarily could not have been conducted in the course and scope of Beason's employment by Centura, since no employment relationship existed at that time.

The remaining basis for holding Centura liable for the conduct of Mr. Beason is the earlier meeting which, for summary judgment purposes, must be treated as having occurred while Mr. Beason was employed by Centura. As to the conduct of Mr. Beason that occurred at this meeting, the decisive issue is whether there is sufficient evidence from which a rational trier of fact could conclude that Mr. Beason was acting within the course and scope of his employment by Centura during the meeting. If not, then as a matter of law, Centura is not liable with respect to the claims for fraud, securities fraud, unfair trade practices and breach of fiduciary

duty. The court concludes that the timing, nature and subject matter of the meeting are such that it is clear that Mr. Beason was not acting as an employee of Centura in attending the meeting nor acting on behalf of Centura or performing any duties on behalf of Centura in doing so.

A claim of liability based upon respondeat superior fails where the employee was not engaged in performing any of the work which he was employed to do and was not even on his employer's premises at the time the alleged wrongful act occurred. See Overton v. Henderson, 28 N.C. App. 699, 702, 222 S.E.2d 724, 726 (1976). The initial meeting did not occur on bank premises. According to the plaintiff's own testimony, the initial meeting occurred at either a restaurant in Hickory or in an automobile at the site where plaintiff was building a new house.[1] There is no evidence of any mention of Centura or any discussion of matters involving Centura at the initial meeting. To the extent that Mr. Beason recommended an investment in or loan to Cornerstone, nothing in the record suggests that Beason's actions in doing so were impliedly authorized by Centura or that making such a recommendation was a part of his duties at Centura. Nor is there any basis for concluding that Beason had apparent authority to render advice regarding investments in general or in particular to recommend Cornerstone as an investment. Mr. Beason's duties as

[1]Deposition of A. Gregory Rosenfeld, p. 40, lines 17 - 23.

disclosed in the record did not include recommending investments to customers and there is nothing to suggest that Centura knew or reasonably should have known that he was doing so. In that regard, it is important that the meeting occurred at a location other than the bank with no evidence of any mention of Centura or any matters involving Centura. Under the undisputed facts of the present case, the court therefore concludes that as a matter of law there is no basis for imposing vicarious liability upon Centura as a result of any alleged wrongful conduct of Mr. Beason at the initial meeting at either a restaurant or the new home site of the plaintiff.

2. Negligence claims against Centura.

The remaining claims against Centura are based upon alleged negligence on the part of Centura in hiring and supervising Mr. Beason and alleged negligence in failing to warn the plaintiff regarding a possible abuse of the banker/customer relationship by Mr. Beason.

To support a claim against an employer for negligent supervision and retention of an employee, the plaintiff must prove (1) that the employee committed a tortious act resulting in injury to the plaintiff; (2) incompetency of the employee, by showing inherent unfitness or previous specific acts from which incompetence may be inferred; (3) either actual notice to the employer of such incompetence or unfitness, or constructive notice by showing that the employer could have known through the exercise

of ordinary care; and (4) that the injury complained of resulted from the incompetency proven by the evidence. Medlin v. Bass, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990); Moricle v. Pilkington, 120 N.C. App. 383, 462 S.E.2d 531 (1995); Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991); Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E. 717 (1999).

The primary evidence relied upon by the plaintiff in opposition to Centura's motion for summary judgment regarding the negligence claims is evidence that Centura was aware that Mr. Beason had made some loans that exceeded his loan authority, that some of the construction loans supervised by Mr. Beason were over advanced and that Mr. Beason had failed to record a deed of trust on a loan that was supposed to be secured. Based upon these failures to properly perform his loan administration duties, Mr. Beason was placed on probation by Centura. Just prior to his dismissal on August 1 (which occurred after the initial meeting with the plaintiff), Centura learned of Mr. Beason's failure to record the deed of trust and terminated his employment on that date. These circumstances are insufficient to raise an issue for the trier of fact regarding the alleged negligence of Centura. There is no relationship between the type of problems that prompted Centura to place Mr. Beason on probation and the type of wrongful conduct alleged by the plaintiff. The failure of Mr. Beason to perform his in-house loan administration duties competently did not

involve moral turpitude or dishonesty and was no indication that Mr. Beason would go outside his assigned duties and defraud or mislead customers regarding their investments or assist customers in obtaining loans from another bank as alleged by the plaintiff.

The duties assigned Mr. Beason did not include recommending or handling investments on behalf of customers and nothing in the record would support a finding that Centura was aware that Mr. Beason was doing so. Nor is there sufficient evidence for concluding that Centura in the exercise of reasonable care should have known that Mr. Beason was engaged in such conduct with the plaintiff, bearing in mind that the plaintiff did not have an investment or brokerage account at Centura and both meetings with the plaintiff occurred away from the bank. The undisputed evidence is that it was only after Mr. Beason had left the bank that Centura became aware that the plaintiff was going to make a loan to Cornerstone and even at that late date, there was nothing to indicate that Mr. Beason had anything to do with the plaintiff's decision to do so. Hence, there is no basis for concluding that Centura was negligent in not supervising such activities or in not warning the plaintiff that Mr. Beason might give bad advice regarding investments.

CONCLUSION

For the foregoing reasons, summary judgment will be entered contemporaneously with the filing of this memorandum opinion

granting Centura's motion for summary judgment and dismissing this adversary proceeding with prejudice as to Centura Bank.

This 8th day of June, 2001.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATE BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

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	)	
Plaintiff,	)	
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v.	)	Adversary No. 99-6034
	)	
Lee Beason and Centura Bank,	)	
	)	
Defendants.	)	

ORDER

In accordance with the memorandum opinions filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) The motion for summary judgment filed on behalf of Lee Beason is denied; and

(2) The motion for summary judgment filed on behalf of Centura Bank is granted and this adversary proceeding is dismissed with prejudice as to Centura Bank.

This 8th day of June, 2001

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge