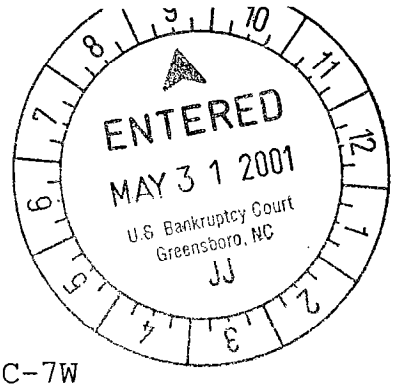


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
	)	
Cornerstone Residential Development Corporation,	)	Case No. 97-52476C-7W
	)	
Debtor.	)	
	)	
Robert Liljeberg, Jr. and wife, Pamela T. Liljeberg,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 99-6035
	)	
J. Scott Hanvey; Sigmon, Clark, Mackie, Hutton & Hanvey, P.A.; and Lee Beason,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This adversary proceeding came before the court on April 26, 2001, for trial. John A. Meadows appeared on behalf of the plaintiffs, Stephen M. Russell appeared on behalf of J. Scott Hanvey and Sigmon, Clark, Mackie, Hutton & Hanvey, P.A., and R. Bradford Leggett appeared on behalf of Lee Beason. Having heard and considered the evidence and arguments offered by the parties, the court made the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

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 "trade homes" from its customers and held these "trade homes" until they could be sold. In purchasing such homes, Cornerstone sought to purchase the homes for less than the price to be obtained by Cornerstone when the homes were sold.

During 1997, the plaintiffs had a banking relationship with Centura Bank. Plaintiffs' personal banker at Centura was Lee Beason. In addition to assisting the plaintiffs with their banking needs, Mr. Beason also had discussions with the male plaintiff at various times concerning investments which the plaintiffs had under consideration.

On August 1, 1997, Mr. Beason left the employ of Centura Bank. Thereafter, Mr. Beason arranged a meeting which occurred in August of 1997 between the male plaintiff and Mr. Sides. Mr. Beason also attended the meeting which was held in the evening at plaintiffs' residence. At this meeting Sides and Beason discussed with the male plaintiff the general idea of the plaintiffs investing with Cornerstone by supplying money to Cornerstone to be used to purchase a trade home, with the plaintiffs to receive the profits from the sale of the trade home purchased with their money. No particular trade home or particular amount of investment was

discussed at the meeting which closed with the understanding that Sides would call the plaintiffs in the future when the opportunity for a trade home investment came along.

At or shortly after the meeting at plaintiffs' residence, the plaintiffs learned that Scott Hanvey was the attorney who represented Cornerstone. The plaintiffs were familiar with Mr. Hanvey as a result of his having handled a real estate closing for them earlier in 1997 when they purchased a tract of land located in Alexander County. The plaintiffs had been favorably impressed with the manner in which Mr. Hanvey handled the earlier transaction and decided to call Mr. Hanvey regarding Cornerstone. The telephone call to Mr. Hanvey was made by the female plaintiff in early September. The conversation was a brief one in which the female identified herself, asked Mr. Hanvey if he was aware of Cornerstone's trade home program and, upon Mr. Hanvey saying he was aware of it, asked Mr. Hanvey if the program was something that he thought would be reasonable for the plaintiffs to do as an investment. According to the female plaintiff, Mr. Hanvey's response was "Yes, if I had the money, I would do it myself."

Thereafter, on Monday, September 15, 1997, Mr. Sides called the male plaintiff at work and offered him the opportunity to invest in Cornerstone's purchase of a residence referred to as the Yates residence, which involved an investment of $123,000.00. The male plaintiff decided to proceed with the investment with the

understanding that plaintiffs' investment of $123,000.00 would be used to purchase the Yates house and when the Yates residence was sold the plaintiffs would receive the repayment of their investment and the profit from the sale, but not less than $128,000.00, for a minimum profit of $5,000.00.

The male plaintiff requested that Mr. Sides call his wife at home in order to obtain a check for $123,000.00 from her. Mr. Sides then called the female plaintiff at home, informed her of his conversation with the male plaintiff and told her that he needed to obtain the check immediately and would come to plaintiffs' residence to pickup the check. After verifying the matter with her husband and calling the bank, the female plaintiff called Mr. Sides and told him that he could pickup the check at her residence, which Mr. Sides did later that day. The check written by the female plaintiff was made payable to Cornerstone and was in the amount of $123,000.00.

A "dry closing" had occurred at Mr. Hanvey's office on the previous Friday in which all of the closing documents involved with Cornerstone acquiring the Yates residence had been signed by the parties. However, no money changed hands on that day and the closing documents were retained by Mr. Hanvey pending receipt of $123,482.84 from Cornerstone which was needed in order to pay the purchase price and certain closing costs related to the purchase of the Yates residence.

After picking up the check from the female plaintiff on the following Monday, Mr. Sides took the check to the bank and used plaintiffs' check to obtain an official bank check for $123,482.84, the amount needed to fund the closing on the Yates residence. Mr. Sides then took the bank check to Mr. Hanvey's office and left it without talking with Mr. Hanvey. This check had nothing on it which referred to the plaintiffs or otherwise indicated that the plaintiffs were the source of most of the funds used to obtain the bank check. Mr. Hanvey was not told and did not realize that funds for the official bank check had come from the plaintiffs. Upon learning that the funds had been received in his office on September 15, Mr. Hanvey released the closing documents and caused the deed from the Yates to Cornerstone to be recorded.

Later in the day on September 15, Mr. Sides called Mr. Hanvey and requested that he prepare a promissory note from Cornerstone to the plaintiffs in the amount of $123,000.00, together with a deed of trust on the Yates residence securing the promissory note. Mr. Sides requested that these instruments be prepared for him to pickup, which Mr. Sides subsequently did on September 15. The promissory note and deed of trust were unsigned when picked up by Mr. Sides. Afterwards, the note and deed of trust were signed on behalf of Cornerstone and notarized, apparently at Cornerstone's offices. Mr. Sides then delivered the note and deed of trust to plaintiffs' residence and left them with the female plaintiff. The

deed of trust was not recorded before it was delivered to the plaintiffs' residence. When the male plaintiff came home, the female plaintiff informed the male plaintiff that the note and deed of trust had been delivered that day, after which the documents were placed in a file at plaintiffs' residence without being recorded. The note and deed of trust remained in the possession of the plaintiffs thereafter and remained unrecorded.

Cornerstone was not able to find a purchaser for the Yates property until December of 1997. Prior to the closing of the sale, Mr. Sides sent the plaintiffs a letter observing that the public record reflected that plaintiffs had not recorded their deed of trust and stating that if the plaintiffs recorded their deed of trust at that point, a pending closing and sale of the Yates residence likely would not occur. Mr. Sides further advised the plaintiffs that the home had sold for only $123,000.00 and proposed that only $60,000.00 be paid to the plaintiffs at that time. The plaintiffs made the conscious decision not to record their deed of trust and the sale of the Yates property closed on or about December 19, 1997, without plaintiffs' deed of trust being recorded. Thereafter, on or about January 5, 1998, Mr. Sides forwarded a check for $60,000.00 to the plaintiffs. Shortly thereafter, Cornerstone was placed in bankruptcy and no further payments were made to the plaintiffs with respect to their $123,000.00 investment.

Plaintiffs allege that Mr. Hanvey was the "sole closing attorney" at the closing of Cornerstone's acquisition of the Yates residence and "had an affirmative obligation to advise the plaintiffs who were the entity providing the financing for that transaction if he was not going to do the things necessary to protect the legal interests of Plaintiffs which would have been the submission to the Office of the Register of Deeds in Alexander County, North Carolina for recordation the Deed of Trust from Cornerstone. . . ." Plaintiffs assert that Mr. Hanvey committed "professional malpractice" and was negligent in failing to submit the deed of trust from Cornerstone for recordation. Plaintiffs allege claims against Mr. Beason for securities fraud, fraud, unfair trade practices and breach of fiduciary duty based upon Mr. Beason having introduced the plaintiffs to Mr. Sides and encouraged the plaintiffs to become involved in Cornerstone's trade home program.

DISCUSSION

A. Claim Against Scott Hanvey and Sigmon, Clark, Mackie, Hutton & Hanvey.

Under North Carolina law, there are several theories under which an attorney may be held liable in the attorney's professional capacity. One theory is contractual in nature and rests on the employment contract between the attorney and the client. Under this theory the attorney may be held liable if the client sustains loss as a result of the attorney's failure or neglect to discharge

some duty which was fairly within the purview of the attorney's employment. However, under this contractual theory, the attorney may be held liable only to the party with whom the attorney has privity of contract. Chicago Title Ins. Co. v. Holt, 36 N.C. App. 284, 244 S.E.2d 177 (1978).

The plaintiffs are not entitled to recover from Mr. Hanvey and his firm based upon the contractual theory of liability because there was no contractual relationship between Mr. Hanvey and the plaintiffs regarding matters involving Cornerstone and Mr. Sides. Rather, the evidence showed that Mr. Hanvey was employed by Cornerstone with respect to the closing which occurred on September 12, 1997, as well as the preparation of the promissory note and deed of trust on September 15, 1997. Although the attorney-client relationship previously did exist with respect to plaintiffs' purchase of real property located in Alexander County, that transaction was concluded several months prior to the transaction involving the Yates property. The evidence reflected that Mr. Hanvey's representation of the plaintiffs ended with the closing of that transaction and that there was no continuing attorney-client relationship with the plaintiffs thereafter. Moreover, it is undisputed that the plaintiffs did not request Mr. Hanvey to act as their attorney with respect to the Yates transaction and did not request that he prepare a note and deed of trust. Hence, the court concludes that there was no privity of

contract between the plaintiffs and Mr. Hanvey and that plaintiffs are not entitled to any recovery from Mr. Hanvey or his firm based upon a contractual theory of liability.

The lack of any privity of contract, however, does not necessarily mean that plaintiffs do not have a claim against Mr. Hanvey. North Carolina also recognizes theories under which an attorney may be held liable to persons other than the client with whom the attorney contracted. One such theory is a tort theory under which an attorney, by entering into a contract with a client, may place himself or herself in such a relation toward a third party that the law will impose upon the attorney an obligation, sounding in tort, to act in such a way that the third party will not be injured. According to the North Carolina Court of Appeals, the determination of whether an attorney has placed himself or herself in such a relation with a third party requires a balancing of various factors, including: (1) the extent to which the transaction was intended to affect the other person; (2) the forseeability of harm to the third person; (3) the degree of certainty that the third person suffered injury; (4) the closeness of the connection between the attorney's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm. United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313 (1980). If the balance of these factors tips in favor of the third party, then the attorney owes a duty to

the third party to use reasonable care in the performance of his employment contract with the client and a violation of that duty constitutes negligence. Id. North Carolina law also recognizes third-party beneficiary as a theory of liability against attorneys. See United Leasing Corp. v. Miller, 45 N.C. App. 400, 405-406, 263 S.E.2d 313 (1980). There also is authority in North Carolina for the concept of inferred attorney-client relationship under which liability arguably may be imposed even though there is no actual attorney-client relationship with respect to the particular matter in question. See North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 358, 326 S.E.2d 320 (1985).

In the present proceeding, the limited nature of the work requested by the client, i.e., only the preparation of the note and deed of trust and not any aspect of execution or recording, the attorney's lack of information regarding past or future dealings between the plaintiffs and Cornerstone and the fact that the past relationship between the plaintiffs and the attorney was limited to a single real estate closing that was completed several months previously and which was completely unrelated to the Cornerstone transaction seriously undermine plaintiffs' claim against Mr. Hanvey and his firm under any of the available theories. The evidence was insufficient to show that Mr. Hanvey owed a duty to the plaintiffs, sounding in tort, which was breached as a result of the deed of trust not being recorded or the plaintiffs not being

advised of the need to do so. Mr. Hanvey was employed by Cornerstone to handle the closing of its purchase of the Yates property. Mr. Hanvey was told that the transaction would be a cash transaction and that there would not be a lender involved. The closing statement and other evidence established that the transaction, in fact, was handled as a cash transaction. Mr. Hanvey was not told and was not aware that the plaintiffs were furnishing any of the funds required for the purchase of the Yates property. The funds that were delivered to Mr. Hanvey's office on September 15 were in form of a bank check which did not refer to the Plaintiffs. Upon receipt of the bank check, Mr. Hanvey caused the deed from the Yates to be recorded and completed the closing of the transaction. The subsequent request on September 15 for the preparation of a deed of trust and promissory note came from Mr. Sides who called on behalf of Cornerstone. This call resulted in Mr. Hanvey being employed for a very limited representation. The client represented by Mr. Hanvey in preparing the note and deed of trust was Cornerstone. The service requested by the client was the preparation of the two legal documents. The instructions of that client were that the client would pickup the documents and itself handle subsequent matters involving those legal documents. The nature of any transactions which had occurred or were to occur in the future between the client, Cornerstone, and the plaintiffs were not discussed with Mr. Hanvey. Moreover, the plaintiffs had not

informed Mr. Hanvey of their involvement with the Yates property nor sought any type of legal advice from him regarding Cornerstone or the Yates transaction. Mr. Hanvey's past handling of a single real estate transaction that had been concluded months earlier was not a sufficient basis upon which the plaintiffs could reasonably infer that Mr. Hanvey was acting as their attorney in Cornerstone matters, particularly in light of the total failure on their part to communicate any information to Mr. Hanvey indicating that they were relying upon him to act as their attorney. Before a duty arises on the party of an attorney based upon implied or inferred attorney-client relationship or upon foreseeable reliance by one other than the actual client, more is required than an individual's "subjective, unspoken belief that the attorney is his attorney." Flaherty v. Baybank Merrimack Valley, N.A., 808 F. Supp. 55, 60-61 (D. Mass. 1992) (quoting from Sheinkopf v. Stone, 927 F.2d 1259, 1265 (1st Cir. 1991)).

Under the circumstances of this case, Mr. Hanvey was under no duty to seek out the plaintiffs and render advice to them about a matter in which he represented only Cornerstone and had received no request from the plaintiffs for assistance or any information from which he reasonably could have concluded that they were relying upon him to act as their attorney. This conclusion is not inconsistent with Ethics Opinion RPC 210, which is relied upon by the plaintiffs. Plaintiffs argue that under RPC 210, if an

attorney handles a residential real estate closing involving a buyer, a seller and a lender, and does not intend to represent the lender, the attorney has a responsibility to give timely notice to the lender that the attorney does not intend to represent the lender, failing which the attorney is deemed to represent the lender. Even assuming that the Yates closing was a residential closing rather than a commercial transaction, RPC 210 does not operate in favor of the plaintiffs since the Yates closing was a cash closing that did not involve the plaintiffs or any other party as a lender. Hence, no deemed representation of the plaintiffs arises as a result of Mr. Hanvey handling the Yates closing.

B. Claim Against Lee Beason.

Under North Carolina law, the essential elements of actual fraud are: (1) a false representation or a concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the plaintiff. E.g., Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988). The party asserting fraud has the burden of proving each of the essential elements of actual fraud. E.g., Lester v. McLean, 242 N.C. 390, 87 S.E.2d 886 (1955).

The plaintiffs failed to establish by a preponderance of the evidence that Mr. Beason made a false representation or concealed a material fact or that there was any intent on the part of

Mr. Beason to deceive the plaintiffs and, hence, failed to establish a fraud claim.

Mr. Beason's involvement in the Cornerstone matter consisted of his participation in the initial meeting with the male plaintiff and, possibly, a single telephone conversation with the male plaintiff shortly after that meeting. No particular trade home was discussed at the initial meeting, no specific request for an investment or loan by the plaintiffs was made and no decision was made by the plaintiffs at that time regarding a loan to or investment in Cornerstone. The plaintiffs' decision to provide funds for Cornerstone to use in purchasing a trade home occurred approximately six weeks later and was the result of a solicitation made entirely by Mr. Sides. It was at that point that the Yates residence was identified and the male plaintiff was furnished with the information which led to his decision to advance $123,000.00 to Cornerstone. That decision was made without the plaintiffs seeking any input or advice from Mr. Beason.

Plaintiffs' evidence did not establish any false or misleading representation by Mr. Beason during the meeting in August or any telephone conversation, nor did the evidence show a failure on the part of Mr. Beason to disclose a material fact regarding Cornerstone that resulted in any reliance or damage by the plaintiffs. While the evidence did disclose that Cornerstone could not obtain further loans at Centura Bank, there was no showing that

Cornerstone's loans were in default or that its inability to obtain further loans involved anything other than Cornerstone having reached the limit of its credit line at Centura. Moreover, the evidence showed that at the initial meeting, the male plaintiff was informed that Cornerstone needed private financing because it no longer could obtain bank loans from Centura Bank and, according to the male plaintiff himself, his reaction to the information received at the meeting was that Mr. Sides and Cornerstone needed financial help.

According to the male plaintiff's testimony, he understood the proposal discussed in August as being one in which he would purchase a trade home for resale. While the transaction that actually occurred in September, following Mr. Sides' presentation, more closely resembled a $123,000.00 loan to Cornerstone, there was no showing that Mr. Beason was aware of any adverse circumstances regarding Cornerstone that had a sufficient bearing upon the type of transaction that was proposed in August or that was consummated in September such that it was fraudulent not to make disclosure.

Plaintiffs' evidence likewise was insufficient to establish constructive fraud. As a general matter, constructive fraud involves breach of a fiduciary obligation by a fiduciary or by one standing in a confidential relationship to the plaintiff. E.g., Miller v. First Nat. Bank, 234 N.C. 309, 67 S.E.2d. 362 (1951). A plaintiff relying upon constructive fraud must allege and prove

facts and circumstances reflecting that a relationship of trust and confidence surrounded the transaction in which the alleged breach of confidence occurred. Rhodes v. Jones, 232 N.C. 547, 61 S.E.2d 725 (1950).

A confidential or fiduciary relationship can exist under a variety of circumstances. Such a relationship is not limited to those persons who stand in some recognized legal relationship such as attorney and client, principal and agent or guardian and ward and may also extend to situations in which there is confidence reposed on one side, and resulting domination and influence on the other. Stilwell v. Walden, 70 N.C. App. 543, 547, 320 S.E.2d 329 (1984); Abbitt v. Gregory, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931).

Plaintiffs' evidence did not establish such a relationship between the plaintiffs and Mr. Beason in the present case. The only relationship shown was that Mr. Beason was one of the bankers with whom the plaintiffs dealt. The plaintiffs both are highly educated, healthy and independent individuals with no infirmities or other characteristics that resulted in their being dependent upon Mr. Beason. For the most part, the dealings between the plaintiffs and Mr. Beason involved routine banking matters such as opening bank accounts and transferring funds and, in one instance, assisting the plaintiffs with obtaining a loan for the purchase of real estate by the plaintiffs several months before August of 1997.

Although there was evidence regarding the male plaintiff on two occasions having discussed restaurant investments that the plaintiff had under consideration, the evidence fell short of establishing that Mr. Beason provided investment advice, that plaintiffs relied significantly upon Mr. Beason as their financial adviser or that the relationship was one in which Mr. Beason had domination or a significant degree of influence over the plaintiffs and their decisions regarding what they did with their money. While there may be circumstances under which a banker and a customer may have a fiduciary or confidential relationship, the evidence in the present case failed to establish that such a relationship existed between this particular banker and these particular plaintiffs.

Another essential element of constructive fraud is that "defendants sought to benefit themselves" in the transaction in question. Barger v. McCoy Hillard & Parks, 346 N.C. 650, 666-67, 488 S.E.2d 215, 224 (1997) ("Implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of the plaintiff' is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself."). The plaintiffs also failed to establish this element of constructive fraud. The evidence was insufficient to show that Mr. Beason sought to benefit himself in the discussions regarding Cornerstone which Mr. Beason had with the male plaintiff.

There was no evidence that Mr. Beason received any compensation, fee or other remuneration for arranging the meeting between Mr. Sides and the male plaintiff. Further, although Mr. Beason himself earlier had advanced funds to Cornerstone (which apparently were never repaid), the evidence failed to establish that he was benefitted in any way as result of arranging the meeting or that his motivation in doing so was to improve his position as a creditor of Cornerstone.

Plaintiffs also rely upon N.C.G.S. § 75-1.1 which declares unlawful "deceptive acts or practices in or affecting commerce. . . ." In order to prevail with respect to a claim under this statutory provision, a plaintiff must establish an "unfair or deceptive" act or practice on the part of the defendant. Plaintiffs rely upon the same alleged conduct with this claim as with respect to the other claims, namely, failure to disclose material facts regarding the financial condition of Cornerstone. No such conduct was established by plaintiffs' evidence and, therefore, plaintiffs are entitled to no recovery under N.C.G.S. § 75-1.1.

Plaintiffs' remaining claim is brought pursuant to N.C.G.S. § 78A-56 and is based upon an alleged violation of the North Carolina Securities Act by Mr. Beason. However, N.C.G.S. § 78A-56(f) provides that "[n]o person may sue under this section more than two years after the sale or contract of sale." If there was

a non-exempt sale or contract of sale of a security in the present case, the evidence establishes that such contract or sale occurred on or about September 15, 1997. This proceeding was not filed until October 1, 1999, which is more than two years after the sale or contract of sale. Accordingly, any claim of the plaintiffs under the North Carolina Securities Act is barred by the limitation contained in N.C.G.S. § 78A-56(f).

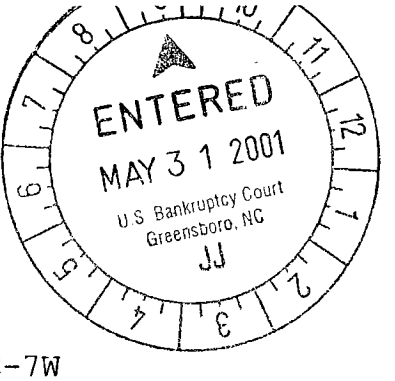
CONCLUSION

In accordance with the foregoing findings and conclusions, a judgment will be entered adjudging that the plaintiffs have no recovery from either of the defendants.

This 30th day of May, 2001

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge



UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
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IN RE:	)	
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Robert Liljeberg, Jr. and wife, Pamela T. Liljeberg,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 99-6035
	)	
J. Scott Hanvey; Sigmon, Clark, Mackie, Hutton & Hanvey, P.A.; and Lee Beason,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED that this adversary proceeding is hereby dismissed with prejudice with no recovery from the defendants.

This 30th day of May, 2001.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge