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.; Lee Beason and Centura Bank (a North Carolina Corporation,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This adversary proceeding came before the court on August 31, 2000, for hearing upon a motion by Centura Bank for summary judgment. John A. Meadows appeared on behalf of the plaintiffs, R. Bradford Leggett appeared on behalf of Defendant Beason and Christine L. Myatt appeared on behalf of Centura Bank.

FACTS

The depositions, answers to interrogatories and other materials submitted by the parties in support of and in opposition

to the motion, read in light most favorable to the plaintiffs, 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 "trade homes" from its customers and held these "trade homes" until they could be sold. In purchasing such homes, Cornerstone intended to purchase the homes for less than the price to be obtained by Cornerstone when the homes were sold.

During 1997, Cornerstone had a banking relationship with Centura Bank which included a substantial line of credit. One of the persons with whom Cornerstone dealt at Centura Bank was Lee Beason, a loan officer at Centura Bank. In approximately July of 1997, Cornerstone was experiencing financial difficulties, was at the limit of its line of credit and was advised by Centura Bank that no additional loans would be extended to Cornerstone.

During 1997, the plaintiffs also had a banking relationship with Centura Bank. Plaintiffs' personal banker at Centura was Mr. 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.

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. During the course of the meeting neither Beason nor Sides mentioned that Cornerstone was experiencing financial difficulties, nor was there any mention of the fact that Centura no longer was making new loans to Cornerstone. 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. Mr. Beason earlier had left the employ of Centura Bank on August 1, 1997, and the male plaintiff already was aware of this fact or learned of it at the meeting.

In late August or early September, 1997, Mr. Sides called the plaintiffs and offered them 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 plaintiffs decided to proceed with the investment and on September 15, 1997, delivered a check for $123,000.00 to Cornerstone, which was used by Cornerstone to purchase the Yates residence. In exchange for their investment of $123,000.00, Cornerstone agreed that 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. After Cornerstone closed on the Yates residence, a promissory note from Cornerstone in the amount of $128,000.00 and a deed of trust on the Yates property securing the promissory note were delivered to the plaintiffs. The deed of trust was not recorded before it was delivered to the plaintiffs and was not recorded by the plaintiffs when received.

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, the closing and sale of the Yates residence 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. 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 filed this adversary proceeding on October 1, 1999, alleging claims against Centura Bank and Mr. Beason for securities fraud, fraud, unfair trade practices and breach of fiduciary duty. The motion for summary judgment now before the court was filed on July 19, 2000, following the completion of discovery. In the motion for summary judgment, Centura Bank seeks summary judgment as to all of the claims asserted by the plaintiffs.

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. See 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. See 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. See 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. See 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.

Centura is entitled to summary judgment as to all claims asserted by the plaintiffs against Centura because it is established by the undisputed facts that there is no basis for imputing liability to Centura even if there was fraudulent concealment of facts by Mr. Beason, unfair or deceptive trade practices or other improper conduct on the part of Mr. Beason on the occasions alleged in the complaint.

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. See 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). However, proof simply of employment 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 held liable, it must be shown that the employment relationship existed and that the employee was acting within the course and scope of his employment and in furtherance of the employer's business. See Smith v. Moore, 220 N.C. 165, 16 S.E.2d 701 (1941); Barrow v. Keel, 213 N.C. 373, 196 S.E. 366

(1941); Liverman v. Cline, 212 N.C. 43, 192 S.E. 849 (1937).

In the present case, plaintiffs rely upon alleged misrepresentations or fraudulent concealments which occurred at the meeting with the plaintiffs which took place in August of 1997 and in subsequent telephone conversations which allegedly took place between the plaintiffs and Mr. Beason. The record reflects that when the meeting occurred in August of 1997, Mr. Beason no longer was an employee of Centura. Hence, any conduct occurring at that time necessarily could not have been conducted in the course and scope of employment by Centura, since no employment existed. Moreover, even if Mr. Beason had been still employed by Centura when this meeting occurred, 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. Nor is there any basis for a finding that Beason had apparent authority based upon the undisputed facts surrounding the meeting. In that regard, it is important that the meeting occurred in the evening at the residence of the plaintiffs with no evidence of any mention of Centura or any matters involving Centura. Also, the male plaintiff admittedly already was aware or learned at the meeting that Mr. Beason had left the employment of the Bank. Under

the undisputed facts of the present case, the court therefore concludes that as a matter of law there is no basis for imposing liability upon Centura as a result of the alleged wrongful conduct of Mr. Beason. The undisputed facts establish that the doctrine of respondeat superior is not applicable and do not disclose any other grounds for imposing liability upon Centura based upon the alleged misconduct of Mr. Beason which is relied upon by the plaintiffs. Accordingly, Centura Bank is entitled to summary judgment in its favor as to all claims alleged against Centura.

CONCLUSION

For the foregoing reasons, summary judgment will be entered contemporaneously with the filing of this memorandum opinion dismissing this adversary proceeding with prejudice as to Centura Bank.

This 25 day of September, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

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Defendants.	)	

ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED that Centura Bank's motion for summary judgment is granted and this adversary proceeding is dismissed with prejudice as to Centura Bank.

This 25 day of September, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge