CTS Metrolina, LLC v. Berastain, 2025 NCBC Order 4.

STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 039534-590
MASTER FILE

CRH EASTERN, LLC, formerly known as CTS METROLINA, LLC,

Plaintiff,

v.

DUSTIN BERASTAIN, TIMOTHY MOREAU, INKWELL EMERGENCY RESPONSE, LLC, S&P CAP PARTNERS, LLC, ZACHARY VANEK, CHAKYRA CHERRY, and VICTOR PENA,

Defendants.

ORDER ON MOTION TO AMEND ANSWER AND COUNTERCLAIMS

CABARRUS COUNTY

METROLINA RESTORATION, LLC, TIM MOREAU, and DUSTIN BERASTAIN,

Plaintiffs,

v.

CTS METROLINA, LLC, CONTINUUM RESTORATION HOLDINGS, LLC, CONTINUUM RESTORATION SERVICES, LLC, CONTINUUM TOTAL SOLUTIONS, LLC, and ROBCAP CTS OPERATING, LLC,

Defendants.

23 CVS 2124

1. **THIS MATTER** is before the Court on Defendants' / Counterclaim-Plaintiffs' Motion to Amend Answer and Counterclaims (the "Motion") pursuant to Rule 15 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), (ECF No. 111).

2. Defendants / Counterclaim-Plaintiffs Dustin Berastain and Timothy Moreau seek leave to amend their Answer and Counterclaims, (ECF No. 89). The proposed amendments would expand the facts and add two new Counterclaim-Defendants—Andrew Robertson and Robertson Capital LLC.[1] (*See generally*, Mot. Ex. A ["Proposed Am. Countercls."], ECF No. 111.)

3. Plaintiff / Counterclaim-Defendants oppose the Motion, arguing, among other things, that the amendment is futile. (*See* Pl.'s Resp. Opp. Defs.' Berastain and Moreau's Mot. Amend Answ. and Countercls., ECF No. 126.)

4. Having considered the Motion, the related briefing, and the arguments of counsel at a hearing on the Motion held 10 December 2024, the Court hereby **DENIES** the Motion.

Williams Mullen, by Camden R. Webb, Alexander M. Gormley, and Killian Wyatt, for Plaintiff / Counterclaim-Defendants CRH Eastern, LLC formerly known as CTS Metrolina, LLC, Continuum Restoration Holdings, LLC, Continuum Restoration Services, LLC, Continuum Total Solutions, LLC, and RobCap CTS Operating, LLC.

TLG Law, by David G. Redding and Sean McLeod, for Defendants / Counterclaim-Plaintiffs Metrolina Restoration, LLC, Dustin Berastain, and Timothy Moreau.

[1] Defendants / Counterclaim-Plaintiffs originally sought to add three new Counterclaim-Defendants—Andrew Robertson, Robertson Capital LLC, and Robertson Real Estate Group LLC. However, at the hearing on the Motion, Defendants / Counterclaim-Plaintiffs withdrew the Motion as to Robertson Real Estate Group LLC.

Villmer Caudill, PLLC, by Bo Caudill and Tomi Suzuki, for Defendants Inkwell Emergency Response, LLC, S&P Cap Partners, LLC, Chakyra Cherry, and Victor Pena.

Copeland Richards, PLLC, by Drew A. Richards, for Defendant Zachary Vanek.

Earp, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

5. Dustin Berastain ("Berastain") and Timothy Moreau ("Moreau") co-founded Metrolina Restoration, LLC ("Restoration"), a North Carolina limited liability company that provided emergency property restoration and repair services. (Proposed Am. Countercls. ¶¶ 1, 27–28, ECF No. 111.)

6. On 1 October 2021, Berastain and Moreau received a letter of intent from Continuum Restoration Services, LLC ("CRS"), by and through Robertson Capital, LLC ("Robertson Capital"), outlining CRS's desire to purchase Restoration's assets. (Proposed Am. Countercls. ¶ 29.) Berastain and Moreau allege that CRS is a wholly owned subsidiary of Continuum Total Solutions, LLC ("Continuum"), which in turn is a wholly owned subsidiary of Robertson Capital. (Proposed Am. Countercls. ¶¶ 10, 22.)[2]

7. Following receipt of the letter of intent, the parties negotiated an asset purchase agreement (the "APA"). (Proposed Am. Countercls. ¶ 30.) The APA resulted

[2] Attached as Exhibit A to Berastain and Moreau's proposed amended counterclaims is an organizational chart purporting to outline the structure of the "Continuum Network." A similar, less-detailed version of the organizational chart was attached as Exhibit A to Berastain and Moreau's original Answer and Counterclaims. With respect to the original version of the chart, Counterclaim-Defendants admit only that it is a "true and accurate copy of an organization chart, at a certain point in time." (Answer to Countercl. ¶ 13, ECF No. 91.)

in the formation of a new entity, CTS Metrolina, LLC, now known as CRH Eastern, LLC ("CTS Metrolina"), a Louisiana limited liability company. (Proposed Am. Countercls. ¶ 4.) Continuum Restoration Holdings, LLC ("CRH") is the parent company of CTS Metrolina. (Proposed Am. Countercls. ¶ 6.)

8. Also as part of the APA, Berastain and Moreau were offered positions as Co-Presidents of CTS Metrolina. Both Berastain and Moreau accepted the positions and thereafter signed employment agreements with CTS Metrolina. (Proposed Am. Countercls. ¶ 39.)

9. Berastain and Moreau allege that one or more of the CTS Entities' representatives communicated that the purpose of the APA "was to provide [Restoration] with the financial capitalization required to grow and expand" and represented that the CTS Entities had the ability to invest financial capital into Restoration's operations. (Proposed Am. Countercls. ¶¶ 31–32.) According to Berastain and Moreau, CTS Metrolina reneged on its promises to infuse capital into the business, and withdrawals from CTS Metrolina's account caused CTS Metrolina to experience a cash shortage. (Proposed Am. Countercls. ¶¶ 42–59.) The strained relationship between the parties ultimately culminated in CTS Metrolina terminating Berastain. Following Berastain's termination, Moreau resigned.

10. On 23 June 2023, while Berastain and Moreau were still Co-Presidents of CTS Metrolina, Berastain, Moreau, and Restoration filed suit in Cabarrus County Superior Court against CTS Metrolina and some of its affiliated companies (Continuum Restoration Holdings, LLC, Continuum Restoration Services, LLC,

Continuum Total Solutions, LLC, and RobCap CTS Operating, LLC (collectively, the "CTS Entities"). (23-CVS-2124 ["Cabarrus County Action"].) The Complaint in the Cabarrus County Action purports to assert claims for recission, breach of contract, fraudulent inducement, negligent misrepresentation, fraud, unfair and deceptive trade practices, and declaratory judgment, and it includes a request to disregard the corporate veil. (*See* Cabarrus County Action, ECF No. 2.)

11. On 15 December 2023, CTS Metrolina filed suit in Mecklenburg County Superior Court against Berastain, Moreau, and an entity indirectly owned by Berastain and Moreau, Inkwell Emergency Response, LLC. (23-CVS-39534 ["Mecklenburg County Action"].)

12. By Order dated 23 May 2024, the Court consolidated the Cabarrus County and Mecklenburg County Actions and permitted the parties to amend their pleadings in the Mecklenburg County Action "to include any allegation, claim, and defense that relates to the disputes between the current parties[.]" (Consolidation Order ¶ 14, ECF No. 78.)

13. CTS Metrolina filed its Amended Complaint on 12 June 2024. (Am. Compl., ECF No. 87.) On 2 July 2024, Berastain, Moreau, and Restoration answered the Amended Complaint and asserted counterclaims against CTS Metrolina and the other CTS Entities. (Answ. & Countercls., ECF No. 89.) The counterclaims mirror the claims asserted in the Cabarrus County Action.

14. Berastain and Moreau previously alleged that "Continuum is a single enterprise that is excessively fragmented into multiple subsidiaries[,]" and that

"Continuum uses its ownership over the [CTS Entities] to completely dominate the finances, policy making, and business practices of each [CTS Entity.]" (Countercls. ¶¶ 119–20.) They alleged that the CTS Entities share common managers, members, officers, agents, and employees, and that such individuals "adhere to the decisions and policies of Continuum[,]" rather than "perform[ing] the duties of their respective offices." (Countercls. ¶ 122.) Berastain and Moreau further alleged that CTS Metrolina and CRH are inadequately capitalized and unable to pay debts as they become due. (Countercls. ¶¶ 125–26, 129–31.) They repeat those allegations in their proposed amended pleading. (*See* Proposed Am. Countercls. ¶¶ 124–27, 134–35, 138–40.)

15. However, Berastain and Moreau now contend that new information reveals that the "appropriate counterclaim-defendant" is Andrew Robertson ("Robertson"). (Mot. ¶¶ 3–4.) Berastain and Moreau allege that (1) Continuum is a wholly owned subsidiary of Robertson Capital and (2) Robertson Capital is owned, in whole or in part, by Robertson. (Proposed Am. Countercls. ¶¶ 22–23.) Berastain and Moreau further contend that the CTS Entities operate as a mere instrumentality of Continuum and that Continuum itself operates as a mere instrumentality of Robertson. (Proposed Am. Countercls. ¶¶ 132–33.) Berastain and Moreau allege that Robertson exercises total dominion over Robertson Capital and every other party named as a Counterclaim-Defendant and that "Robertson established the convoluted structure of the [CTS Entities] in order to inappropriately conceal and shield assets from creditors and potential judgments." (Proposed Am. Countercls. ¶¶ 131, 145.)

16. Berastain and Moreau request permission to amend their counterclaims to name Robertson and Robertson Capital as Counterclaim-Defendants. They allege that the named Counterclaim-Defendants "comprise only part of a conglomerate of entities, all dominated by one individual named Andrew Robertson," (Defs.' Br. Supp. Mot. Amend Answ. & Countercls. 2, ECF No. 114), and they seek to include allegations, upon information and belief, regarding the ownership of these various entities.

17. After full briefing, the Court held a hearing on the Motion on 10 December 2024, at which all parties were represented by counsel. (Not. of Hr'g, ECF No. 127.)

18. The Motion is now ripe for disposition.

II. LEGAL STANDARD

19. Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." N.C. R. Civ. P. 15(a). Indeed, "[t]here is no more liberal canon in the rules than that leave to amend 'shall be freely given when justice so requires.' " *Duke Energy Carolinas, LLC v. AG Ins. SA/NV*, 2019 NCBC LEXIS 105, at *4 (N.C. Super. Ct. Dec. 10, 2019) (quoting *Vaughan v. Mashburn*, 371 N.C. 428, 434 (2018)). "Rule 15 encourages trial courts to permit amendment liberally and evinces our State's 'general policy of allowing an action to proceed to a determination on the merits.' " *Id.* (quoting *House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 282 (1991)); *see also Vaughan*, 371 N.C. at 433 ("[A]mendments should be freely

allowed unless some material prejudice to the other party is demonstrated." (quoting *Mauney v. Morris*, 316 N.C. 67, 72 (1986))).

20. However, the right to amend pursuant to Rule 15 is not unfettered. "Reasons justifying denial of an amendment include: (1) undue delay, (2) bad faith, (3) undue prejudice, (4) futility of amendment, and (5) repeated failure to cure defects by previous amendments." *Window World of St. Louis, Inc. v Window World, Inc.*, 2015 NCBC LEXIS 79, at **18 (N.C. Super. Ct. Aug. 10, 2015) (citing *Martin v. Hare*, 78 N.C. App. 358, 361 (1985)). The burden is upon the nonmovant to establish that the motion should not be granted. *See, e.g., Mauney*, 316 N.C. at 72; *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 2018 NCBC LEXIS 30, at *9–10 (N.C. Super. Ct. Apr. 6, 2018).

21. Plaintiff contends that the proposed amendments should be denied on futility grounds. In that regard, the standard under Rule 15 is essentially the same standard used in reviewing a motion to dismiss under Rule 12(b)(6), but it provides the Court with broad discretion to find that a proposed amendment is not futile. *Simply the Best Movers, LLC v. Marrins' Moving Sys., Ltd.*, 2016 NCBC LEXIS 28, at **5–6 (N.C. Super. Ct. Apr. 6, 2016).

22. "[A] motion to amend is not futile when 'the allegations of the [amendment], treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.' " *Howard v. IOMAXIS, LLC*, 2023 NCBC LEXIS 159, at **15 (N.C. Super. Ct. Nov. 29, 2023) (quoting *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987)).

23. However, "[a] motion for leave to amend is futile and appropriately denied when the 'proposed amendment could not withstand a motion to dismiss for failure to state a claim.' " *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2016 NCBC LEXIS 77, at *6 (N.C. Super. Ct. Oct. 7, 2016) (quoting *Smith v. McRary*, 306 N.C. 664, 671 (1982)). A claim should be dismissed under Rule 12(b)(6) if "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 598 (2018) (citing *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)).

24. Finally, "[a] motion for leave to amend is addressed to the sound discretion of the trial judge[.]" *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 430 (1990).

III. ANALYSIS

25. Berastain and Moreau allege that the CTS Entities are all dominated by Robertson, who indirectly owns them through Robertson Capital, and they move to add Robertson and Robertson Capital as Counterclaim-Defendants. They also seek to amend to request that the Court pierce the corporate veil on multiple levels so that Robertson can be held liable for the actions of all of the CTS Entities, Continuum, and Robertson Capital as their alter ego. (Proposed Am. Countercls. ¶¶ 123−146.)[3]

[3] They ask the Court to permit an amendment that would allow them to hold Robertson responsible by piercing the corporate veils that exist between CTS Metrolina and CRH, CRH and Continuum, Continuum and Robertson Capital, and finally between Robertson Capital and Robertson himself.

26. “To pierce the corporate veil is to set aside the corporate form and the protections that go along with it.” *Harris v. Ten Oaks Mgmt.*, 2022 NCBC LEXIS 62, at **5 (N.C. Super. Ct. June 20, 2022). “[V]eil piercing ‘allows a plaintiff to impose legal liability for a corporation’s obligations . . . upon some other company or individual that controls and dominates a corporation.’ ” *Id.* (quoting *Green v. Freeman*, 367 N.C. 136, 145 (2013)). “The doctrine of piercing the corporate veil applies to LLCs as well as to corporations.” *Gurkin v. Sofield*, 2020 NCBC LEXIS 49, at *23 (N.C. Super. Ct. Apr. 15, 2020) (citing *Estate of Hurst v. Moorehead I, LLC*, 228 N.C. App. 571, 576 (2013)).

27. “In order to pierce the corporate veil a party must show ‘that the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State.’ ” *Cold Springs Ventures, LLC v. Gilead Scis, Inc.*, 2015 NCBC LEXIS 1, at *15–16 (N.C. Super Ct. Jan. 6, 2015) (quoting *Green*, 367 N.C. at 145).

28. When determining whether to employ its equitable power to pierce the corporate veil, the Court looks for three elements:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [a] plaintiff’s legal rights; and

> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at *16 (citation omitted).

29. Conclusory allegations of control are insufficient. *See Gurkin*, 2020 NCBC LEXIS 49, at *25. Courts look for facts revealing "inadequate capitalization, noncompliance with corporate formalities, lack of separate corporate identity, excessive fragmentation, siphoning of funds by the dominant shareholder, nonfunctioning officers and directors, and absence of corporate records." *Id.* at *24 (quoting *Green*, 367 N.C. at 145.) "[T]he presence or absence of any particular factor . . . is [not] determinative. Rather, it is a combination of factors which . . . suggest that the corporate entity attacked had no separate mind, will or existence of its own and was therefore the mere instrumentality or tool of the dominant corporation." *Fischer Inv. Cap., Inc. v. Catawba Dev. Corp.*, 200 N.C. App. 644, 651 (2009) (internal citations omitted) (alterations in original).

30. The amendments proposed by Berastain and Moreau do not satisfy this pleading standard. First, while Berastain and Moreau allege that Robertson exercises complete domination and control over each of the CTS entities, (Proposed Am. Countercls. ¶¶ 26, 131, 144), that some of the entities are excessively fragmented, (Proposed Am. Countercls. ¶¶ 12, 124, 137), that some of the entities are undercapitalized, (Proposed Am. Countercls. ¶¶ 134, 138–40), and that some of the entities do not adhere to "appropriate corporate formalities," (Proposed Am. Countercls. ¶ 141), the allegations are conclusory, and the majority are made upon information and belief, (*see* Proposed Am. Countercls. ¶¶ 26, 129–31, 134–36,

138–41, 145). These allegations, without factual support, are insufficient to support veil piercing. *Cf. Sykes v. Health Network Sols., Inc.*, 2018 NCBC LEXIS 29, at **20 (N.C. Super. Ct. Apr. 5, 2018) ("Even North Carolina's more lenient standard does not allow a party to withstand a Rule 12(b)(6) motion based on conclusory allegations that are not supported by underlying factual allegations." (cleaned up)).

31. For example, Berastain and Moreau allege that CTS Metrolina and CRH are inadequately capitalized, (Proposed Am. Countercls. ¶¶ 134–40), but there is no allegation that Continuum, which allegedly owns CRH, or Robertson Capital, which allegedly owns Continuum, are inadequately capitalized. Moreover, to the extent Berastain and Moreau rely on the affidavits of former employees, vendors, and clients to support their allegation of inadequate capitalization, (ECF Nos. 113, 115–18), the affidavits speak to the alleged undercapitalization of CRS and Continuum, not to the undercapitalization of Robertson Capital. Similarly, while Berastain and Moreau allege that CRH siphoned funds from CTS Metrolina, (Proposed Am. Countercls. ¶¶ 56–59), there are no similar allegations as to Continuum or Robertson Capital.

32. At the hearing, counsel for Berastain and Moreau acknowledged that their proposed amendments do not address whether Robertson Capital is undercapitalized or whether it has siphoned funds, but they argued that since Robertson is a manager and perhaps sole owner of Robertson Capital, he has complete dominion and control over Robertson Capital. But alleging that Robertson has complete dominion and control over Robertson Capital because he owns and manages that entity is not sufficient. *See Insight Health Corp. v. Marquis Diagnostic Imaging*

of N.C., LLC, 2018 NCBC LEXIS 56, at *11 (N.C. Super. Ct. June 5, 2018) ("[C]ontrol means more than mere majority or complete ownership."); *Harris*, 2022 NCBC LEXIS 62, at **7 ("[C]ommon ownership and management, without more, do not equate to the kind of complete domination needed to show that one entity is another's puppet." (citing *Richardson v. Bank of Am., N.A.,* 182 N.C. App. 531, 548 (2007); *Cold Springs Ventures*, 2015 NCBC LEXIS 1, at *18)); s*ee also Waff Bros., Inc. v. Bank of North Carolina, N.A.*, 289 N.C. 198, 210 (1976) ("The mere fact that all of the outstanding shares of stock of each of two corporations are owned by one individual, who is the chief executive officer of each corporation, does not necessarily destroy the corporate entities so as to make the two corporations and the sole stockholder one and the same person in contemplation of the law.").

33. Furthermore, while Berastain and Moreau allege in their reply brief that Robertson Capital has "recently ceased to maintain even a pretense of corporate formalities[,]" no such allegation appears in the proposed counterclaim. (*See* Defendants' Reply Br. Supp. Mot. Amend 6, ECF No. 130.) Language in a brief is not a substitute for language in a pleading. *See McGuire v. Lord Corp.*, 2020 NCBC LEXIS 15, at *8 fn. 4 (N.C. Super. Ct. Feb. 11, 2020) ("[T]he Court only looks to the allegations of the Complaint[.]"); *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 60, at *11 (N.C. Super. Ct. July 12, 2017) ("When considering a Rule 12(b)(6) motion to dismiss, a court properly may consider only evidence contained in or asserted in the pleadings.").

34. In sum, piercing the corporate veil "is a strong step: Like lightning, it is rare and severe." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 439 (2008). Plaintiff has failed to allege enough for it to strike here. Accordingly, the Court **DENIES** the Motion.

IV. CONCLUSION

35. **WHEREFORE**, the Court hereby **DENIES** Defendants' / Counterclaim Plaintiffs' Motion to Amend Answer and Counterclaims, (ECF No. 111).

SO ORDERED, this the 23rd day of January, 2025.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases