STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17-CVS-9998

W&W PARTNERS, INC. and CHASE PROPERTIES, INC.

Plaintiffs,

v.

FERRELL LAND COMPANY, LLC; FERRELL INVESTMENTS LIMITED PARTNERSHIP; DAVID S. FERRELL; and LUANNE FERRELL ADAMS,

Defendants.

ORDER ON DEFENDANTS' MOTION FOR AWARD OF ATTORNEYS' FEES AND MOTION TO STRIKE

THIS MATTER comes before the Court on Defendants' Motion for Award of Attorneys' Fees ("Motion for Fees," ECF No. 113) and Defendants' Motion to Strike Affidavits of P.M. Boulus and George B. Currin and Plaintiffs' Brief in Opposition to Defendants' Motion for an Award of Attorneys' Fees ("Motion to Strike," ECF No. 116) (collectively, the Motion for Fees and the Motion to Strike are referred to as the "Motions").

The Court herein incorporates by reference the factual and procedural history of this case from its Order and Opinion on Cross-Motions for Summary Judgment. (ECF No. 123, at pp. 2–11.)

Defendants filed a Brief in Support of the Motion for Fees (Br. Supp. Mot. Fees, ECF No. 114), and Brief in Support of the Motion to Strike (Br. Supp. Mot. Strike, ECF No. 117). Plaintiffs filed briefs in opposition to the Motion for Fees ("Plaintiffs' Fees Brief," ECF No. 115) and the Motion to Strike (ECF No. 121). Defendants filed

replies. (Defs.' Reply Supp. Mot. Fees, ECF No. 118; Defs.' Reply Supp. Mot. Strike, ECF No. 122.) The Motions are now ripe for determination.

THE COURT, having thoroughly reviewed the Motions, the briefs and other evidentiary materials filed in support of, and in opposition to, the Motions, and other appropriate matters of record, CONCLUDES, in its discretion, that the Motion to Strike should be GRANTED, in part, and DENIED, in part, and the Motion for Fees should be GRANTED, in part, and DENIED, in part, in the manner and for the reasons set forth below.

I. MOTION TO STRIKE

Defendants move to strike the Affidavits of P.M. Boulus ("Boulus Affidavit," ECF No. 115.4) and George B. Currin ("Currin Affidavit," ECF No. 115.2), and to strike Plaintiffs' Fees Brief to the extent it relies upon those affidavits. (ECF No. 116, at p. 2.)

Defendants argue that the Court should strike the Boulus Affidavit because Plaintiffs identified him as a rebuttal or responsive expert but, when he "was deposed on January 24, 2019, [he] was unprepared to provide any opinion testimony on any subject." (ECF No. 117, at p. 3.) Defendants also contend that Boulos's affidavit "asserts opinions upon which Defendants had no opportunity to cross-examine him." (*Id.*) The portions of Boulos's deposition transcript filed with the Court support these contentions. (ECF No. 117.2.) "Moreover, the Boulus Affidavit (i) contains inadmissible legal conclusions and testimony not based on personal knowledge; and (ii) contains information that is not relevant to the Court's determination of whether

Plaintiffs' UDTPA claim was brought frivolously and maliciously multiple times under § 75-16.1 or whether it was nonjusticiable under § 6-21.5." (ECF No. 117, at p. 3.)

Defendants move to strike the Currin Affidavit because it "seeks to introduce Plaintiffs' counsel's legal theory of the case," and "constitutes a waiver of privilege as to Mr. Currin's communications regarding Plaintiffs' UDTPA claims[.]" (*Id.*)

The introduction of evidence into the record, including the Court's decision on a motion to strike an affidavit, is left to the sound discretion of the trial court. *3 Waterway Drive Prop. Owners' Ass'n, Inc. v. Town of Cedar Point*, 224 N.C. App. 544, 555, 737 S.E.2d 126, 136 (2012); *see also Holcombe v. Oak Island Aircraft Hous., LLC*, 812 S.E.2d 911 (N.C. Ct. App. 2018) (affirming order striking affidavit); *In re Estate of Phillips*, 251 N.C. App. 99, 104, 795 S.E.2d 273, 278 (2016) ("[W]e review an order striking an affidavit in support of or in opposition . . . for abuse of discretion[.]").

Under the North Carolina Rules of Evidence, "[e]vidence which is not relevant is not admissible." N.C. R. Evid. 402. Moreover, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid. 403. Accordingly, "[a]n affidavit must be based on personal knowledge, and its allegations should be of the pertinent facts and circumstances, rather than conclusions." *Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 348 (2004) (citation omitted); *see also* N.C. R. Evid. 602 ("A witness may not testify to a matter

unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."). Thus, "[s]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect." *Lemon*, 164 N.C. App. at 622, 596 S.E.2d at 349; *see also In re Foreclosure by David A. Simpson, P.C.*, 211 N.C. App. 483, 496, 711 S.E.2d 165, 174 (2011) ("This statement is a legal conclusion postured as an allegation of fact and as such will not be considered by this Court.").

The Court, in its discretion, finds that there are multiple reasons to strike the Boulus Affidavit, including, *inter alia*, (1) the fact that Boulus did not file a written report in compliance with Rule 26 of the North Carolina Rules of Civil Procedure prior to the close of discovery and, as a result, Defendants were unable to cross examine Boulus on his opinions and methods; (2) Boulus was designated as a rebuttal expert witness and the Boulus Affidavit is not presented as rebuttal to any expert witness put forth by Defendants on these issues; and (3) the Boulus Affidavit includes numerous conclusions of law that are of no effect.

Similarly, the Court finds that the Currin Affidavit should be stricken because, *inter alia*: (1) the Currin Affidavit reasserts and reargues the arguments from Plaintiffs' Fees Brief and elsewhere relating to the dismissed Unfair or Deceptive Trade Practices Act claim; and (3) the Currin Affidavit also asserts conclusions of law that are of no effect.

The Court, however, will not strike the entirety of the Plaintiffs' Fees Brief. The Court is able to discern the arguments in the Brief that are properly made from those based upon the stricken affidavits.

Accordingly, the Motion to Strike should be GRANTED, in part, and DENIED, in part. The Boulus Affidavit and the Currin Affidavit should be STRICKEN and will not be considered by the Court in its evaluation of the Plaintiffs' Fees Brief. The Court will not strike Plaintiffs' Fees Brief.

II. MOTION FOR FEES

A. Relevant facts and procedural background

On August 18, 2017, Plaintiffs filed their Complaint in this action (ECF No. 3), and subsequently filed an Amended Complaint (ECF No. 9), and a verified Second Amended Complaint. (ECF No. 13.) The claims raised by Plaintiffs in the complaints arise out of a Management, Development and Exclusive Agency Agreement ("Management Agreement"). The Management Agreement was entered into between Plaintiffs and Defendant Ferrell Land Company, LLC ("FLC") for the development to be known as the "Carpenter Village Planned Unit Development" (the "Development"). (ECF No. 13, at ¶ 9.) Plaintiffs allege that FLC breached the Management Agreement in several regards. Each complaint contained, *inter alia*, a claim for unfair or deceptive trade practices in violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1 *et seq*. (the "UDTPA Claim").

Prior to the filing of the Complaint, Plaintiffs and Defendants engaged in extensive correspondence regarding Plaintiffs' threatened claims, including the UDTPA Claim. (Letters Between Counsel, ECF No. 114.3–114.12.) In this correspondence, Defendants' counsel repeatedly warned Plaintiffs' counsel that it considered the potential UDTPA Claim to be unfounded and frivolous, and that the

dispute between the parties was nothing more than a dispute over interpretation of the Management Agreement. (*Id.*) Despite these warnings, Plaintiffs' counsel continued to insist that it would pursue the UDTPA Claim. (*Id.*)

On December 29, 2017, Defendants filed a motion to dismiss some of Plaintiffs' claims in the Second Amended Complaint, including the UDTPA Claim. ("Motion to Dismiss," ECF No. 23.) The Motion to Dismiss was fully briefed, and the Court held a hearing at which counsel for the parties made oral argument.

On May 22, 2018, the Court entered an Order and Opinion on Defendants' Motion to Dismiss the Second Amended Complaint. ("Order on Motion to Dismiss," ECF No. 65; *W & W Partners, Inc. v. Ferrell Land Co., LLC*, 2018 NCBC LEXIS 52 (N.C. Super. Ct. May 22, 2018)). In the Order on Motion to Dismiss, the Court dismissed the UDTPA Claim with prejudice holding

> Plaintiffs contend that FLC not only breached the Management Agreement, but also engaged in conduct that was deceptive. (ECF No. 45, at pp. 15–17.) The conduct cited by Plaintiffs in support of their contention, however, all arises from FLC's alleged failure to fulfill its obligations under the Management Agreement, and the Parties' differing interpretations of the terms of the agreement. (*Id.*) "Plaintiff[s have] not alleged the type of substantial aggravating circumstances, such as fraud, necessary to transform a breach of contract into a section 75-1.1 claim." *Strategic Mgmt. Decisions v. Sales Performance Int'l*, 2017 NCBC LEXIS 69, at *9 (N.C. Super. Ct. Aug. 7, 2017). Plaintiffs have not sufficiently alleged a violation of the UDTPA.

(Order on Mot. Dismiss, ECF No. 65, at ¶ 47.) Plaintiffs never sought reconsideration of the Order on Motion to Dismiss.

Discovery in this action closed on January 30, 2019. On March 1, 2019, Plaintiffs and Defendants filed motions for summary judgment. On March 1, 2019, Plaintiffs also filed a Motion for Leave to Amend the Second Amended Complaint. ("Motion for Leave," ECF No. 91.) The Motion for Leave sought, *inter alia*, to reassert the dismissed UDPTA Claim. (*Id.*) On April 23, 2019, the Court denied the Motion for Leave. (ECF No. 108.) The Court held that Plaintiffs' request to reassert the UDTPA Claim should be denied on the grounds it was futile and barred by res judicata because of the Court's prior dismissal of the UDTPA Claim. (*Id.* at p. 6.)

Thereafter, Defendants filed the Motion for Fees, which has been fully briefed and is ripe for decision.

B. Defendants' contentions and applicable legal standards

Defendants move for an award of their "reasonable attorneys' fees and costs incurred in defending against Plaintiffs' claims for alleged unfair and deceptive trade practices ["UDTPA Claim"] . . . as asserted in each of Plaintiffs' Complaints and as sought to be re-asserted through Plaintiffs' Motion to Amend" under both N.C.G.S. § 75-16.1(2) and N.C.G.S. § 6-21.5. (ECF No. 113, at p. 1.)

N.C.G.S. § 75-16.1 provides "the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party," in a suit instituted by a person who alleges a violation of the UDTPA, "upon a finding . . . that: . . . (2) The party instituting the action knew, or should have known, the action was frivolous and malicious." "A claim is frivolous [under N.C.G.S. § 75-16.1] if a proponent can present no rational argument based upon the evidence or law

in support of [it]. A claim is malicious [under N.C.G.S. § 75-16.1] if it is wrongful and done intentionally without just cause or excuse or as a result of ill will." *Blyth v. McCrary*, 184 N.C. App. 654, 663 n.5, 646 S.E.2d 813, 819 n.5 (2007) (internal quotation marks and citations omitted). An "award of attorneys' fees under G.S. [§] 75-16.1 is within the sound discretion of the trial judge." *Borders v. Newton*, 68 N.C. App. 768, 770, 315 S.E.2d 731, 732 (1984).

N.C.G.S. § 6-21.5 provides, in relevant part, as follows:

> In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award.

"In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss." *K & K Development Corp. v. Columbia Banking Fed. Savings & Loan*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 299 (1989) (citations omitted). "Under this deferential review of the pleadings, a plaintiff must either: (1) 'reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue'; or (2) be found to have 'persisted in litigating the case after the point where [he] should reasonably have

become aware that pleading [he] filed no longer contained a justiciable issue.'" *Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 655, 689 S.E.2d 889, 895 (2010) (citing *Brooks v. Fiesey*, 224 N.C. 303, 309, 432 S.E.2d 339, 342 (1993)); *see also Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991). "A trial court must make one or both of these findings to support its award of [N.C.G.S. §] 6-21.5 attorneys[']fees." *McLennan v. Josey*, 247 N.C. App. 95, 99, 785 S.E.2d 144, 148 (2016).

Granting a 12(b)(6) motion to dismiss is not itself a sufficient enough reason for a court to award attorneys' fees, but it "may be evidence that a pleading lacks a justiciable issue." *Id.* "[A]ction by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of [§] 6-21.5." *Id.* (quoting *Sunamerica Financial Corp.*, 328 N.C. at 259, 400 S.E.2d at 439). "The decision to award or deny attorney's fees under Section 6-21.5 is a matter left to the sound discretion of the trial court." *Persis Nova Constr. v. Edwards*, 195 N.C. App. 55, 67, 671 S.E.2d 23, 30 (2009). N.C.G.S. § 6-21.5 requires the Court to "make findings of fact and conclusions of law to support its award of [attorneys'] fees under this section."

Defendants argue that they are entitled to the requested relief because

> Plaintiffs brought their original UDTPA claim frivolously and maliciously despite no justiciable controversy over the claim. The record further demonstrates that Plaintiffs continued to pursue this non-justiciable claim by filing the now-denied Motion to Amend to harass Defendants and to cause them to incur substantial additional costs in

> defending against meritless claims previously dismissed with prejudice.

(ECF No. 114, at pp. 11–12 (emphasis in original).)

Defendants contend that there are two separate bases for awarding fees and costs under N.C.G.S. §§ 75-16.1(2) and 6-21.5 because Plaintiffs took actions frivolously and maliciously, and with a "complete absence of a justiciable issue": (1) in the filing of the initial Complaint containing the UDTPA Claim, and then amending the Complaint; and (2) the filing of a motion to amend the Second Amended Complaint to reassert the UDTPA Claim after the claim was dismissed with prejudice by the Court and following the close of all discovery.

C. Analysis

i. Fees for defending against the initial filing of the UDTPA Claim

a. N.C.G.S. § 75-16.1(2)

The Court has carefully considered the facts and the arguments of Plaintiffs and Defendants and concludes that Plaintiffs knew, or should have known, that the UDTPA Claim was frivolous when they brought it, and that Plaintiffs brought the UDTPA Claim maliciously.

Plaintiffs raise no substantial argument that the UDTPA Claim was not grounded in the same facts, and based on the same alleged conduct, upon which they base their claims for breach of the Management Agreement. It is well-established that "[a] mere breach of contract, even if intentional, is not an unfair or deceptive act under Chapter 75" unless there are "substantial aggravating circumstances attending the breach of contract." *Bob Timberlake Collection, Inc. v.*

Edwards, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006) (citations omitted); *see also Gunn v. Simpson, Schulman & Beard, LLC*, 2011 NCBC LEXIS 35, at *34–35 (N.C. Super. Ct. Sept. 23, 2011) ("'[C]laims regarding the existence of an agreement, the terms contained in an agreement, and the interpretation of an agreement are relegated to the arena of contract law' and are not properly addressed as unfair and deceptive trade practice claims.") (citing *23 Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 347 (4th Cir. 1998)).

Moreover, aggravating circumstances are most often found in the formation of the contract; "[i]t is far more difficult to allege and prove egregious circumstances *after* the formation of the contract." *Post v. Avita Drugs, LLC*, 2017 NCBC LEXIS 95, at *10 (N.C. Super. Ct. Oct. 11, 2017) (emphasis in original). In *Post*, the Court noted that "[a] defendant's conduct may be actionably deceptive if it induced the plaintiff to enter a contract when it did not intend to keep the promises made. Likewise, evidence of deliberate misrepresentations made by defendant during the formation of the contract could be a sufficiently aggravating circumstance." *Id.* at *10 (internal quotation marks and citations omitted).

Here, Plaintiffs do not allege that they were fraudulently induced into entering the Management Agreement by Defendants. To the contrary, Plaintiffs did not make a claim for fraud in the inducement. Instead, Plaintiffs allege that "Defendants have not only breached the Contract, but they have deceived and taken unfair advantage of Plaintiffs *by now claiming* that portions of Phases 18 and 19 are not part of the [Management Agreement] and refusing to compensate Plaintiffs under the

[Management Agreement], when Defendants originally represented and agreed that all 19 Phases, including Phases 18 and 19, were part of the [Management Agreement]." (ECF No. 13, at ¶¶ 26–27.) In other words, Plaintiffs allege that Defendants' "deceptive" conduct consists of claiming a different interpretation of the Management Agreement than they originally claimed. This type of conduct may suggest an intentional breach of the Management Agreement, but it does not amount to fraud or other conduct constituting substantial aggravating circumstances.

Plaintiffs also did not allege any other type of conduct that has been recognized as sufficient to support a claim for unfair trade practices arising from a breach of contract. In *Post*, the Court held

> Only where the circumstances of the breach exhibit clear deception are they sufficiently egregious to impose section 75-1.1 liability. Examples include forging or destroying documents. *See Garlock v. Henson*, 112 N.C. App. 243, 246, 435 S.E.2d 114, 115 (1993) ("defendant forged a bill of sale in an attempt to extinguish plaintiff's ownership interest"); *N.C. Mut. Life Ins. Co. v. McKinley Fin. Servs.*, 1:03CV00911, 2005 U.S. Dist. LEXIS 36308, at *38–39 (M.D.N.C. Dec. 22, 2005) ("destruction of documents" could constitute "intentional action to mislead or deceive"). Similarly, the concealment of a breach combined with acts to "deter further investigation" may constitute aggravating circumstances. *Sparrow Sys. v. Private Diagnostic Clinic, PLLC*, 2014 NCBC LEXIS 70, at *44 (N.C. Super. Ct. Dec. 24, 2014); *see also Lendingtree*[*, LLC v. Intercontinental Capital Grp., Inc.*], 2017 NCBC LEXIS 54, at *8–9 [N.C. Super. Ct. June 23, 2017] (denying motion to dismiss where the defendant circumvented a "non-solicitation provision by directing its alter ego" to hire plaintiff's employees, "insisted" it did not employ those individuals, "and denied breaching the Agreement"); *Interstate Narrow Fabrics, Inc. v. Century USA, Inc.*, 218 F.R.D. 455, 465–66 (M.D.N.C. 2003) (denying summary judgment where defendant

> engaged in intentional deception for the purpose of "continu[ing] to reap the benefits of the Agreement").

2017 NCBC LEXIS 95, at *11–12. On the other hand, this Court has also held that the defendant's knowing and intentional overbilling of the plaintiff and the concealment of the overbilling during the performance of the contract were not substantial aggravating circumstances supporting a claim for unfair or deceptive trade practices. *Forest2Market, Inc. v. Arcogent, Inc.*, 2016 NCBC LEXIS 3, *15–17 (N.C. Super. Ct. Jan. 5, 2016).

Here, Plaintiffs contend that through discovery they found evidence that David and Luanne Ferrell decided that including Phases 18 and 19 under the terms of the Management Agreement was highly unfavorable to Defendants and aggressively tried to get out of FLC's obligations under the Management Agreement. They also repeatedly claim that Defendants attempted to deceive Plaintiffs about Defendants' obligations under the Management Agreement, but also acknowledge that as early as 2002, the parties had disputed whether Phases 18 and 19 were part of the Management Agreement. Plaintiffs fail to explain how they were deceived.

Considering the allegations in the Second Amended Complaint and North Carolina case authority, the Court concludes that the UDTPA Claim was instituted frivolously.

The question of whether Plaintiffs' filing of the UDTPA Claim was malicious is a more difficult one. Ultimately, however, the Court concludes that Defendants have established that Plaintiffs brought the UDPTA claim maliciously. Defendants repeatedly advised Plaintiffs in pre-litigation correspondence that the UDPTA claim

was frivolous, and the dispute was simply over the parties' competing interpretations of the Management Agreement. Despite the warnings, Plaintiffs failed to allege facts supporting the presence of substantial aggravating circumstances across three separate complaints.

Therefore, the Court concludes, in its discretion, that Plaintiffs knew, or should have known, when they instituted the UDTPA Claim that it was frivolous and malicious. Accordingly, Defendants' Motion for Fees pursuant to N.C.G.S. § 75-16.1(2), for fees incurred defending against the UDTPA Claim as initially filed, should be GRANTED.

b. N.C.G.S. § 6-21.5

Since the Court has awarded fees to Defendants for their defense of the UDTPA Claim as raised in Plaintiffs' complaints under N.C.G.S. § 75-16.1(2), it is unnecessary for the Court to consider Defendants' claim for the same fees pursuant to N.C.G.S. § 6-21.5. Therefore, Defendants' Motion for Fees pursuant to N.C.G.S. § 6-21.5, for fees incurred defending against the UDTPA Claim as initially filed, should be DENIED as moot.

ii. Fees for defending against Plaintiffs' Motion for Leave

a. N.C.G.S. § 6-21.5

The Court now turns to the issue of whether Plaintiffs' attempt to reassert the UDTPA Claim through the Motion for Leave, after it had been dismissed by the Court with prejudice, warrants an award of attorneys' fees to Defendants for their opposition to that motion. It is not clear whether Defendants seek an award of fees

for their opposition to the Motion for Leave under N.C.G.S. § 75-16.1(2). Therefore, the Court first addresses Defendants' Motion for Fees under N.C.G.S. § 6-21.5.

As an initial matter, the application of N.C.G.S. § 6-21.5 is not limited to the initial filing of the UDTPA Claim, but can also encompass the issues raised in Plaintiffs' Motion for Leave. Section 6-21.5 allows for an award of attorneys' fees for a nonjusticiable issue raised in *any* pleading in the litigation, not just the original complaint. Section 6-21.5 was enacted "to discourage frivolous legal action and that purpose may not be circumvented by limiting the statute's application to the initial pleadings. Frivolous action in a lawsuit can occur at any stage of the proceeding and whenever it occurs is subject to the legislative ban." *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990).

The Court, after careful consideration of the facts and arguments of Plaintiffs and Defendants, concludes that Plaintiffs should have reasonably been aware, at the time of the filing of the Motion for Leave, that the pleading contained no justiciable issue. Indeed, Plaintiffs' filing of the Motion for Leave in an attempt to reassert the very UDTPA Claim that this Court had previously dismissed with prejudice under Rule 12(b)(6) is almost the very definition of asserting a nonjusticiable claim.

Dismissal with prejudice of a claim "constitutes a final judgment on the merits" and "'is said to preclude subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff.'" *Miller Bldg. Corp. v. NBBJ N.C., Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998); *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 364, 533 S.E.2d 827, 830–31

(2000) (partial dismissal/summary judgment equals "final" judgment on UDTPA claim). A "new" UDTPA claim following dismissal with prejudice is thus barred by res judicata and collateral estoppel. *Housecalls Home Health Care, Inc. v. DHHS*, 225 N.C. App. 306, 313, 738 S.E.2d 753, 758 (2013) ("Under the doctrine of res judicata or claim preclusion, a final judgment on the merits in one action precludes a second suit based on the same cause of action . . . ."); *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 463, 646 S.E.2d 418, 425 (2007).

Following dismissal with prejudice, a party can no longer come back and amend their claim. "[O]nce a trial court enters its dismissal under Rule 12(b)(6), plaintiff's right to amend under Rule 15(a) is terminated. . . . To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgment and the expeditious termination of litigation." *Johnson v. Bollinger*, 86 N.C. App. 1, 7–8, 356 S.E.2d 378, 382 (1987) (internal citation and quotation marks omitted).

A North Carolina Court of Appeals case is illustrative. In *Davis Lake Community Ass'n v. Feldmann*, the plaintiff sued defendants for unpaid homeowners' dues. 138 N.C. App. 322, 323, 530 S.E.2d 870, 870 (2000). The defendants filed counterclaims against the plaintiff and its attorneys. *Id.* at 323, 530 S.E.2d at 870–871. The trial court subsequently dismissed the counterclaims with prejudice as to both the plaintiff and its attorneys. *Id.* at 323, 530 S.E.2d at 871. The defendants later attempted to bring the same counterclaims against the plaintiff's attorneys that already had been dismissed by filing a motion under Rule 13(h) to join them as a

party. *Id*. The trial court denied the Rule 13(h) motion, and imposed sanctions against the defendants' attorneys based upon the fact that the counterclaims had already been dismissed and were thus barred by res judicata. *Id*.

Like the defendants in *Davis Lake*, Plaintiffs' UDTPA Claim was barred by res judicata and Plaintiffs' right to amend the claim was terminated the moment the Court dismissed the claim with prejudice. Plaintiffs did not file a motion for reconsideration of that ruling, and the proposed amendments in the Motion for Leave contained the same pleading defect this Court addressed in its Order on Motion to Dismiss. Instead, Plaintiffs attempted to reassert the UDTPA Claim over thirteen months after it had been dismissed with prejudice and after discovery had closed. Plaintiffs' reassertion of the UDTPA Claim in their Motion for Leave was based on "a complete absence of a justiciable issue."

Therefore, the Court concludes, in its discretion, that Plaintiffs should have reasonably been aware, at the time they reasserted the UDTPA Claim in their Motion for Leave, that the motion contained no justiciable issue. Accordingly, Defendants' Motion for Fees pursuant to N.C.G.S. § 6-21.5, for fees incurred defending against Plaintiffs' reassertion of the UDTPA Claim in their Motion for Leave, should be GRANTED.

b. N.C.G.S. § 75-16.1(2)

Because the Court has concluded that Defendants are entitled to an award of attorneys' fees under N.C.G.S. § 6-21.5 for fees incurred in defending against Plaintiffs' attempt to reassert the UDTPA Claim through the Motion for Leave, it is

unnecessary for the Court to consider any request for the same fees pursuant to N.C.G.S. § 75-16.1(2). Therefore, Defendants' Motion for Fees, to the extent it seeks an award of fees under N.C.G.S. § 75-16.1(2) for fees related to Plaintiffs' attempt to reassert the UDTPA Claim through the Motion for Leave, should be DENIED as moot.

THEREFORE, IT IS ORDERED THAT:

1. Defendants' Motion for Fees pursuant to N.C.G.S. § 75-16.1(2), for fees incurred defending against the UDTPA Claim as initially filed, is GRANTED.

2. Defendants' Motion for Fees pursuant to N.C.G.S. § 6-21.5, for fees incurred defending against the UDTPA Claim as initially filed, is DENIED as moot.

3. Defendants' Motion for Fees pursuant to N.C.G.S. § 6-21.5, for fees incurred defending against Plaintiffs' reassertion of the UDTPA Claim in their Motion for Leave, is GRANTED.

4. Defendants' Motion for Fees pursuant to N.C.G.S. § 75-16.1(2), to the extent it seeks fees incurred defending against Plaintiffs' reassertion of the UDTPA Claim in their Motion for Leave, is DENIED as moot.

5. Within thirty (30) days of entry of this Order, Defendants' counsel shall:

    a. File with the Court an appropriate application for attorneys' fees and costs reasonably incurred in defending against the initial filing of Plaintiffs' UDTPA Claim, as well as fees and costs incurred in defending against Plaintiffs' reassertion of the UDTPA Claim in their Motion for Leave. This application should

include, at a minimum, the following information: (a) the identity of each timekeeper for which it seeks fees; (b) a description of the timekeeper's experience, abilities, and skills; (c) a description of the complexity of the issues involved; (d) the hourly rate for each timekeeper; (e) the rates charged for comparable work performed in the local area; (f) the total amount of time expended by each timekeeper; and (g) the total amount of fees charged by each timekeeper; and

b. Prepare and submit to the Court for *in camera* review (via email to the law clerk assigned to this matter) invoices detailing the fees and costs. The invoices must be task-billed and contain, at a minimum, the following information: (a) the identity of each timekeeper for which it seeks fees; (b) the hourly rate for each timekeeper; (c) the date the task was performed; (d) a description of each task; and (e) the number of hours expended by each timekeeper on a task basis in one-tenth of an hour increments (not block-billed).

SO ORDERED, this the 6th day of December, 2019.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge for
Complex Business Cases