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STATE OF NORTH CAROLINA 5 AM 10: IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF HALIFAX

08 CVS 922

HALIFAX CO., C.S.C.

JAMES GARRETT

BY JB

Plaintiff,

v.

RANDLE "RANDY" PARTON;
RICHARD "RICK" WATSON;
MOONLIGHT BANDIT PRODUCTIONS,
LLC; MOONLIGHT BANDIT
PROPERTIES, LLC; FRIENDS OF
MOONLIGHT BANDITS, LLC;
MOONLIGHT BANDIT CONCESSIONS,
LLC; MOONLIGHT BANDIT
MERCHANDISING, LLC;
NORTHEASTERN NORTH CAROLINA
REGIONAL ECONOMIC
DEVELOPMENT COMMISSION; AND
NORTH CAROLINA'S NORTHEAST
PARTNERSHIP;

Defendants.

PLAINTIFF'S RESPONSE TO
MOTION TO DISMISS
AMENDED COMPLAINT

NOW COMES Plaintiff, by undersigned counsel, and hereby responds to Motions to Dismiss Amended Complaint filed by all Defendants.

FACTS

Plaintiff instituted this action on June 19, 2008. Defendants Northeastern North Carolina Regional Economic Development Commission ("Commission") and North Carolina's Northeastern Partnership ("Partnership") filed a Motion to Dismiss and a Motion for a More Definite Statement on August 29, 2008, based largely on the grounds that the lawsuit as filed was vague and ambiguous. Defendants Randle Parton and Moonlight Bandits filed a Motion to

Dismiss on August 29, 2008. Defendant Richard Watson filed a Motion to Dismiss on September 11, 2008. On September 26, 2008, Plaintiff filed a Notice of Dismissal dismissing claims against Ernest Pearson and an Amended Complaint with Exhibits.

Defendant Watson filed a Motion to Dismiss the Amended Complaint on October 6, 2008. Defendants Parton and Moonlight Bandits filed a Motion to Dismiss Amended Complaint on October 10, 2008. Defendants Commission and Partnership filed a Motion to Dismiss the Amended Complaint on October 10, 2008, as well. All such motions were accompanied by memoranda of law.

As with the previously filed Motions to Dismiss, the Motions to Dismiss the Amended Complaint rely largely on assertions that Plaintiff lacks standing, that the Settlement Agreement between the City of Roanoke Rapids and Moonlight Bandits released all claims arising out of the operation and creation of the Randy Parton Theater, and that Plaintiff generally failed to state a claim upon which relief may be granted. Given the similarity between the arguments raised in the Motion to Dismiss the Amended Complaint and the previously addressed issues raised by the Motion to Dismiss the original complaint, Plaintiff incorporates the arguments presented in Plaintiff's Response to Motion to Dismiss, filed October 3, 2008, and provides additional argument below to the issues presented by the Motions to Dismiss the Amended Complaint.

ARGUMENT

I. PLAINTIFF HAS STANDING TO ASSERT A LEGAL CHALLENGE TO THE ILLEGAL DISBURSEMENT OF PUBLIC FUNDS ON THE GROUNDS THAT I) HE IS A TAXPAYER; AND II) THE PROPER AUTHORITIES HAVE REFUSED TO ACT.

Defendants contend that Plaintiff lacks standing and cannot rely on so-called taxpayer standing or derivative standing. Both positions are without merit.

Taxpayers have standing to assert challenges to the unlawful expenditure of public monies. *See Goldston v. Harrington*, 361 N.C. 26, 637 S.E.2d 876 (2006). This vein of standing is not limited to constitutional challenges lodged against government entities. Nothing in *Goldston* so limits its core holding: “We reaffirm our long-standing holdings that taxpayers have standing to challenge unlawful or unconstitutional government expenditures and conclude that taxpayers are entitled to seek equitable relief in the form of a declaratory judgment.” *Id.* at 878.

Defendants seem to press the argument that *Goldston* applies only where a taxpayer is suing a government entity. Not only does *Goldston* itself not say this, long-standing precedent is to the contrary. In *Horner v. Chamber of Commerce, Inc.*, 231 N.C. 440, 57 S.E.2d 789 (1950), the Supreme Court permitted a taxpayer to sue not only the municipality to which he paid taxes, but also the private entity which allegedly received unauthorized payments from the city.

Contrary to the arguments of Defendants, Plaintiff has alleged the unlawful expenditure of public money. Specifically, Plaintiff has alleged that funds were diverted from the Commission to the Partnership “for purpose of exceeding lawful compensation limits” including bonuses and severance to Watson (Compl. ¶¶ 87, 111). That is to say, the Commission and the Partnership circumvented the State Personnel Act, N.C.G.S. § 126-1, et seq., in order to pay Defendant Watson more compensation than is lawfully allowed. *See also Freeman v. Board of Comm’rs*, 217 N.C. 209 7 S.E.2d 354 (1940) (Plaintiffs as citizens and taxpayers sought to restrain commissions from making illegal disbursement of public funds for salaries and, for that purpose had standing).

Numerous allegations chronicle the impermissible use of Commission and Partnership resources for the personal gain of Defendants Watson and Parton. For example, Defendant Watson’s work for Defendant Parton and the Moonlight Companies he co-owned took place in

the ordinary course and scope of the business of the Commission and the Partnership of which he was president and chief executive officer and used resources, including the services of subordinate employees, of the Commission and the Partnership which were funded by tax dollars. (Compl. ¶¶22, 24, 26, 97).

The allegations, taken here as true, also amount to a violation of N.C.G.S. § 14-234, which makes it a crime for a public officer or employee to benefit from public contracts. *See also Lexington Insulation Co. v. Davidson County*, 243, N.C. 252, 90 S.E.2d 496 (1955) (In adopting N.C.G.S. § 14-234, the legislature sought “to remove from public officials the temptation to take advantage of their official positions.”). As alleged in the Amended Complaint, Defendant Watson was at all relevant times an employee of the Commission, a State agency. Although this statute was not cited in the Amended Complaint as a basis for standing, a plaintiff need only plead the *facts* which give rise to his standing, not the legal theory or authorities which establish standing.

Defendants also make must fodder of Plaintiff’s alleged failure to allege an injury. However, North Carolina appellate jurisprudence has evolved over the last forty years to view taxpayers, generally, as having an interest in avoiding unfair tax burdens. The North Carolina Supreme Court has permitted taxpayers to mount such suits provided litigants demonstrate a connection between the challenged statute and an injury to “persons, property, or constitutional rights.” However, that injury may amount to nothing more than a *de minimis* increase in the plaintiff’s tax burden. *Piedmont Canteen Service, Inc. v. Johnson*, 256 NC 155, 123 S.E.2d 582, 589 (1962); accord *Stanley v. Dept. of Conservation and Development*, 284 N.C. 15, 199 S.E.2d 641 (1973).

In *Stanley*, Justice Sharp, writing for the North Carolina Supreme Court, enunciated a conception of standing in line with the United States Supreme Court's holding in *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968) (question of standing is whether the party seeking relief has alleged personal stake in the outcome to assure concrete adverseness which sharpens presentation of issues). *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650.. The *Stanley* plaintiffs mounted challenges to a tax-exempt State bond issue which was to finance construction of pollution-abatement facilities for the use of private paper mills.

The *Stanley* plaintiffs argued that the bond issue amounted to a state subsidy for private enterprise in contravention of the North Carolina Constitution, and that exempting the bonds from tax yielded an unfair tax burden for all other North Carolina taxpayers. En route to agreeing with the plaintiffs' public purpose argument on the merits, the Court held that the plaintiffs' allegation of unfair tax burden based upon the exemption was sufficient for standing:

. . . petitioners will be injured unless [the statute's] invalidity is judicially declared[,] for the exemption of any property from its fair share of the public burden, to that extent, increases the burden imposed upon all other taxable property. 'A taxpayer injuriously affected by a statute may generally attack its validity. Thus, he may attack a statute which . . . exempts person or property from taxation, or imposes on him in its enforcement an additional financial burden, however slight.'

Stanley, 284 at 29, 199 S.E.2d at 650-51 (citation omitted).

A Court of Appeals case following *Stanley*, determined that a citizen, resident, and taxpayer had standing to contest the legality of actions of a regional government body "where such activities are funded by tax monies or property derived from local or federal sources, or where such activities may later require support by tax monies." *Kloster v. Council of Governments*, 36 N.C. App. 421, 427, 245 S.E.2d 180, 184 (1979). It was enough in that case "that it [could] be inferred from the plaintiff's complaint that local taxpayers' monies will be

necessary for future [use].” *Id.* Thus, the plaintiff showed no individualized or imminent harm beyond that applicable to all local taxpayers.

Even though an injury need not be alleged, Plaintiff also alleged that taxpayers, including himself, have been deprived and defrauded of tax money that went to Commission. (Compl. ¶113). He alleged that bond payments will have to be paid from City or State funds not generated by the Theater. (Compl. ¶ 75). This has and will continue to result in the diminution in the funds available to the State, Commission and Partnership for lawful purposes (Compl. ¶121, 133, 145). Accordingly, he has “lost the honest benefit of the services paid for by his taxes,” (Compl. ¶ 121, 133, 145), been deprived of the benefits of tax revenues which would have been available from Carolina Crossroads, (Compl. ¶122, 134, 146), and been deprived of the benefit of tax money that must now be diverted to debt servicing and operating costs of the Theater (Compl. ¶ 123, 135, 147). *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975), reaffirmed the right of a taxpayer to maintain an action in court to restrain the unlawful use of public funds to his injury. Plaintiff here has more than adequately pleaded both the misuse of funds and the injury which flowed therefrom.

The Amended Complaint provides a more than sufficient basis for the Court to conclude Plaintiff has standing. At its heart, this action is a claim to challenge the misuse of government money. Plaintiff has alleged the unlawful expenditure of public money, as well as the harm which resulted. As discussed in Plaintiff’s Response to the Motion to Dismiss, Plaintiff also has standing in that the City would not act to recoup the unlawful expenditures challenged here. For all these reasons, and for the reasons set forth in Plaintiff’s previous memorandum of law, Plaintiff has standing and Defendant’s Motion to Dismiss the Amended Complaint for lack of standing should be dismissed.

II. THE STATUTE OF LIMITATIONS DOES NOT BAR ANY CAUSE OF ACTION IN THIS LAWSUIT

Defendants Parton and Moonlight Bandits maintain the Plaintiff's causes of action for Tortious Acting in Concert and Negligent Misrepresentation are barred by the three year statute of limitations. This argument ignores facts that the cause of action continued through the processes of amended the Economic Development Agreement in September 2006 and February 2007. (Compl. ¶¶ 59, 63)

A claim for negligent misrepresentation "does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation, and second, the claimant discovers the misrepresentation." *Jefferson-Pilot, Life Ins. Co. v. Spencer*, 336 N.C. 49, 57, 442 S.E.2d 316, 320 (1994). Regarding claims based on fraud or mistake, the cause of action does not accrue until the injured party discovers the facts constituting the fraud. N.C.G.S. § 1-52(9). "The Supreme Court of our State has held in numerous cases that in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence." *Calhoun v. Clahoun*, 18 N.C. App. 429, 432, 197 S.E.2d 83, 85 (1973). *See also Jennings v. Lindsey*, 69 N.C. App. 710, 715 318 S.E.2d 318 (1984). ("[F]raud may be said to embrace all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another or the taking of undue or unconscientious advantage of another." (internal quotations omitted)).

The conspiracy which is embodied in the tortious acting in concert claim and the misrepresentations at the heart of the negligent misrepresentation claim were ongoing and kept from Plaintiff the true facts and circumstances surrounding the development and operation of the Theater until not less than sixteen months prior to the filing of this case. Even more recently than that, the City entered into the Settlement Agreement with Moonlight Bandits in February of this

year. That release is just one of the contracts which Plaintiff asks be declared null and void as it, like the original Economic Development Agreement and the supplements thereto, was procured as a result on continuing misrepresentations and concerted action by Defendants. Thus, this action was instituted well within the three year limitations period.

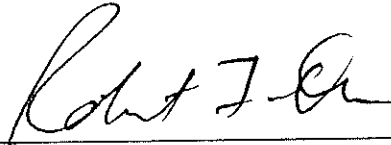
Alternatively, the statute of limitations does not bar Plaintiff's claims on the grounds that he is suing derivatively on behalf of the City of Roanoke Rapids. The statute of limitations would not bar the same claims were they filed by the City because of the doctrine of "nullum tempus occurrit regi," or "time does not run against the king." Essentially, where a city is performing a government function, time based defenses are inapplicable. *See MCI Constructors, Inc. v. Hazen & Sawyer, P.C.*, 310 F.Supp.2d 754 (M.D.N.C. 2004).

CONCLUSION

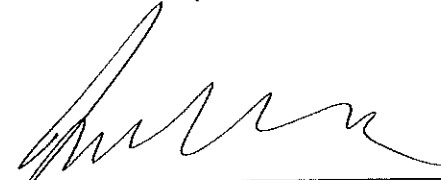
Plaintiff has standing as a taxpayer to challenge the misuse or misappropriation of his tax money and additionally has derivative standing because the government has not taken steps to recover money spent as a result of Defendants' scheme. Taken in the light most favorable to Plaintiff, the Amended Complaint states a claim upon which relief can be granted and remedied the alleged deficiencies which formed the basis of the request for a more definite statement. Accordingly, the Motions to Dismiss the Amended Complaint should be denied.

This 13th day of October, 2008.

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CERTIFICATE OF SERVICE

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I hereby certify that I have this day served a copy of the foregoing **Response to Defendants' Motions to Dismiss the Amended Complaint** by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following address 7/2 which is the last address known to me:

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This the 13th day of October, 2008.

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