STATE OF NORTH CAROLINA COUNTY OF BRUNSWICK	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 2191
EXTRA CARE, LLC, Plaintiff, v. CAROLINAS ALLIANCE FOR RESIDENTIAL EXCELLENCE, LLC; CAROLINAS ALLIANCE FOR RESIDENTIAL EXCELLENCE – ELKIN, LLC; C.A.R.E. HOLDINGS – INDIAN RIVER, LLC; and C.A.R.E. HOLDINGS – ELKIN, LLC, Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

1. Extra Care, LLC ("Extra Care") is a member of each of the North Carolina limited liability companies named as defendants in this action: Carolinas Alliance for Residential Excellence, LLC, Carolinas Alliance for Residential Excellence – Elkin, LLC, C.A.R.E. Holdings – Indian River, LLC, and C.A.R.E. Holdings – Elkin, LLC, (collectively "the Companies"). This matter is before the Court on the Companies' motion to dismiss Extra Care's claim with respect to records inspection rights afforded members of an LLC by Section 57D-3-04 of the North Carolina General Statutes. (Am. Mot. Dismiss ["Motion"], ECF No. 21.) The Motion is brought pursuant to both Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule[s]").

2. Having considered the parties' briefs and the arguments of counsel at a hearing held on 10 June 2024, the Court, in its discretion, hereby **GRANTS** the Motion and **DISMISSES** this action.

Ward and Smith, P.A., by Christopher Edwards, Hannah Morgan Daigle, and Payton Bullard, for Plaintiff Extra Care, LLC

Miller Monroe & Plyler, PLLC, by John W. Holton and Jason A. Miller for Defendants Carolinas Alliance for Residential Excellence, LLC, Carolinas Alliance for Residential Excellence–Elkin, LLC, C.A.R.E. Holdings – Indian River, LLC, and C.A.R.E. Holdings – Elkin, LLC

Earp, Judge.

I. FINDINGS OF FACT

3. The Court does not make findings of fact when ruling on a motion to dismiss under Rule 12(b)(6). Rather, the Court tests the legal sufficiency of the complaint by determining whether the factual allegations, construed in the plaintiff's favor, state a claim. *Concrete Serv. Corp. v. Invs. Grp., Inc.*, 79 N.C. App. 678, 681 (1986).

4. With respect to Rule 12(b)(1), the Court is required to make findings of fact only when requested to do so by the parties. *See* Rule 52(a)(2). No such request has been made here. Nevertheless, the Court makes the following findings of fact, all of which are undisputed and supported by filings on the Court's docket.

5. Extra Care is a North Carolina limited liability company with its principal office in Calabash, North Carolina. Extra Care is a member of each Defendant. (Compl. ¶¶ 1, 5, ECF No. 3.)

6. Defendants are all North Carolina limited liability companies (collectively, the "Companies"), each having its principal place of business in Tabor City, North Carolina. (Compl. ¶¶ 6-9.)

7. In January 2020, Extra Care became a preferred member of each of the Companies in exchange for a $1,000,000 capital contribution. As a preferred member, Extra Care alleges that it is entitled to monthly distributions. However, it also alleges that it has not received distributions for months. (Compl. ¶¶ 13-17.) Seeking an explanation, Extra Care made two written demands on the Companies for information pursuant to Section 57D-3-04, one in June 2023, and a second in November 2023.

8. The first demand was signed by Extra Care's counsel on 16 June 2023. It was delivered by mail to the Companies' registered agent, Littlewood Law, PLLC, and requested that the information demanded be provided via email or sent via UPS overnight delivery within fourteen days. (Compl., Ex. A ["June Demand"].) The Companies responded to the June Demand by producing documents via email on 29 June 2023 and by Dropbox[1] on 14 July 2023 and 2 October 2023. (Aff. of Jane Francis Nowell ["Nowell Aff."] ¶¶ 6-10, ECF No. 24.)

9. When documents were added to Dropbox on 14 July 2023, counsel for the Companies alerted Extra Care's counsel by letter that the records were available. He added that if further inspection was required, the Companies would hold Extra

[1] Dropbox is a file hosting and sharing service that allows a provider party to make documents available to another party for inspection and printing. *See* Dropbox, www.dropbox.com (last visited June 18, 2024).

Care responsible for both inspecting and copying the records at the LLCs' principal office "or other location designated by the company" and for the associated costs. (Aff. of G. Grey Littlewood, Esq. ["Littlewood Aff."], Ex. 1 ["July Response Letter"], ECF No. 19.5.)

10. Following discussions between counsel, on 2 October 2023, the Companies agreed to add additional bank statements and tax returns to Dropbox in response to the June Demand. (Nowell Aff., Ex. C.)

11. Thereafter, on 3 November 2023, in a letter again signed by its counsel, (the "November Demand"), Extra Care issued a second inspection demand, this time seeking both documents that it contended were missing from the Companies' earlier responses, as well as newly identified information. The November Demand requested that Defendants "produce records within ten business days of the date of the letter." (Nov. Demand, ECF No. 19.4.)

12. The November Demand was emailed to the Companies' counsel, Grey Littlewood, at his work email address, but no other attempts were made to deliver it to the Companies.[2] Mr. Littlewood testified that he was unaware of the November Demand until it was presented to him in January 2024, after this lawsuit was filed.[3] (Littlewood Aff. ¶¶ 5-7.)

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[2] The November Demand says that it was sent via Federal Express, but Plaintiff's counsel later confirmed that this was said in error. (Littlewood Aff., Ex. 2.)

[3] In email traffic between counsel attached to Mr. Littlewood's affidavit, Mr. Littlewood wrote that he discovered the November Demand in his "junk" folder. (Littlewood Aff., Ex. 2.)

13. On 22 December 2023, Extra Care brought this lawsuit asking the Court to exercise its mandamus power to require the Companies to permit inspection of information demanded in the November Demand pursuant to N.C.G.S. § 57D-3-04.[4] (Compl., ECF No. 3.) Service of process upon the Companies was not perfected until 6 February 2024. (Aff. Serv. Designated Delivery Serv. as to Defs., ECF No. 6.) On 19 February 2024, the Court granted the Companies' request for an additional thirty days to respond to the Complaint, extending the time to respond to 8 April 2024. (Order Granting Defs.' Mot. Enlargement Time, ECF No. 11.) The case was designated to this Court on 5 January 2024 and assigned to the undersigned the same day. (ECF Nos. 1, 2.)

14. On 8 April 2024, Defendants filed the instant Motion pursuant to Rules 12(b)(1) and 12(b)(6). After full briefing, the Court held a hearing on the Motion on 10 June 2024. It is now ripe for determination.

III. CONCLUSIONS OF LAW

15. Defendants move to dismiss Plaintiff's single-claim complaint arguing both that the Court lacks subject matter jurisdiction and that no claim has been stated. When considering whether the Court has subject matter jurisdiction, "the court need not confine its evaluation . . . to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Smith v. Privette*, 128 N.C. App. 490, 493 (1998) (quoting 2 James W. Moore et al.,

[4] The claim in this action pertains solely to the November Demand. Plaintiff did not petition the Court to compel the Companies to complete their response to the June Demand, and the Court does not opine regarding the June Demand.

Moore's Federal Practice § 12.30(3) (3d ed. 1997)). Should the plaintiff fail to satisfy its burden to establish subject matter jurisdiction, the Court "cannot enter a judgment in favor of either party; it can only dismiss the proceeding or case for want of jurisdiction." *Richards v. Nationwide Homes*, 263 N.C. 295, 303 (1965).

16. Pursuant to Rule 12(b)(6), dismissal of a claim is proper 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." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)). Under Rule 12(b)(6), the Court reviews the allegations of the pleading at issue in the light most favorable to the nonmoving party, *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017), but it is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dept. of Health and Hum. Servs., Div. of Facility Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (internal quotation marks omitted)). Further, when ruling on a Rule 12(b)(6) motion, the Court may consider documents that are the subject of the complaint and to which the complaint specifically refers. *Krawiec v. Manly,* 370 N.C. 602, 606 (2018); N.C. R. Civ. P. 10(c).

17. The Companies contend that because Extra Care did not comply with the statutory requirements of Section 57D-3-04, it cannot petition the Court for an order mandating the Companies' compliance. Specifically, the Companies argue that

Extra Care's November Demand (1) was not signed by a member of each LLC, (2) was not delivered to the LLCs, and (3) requested that it "produce" documents as opposed to providing them for inspection. (Mem. L. Supp. Defs.' Mot. Dismiss ["Defs.' Br."], ECF No. 20.) These failures, the Companies maintain, render the November Demand defective, making it an inadequate basis upon which to invoke the Court's subject matter jurisdiction. Alternatively, the Companies move to dismiss Plaintiff's claim to enforce its statutory inspection rights pursuant to Rule 12(b)(6) for failure to state a claim.

A. The Member Signature Requirement

18. Defendants first contend that Section 57D-3-04(d) provides that only a member of an LLC may sign an inspection demand to that LLC. Because Extra Care's counsel signed the November Demand and it was not signed by Extra Care itself, Defendants conclude that the November Demand does not satisfy this statutory requirement. Therefore, they argue, the Court is without jurisdiction to rule on Plaintiff's claim or, alternatively, Plaintiff's allegations admitting this failure preclude the existence of its claim. (Defs.' Br. 5-6.)

19. Extra Care reads the statute differently. According to it, Section 57D-3-04(c)'s provision that "[i]nspection rights and rights to copy LLC records may be exercised through a member's agent," read in conjunction with subsection (d), permits a member to grant its agent authority to do all things necessary to exercise the member's inspection rights, including authority to sign a demand on the member's behalf. (Pl.'s Resp. Opp. Defs.' Am. Mot. Dismiss 4-6 ["Pl.'s Br."], ECF No. 23.)

20. The Court concludes that the Companies' position on this issue is correct. In *Miller v. Burlington Chem. Co., LLC*, 2016 NCBC LEXIS 190, at **15 (N.C. Super. Ct. Sept. 7, 2016), this Court observed that the language of Section 57D-3-04 was amended in 2014 to require the member, not the member's agent (here its attorney), to sign the written "notice of exercise." Although the holding in *Miller* ultimately turned on the language of the statute prior to the 2014 amendment, the Court declines Extra Care's invitation to disregard the Court's observation that the 2014 amendment changed the signature requirement going forward.

21. When amending the statute, the General Assembly specified that the member must sign a written demand "[*t*]*o* exercise inspection and other information rights." N.C.G.S. § 57D-3-04(d) (emphasis added). Once the demand is signed and delivered, however, inspection rights and rights to copy LLC records may *be* exercised by the member's agent. N.C.G.S. § 57D-3-04(c) (emphasis added). "[I]t is always presumed that the legislature acted with care and deliberation[.]" *State v. Coffey*, 336 N.C. 412, 418 (1994) (citations omitted) (cleaned up); *see also State v. Moraitis*, 141 N.C. App. 538, 541 (2000) ("We presume that the use of a word in a statute is not superfluous and must be accorded meaning, if possible."). It is the work of the General Assembly, not this Court, to rewrite the statute to delete the member signature requirement if that, as Plaintiff argues, was its intent.[5]

[5] The General Assembly has provided for such a result in the statute governing shareholders' inspection rights. Qualified shareholders of a corporation must "give[] the corporation written notice of the qualified shareholder's demand at least five business days before the date on which the qualified shareholder wishes to inspect and copy." N.C.G.S. § 55-16-02(a). Unlike Section 57D-3-04 in the LLC context, there is no requirement in the Corporations Act that a shareholder sign the notice. *See, e.g.*, *Erwin v. Myers Park Country Club, Inc.*, 2021

22. Here, counsel for Extra Care signed both the June and November Demands. Because the Demands were not signed by Extra Care, the member, the requirements of Section 57D-3-04(d) were not met. Nevertheless, citing *Brown v. Onslow Bay Marine Grp.*, 2022 NCBC LEXIS 154 (N.C. Super. Ct. Dec. 12, 2022), Extra Care argues that the Companies waived their objection to the member signature requirement because they responded without objecting to Extra Care counsel's signature on the June Demand. (Pl.'s Br. 5.) The Court disagrees.

23. In *Brown*, the plaintiff contended that the defendant, an LLC, inadequately responded to the plaintiff's inspection demand. The LLC challenged the validity of the demand because it requested that corporate records be sent electronically or by overnight mail rather than produced in-person at the LLC's principal office as stated in Section 57D-3-04(e). This Court, however, concluded that the LLC had waived this objection by repeatedly producing records in response to the demand over the course of six months, at least twice by mail, without objection. Therefore, this Court held that the LLC could not challenge the validity of the inspection demand simply because it had requested that the documents be sent to the plaintiffs. The LLC's "repeated course of conduct and failure to object" resulted in a waiver of the LLC's objection to plaintiffs' failure to satisfy the requirements of Section 57D-3-04. *Brown*, 2022 NCBC LEXIS 154 at **9-10.

NCBC LEXIS 66, at **3-4, 13 (N.C. Super. Ct. July 17, 2021) (recognizing that a letter signed by plaintiff's counsel was sufficient to constitute written notice of plaintiff's demand for inspection of a corporation's records).

24. Unlike *Brown*, the Companies in this case were presented with a second inspection demand in November 2023. While they may have waived their objection to the member signature requirement with respect to the June Demand by responding, the Court does not conclude that the Companies' actions with respect to the June Demand waived their right to object to insufficiencies in the November Demand.

25. Because Extra Care did not satisfy Section 57D-3-04's member signature requirement with respect to the November Demand, Extra Care may not come to the Court to enforce its inspection rights with respect to that demand. Accordingly, as to the November Demand upon which this action is based, Defendants' motion to dismiss for lack of subject matter jurisdiction is hereby **GRANTED**.

B. The Delivery Requirement

26. Even had the member signature requirement been met, the Court concludes that the November Demand was not delivered to the Companies in accordance with Section 57D-3-04(d). To be sure, the problem was not Extra Care's decision to use email as its method of delivery. Rather, the problem is that, prior to sending the November Demand, Extra Care did not ensure that the email address it used was one that the Companies had identified for this purpose.

27. The statute makes it incumbent on the member to ensure that its demand is delivered to the LLC at least seven days before the date on which the inspection is to take place. N.C.G.S. § 57D-3-04(d). The parties agreed by virtue of

the Companies' operating agreement[6] that notice to the Companies was to be delivered either "by hand, facsimile or electronic mail (at an address provided by the person being notified for such purpose) or . . . by mail or Federal Express or similar expedited commercial carrier[.]" In addition, "[a]ll such notices, demands and requests shall be addressed, if to the Company, at its principal executive offices[.]" (Am. and Restated Operating Agreement Carolinas Alliance Residential Excellence – Elkin, LLC Section 11.1, ECF No. 19.1.) Extra Care chose the electronic mail route.

28. Unfortunately for Extra Care, it assumed that sending the November Demand to the work email address for the Companies' counsel was sufficient to ensure its delivery. It wasn't. The email address Extra Care used was not one used by the Companies at their principal executive offices, nor was it one provided by Extra Care's counsel for that purpose. Because delivery was improper, Defendants had no notice of the November Demand Letter until after the lawsuit was filed – precisely the situation the statute was designed to prevent.[7]

IV. CONCLUSION

29. For these reasons, Defendants' Amended Motion to Dismiss, (ECF No. 21), is **GRANTED.** This case is **DISMISSED** with prejudice.

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[6] Defendants represent, and Plaintiff does not contest, that the relevant provision of each Defendant's operating agreement is the same. (Defs.' Reply 4 n.1.) Therefore, the Court refers to the Companies' operating agreements in the singular.

[7] Contrary to Extra Care's argument that Section 57D-2-30 limits the Companies' ability to rely on the notice provision in the Operating Agreement, the provision in no way "diminishes the rights and protections of members under Section 57D-3-04(a)," which speaks to the types of information subject to an inspection demand, not to the method of its delivery.

IT IS SO ORDERED, this 18th day of June, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases