Whalen v. Tuttle, 2026 NCBC 87.

STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV029650-590
PATRICK WHALEN, individually, and CU SOBE, LLC, Plaintiffs, v. MICHAEL M. TUTTLE, Defendant, --- MICHAEL M. TUTTLE, individually and derivatively, Third-Party Plaintiff, v. KRISTIN WHALEN et al., Third-Party Defendants.	**ORDER AND OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

1. Out of the five claims for relief that Plaintiffs CU SOBE, LLC and Patrick Whalen originally asserted against Defendant Michael Tuttle, just two remain. CU SOBE claims that Tuttle breached an oral contract to contribute capital to the company, and CU SOBE and Whalen claim that Tuttle breached CU SOBE's operating agreement. Tuttle now moves for summary judgment on both. For the following reasons, the Court **GRANTS** his motion.

Parton Law PLLC, by Corey Parton, Leslie Muse, and Brian North, for Plaintiffs Patrick Whalen and CU SOBE, LLC.

Parton Law PLLC, by Corey Parton, Leslie Muse, and Brian North, for Third-Party Defendants Kristin Whalen, Maurice Whalen,

Alejandro Torio, Jamie Lynch, James Nguyen, Adam Williams, Only We LLC, Fifth Street Group, LLC, Pink Moon SC LLC, d/b/a Tempest, 5Church Inc., d/b/a Church and Union Charlotte, 5Church Charleston, LLC d/b/a Church and Union Charleston, 515 Jersey LLC, Sophia's Clt LLC, d/b/a Sophia's Lounge.

TLG Law, by David G. Redding and Jordan LaTorre, for Third-Party Defendants LBH NC LLC, d/b/a La Belle Helene, Church and Union LLC, d/b/a Church and Union Nashville, Ophelia's TN LLC, d/b/a Ophelia's Pizza and Bar, and Church and Union DEN LLC, d/b/a Church and Union Denver.

Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by Jennifer Van Zant, Amanda Hawkins, and Mae Zeitouni, for Defendant and Third-Party Plaintiff Michael Tuttle.

Stevens, Martin, Vaughn & Tadych, PLLC, by William Janvier as Receiver for Church and Union DEN, LLC.

Conrad, Chief Judge.

I.
BACKGROUND

2. The Court does not make findings of fact when ruling on motions for summary judgment. The following background, drawn from the record evidence, is intended to provide context for the Court's analysis and ruling.

3. Whalen is a restaurateur. Along with a group of friends, family members, and business associates, he owns and operates many restaurants in the Carolinas and elsewhere. Tuttle has invested in several of Whalen's restaurant businesses in recent years. (*See, e.g.*, Dep. Tuttle (2/25/26) 69:19–70:5, ECF Nos. 256.7, 276.1; 30(b)(6) Dep. Church and Union DEN, LLC et al. 115:22–116:22, ECF No. 256.5; ECF No. 256.10 at 24.)

4. In June 2022, Whalen and Tuttle flew to Miami, Florida, to investigate locations for one or two new restaurants. During the flight, they discussed whether Tuttle would invest in a Miami restaurant. In his deposition, Whalen testified that he and Tuttle reached an oral agreement in which Tuttle promised to "contribute $2 million" divided into a series of installments "in exchange for 25%" ownership of a yet-to-be-formed company plus a "right of first refusal" to invest in future restaurants. Tuttle recalls discussing similar terms but denies having made a final agreement. It is undisputed that Whalen and Tuttle did not put their agreement, if one was made, in writing. (Dep. Whalen 48:12–18, ECF No. 256.1; 30(b)(6) Dep. CU SOBE 87:4–6, ECF No. 256.2; Dep. Tuttle (2/25/26) 41:22–42:23, 45:28–49:16.)

5. Not long after the June 2022 flight, Whalen decided to move forward with one restaurant in Miami, not two. In November 2022, he organized CU SOBE (a North Carolina LLC) to serve as the operating company for that restaurant. A few weeks later, CU SOBE rented space, and in March 2023, it hired contractors and designers. (*See* 30(b)(6) Dep. CU SOBE 66:18–67:21, 194:5–196:10; Art. of Org., ECF No. 276.17.)

6. Much about CU SOBE's membership and management is disputed, including whether it had an operating agreement. Both sides seem to acknowledge that CU SOBE has no written operating agreement. Whalen contends that the company has an unwritten operating agreement that mirrors the terms contained in one or more written agreements used by his other restaurant businesses, such as Pink Moon SC LLC. It is undisputed that Tuttle is a member of Pink Moon and a

party to Pink Moon's operating agreement. But Tuttle denies that CU SOBE has an operating agreement or, if it does, that he is a party to it. (*See, e.g.*, 30(b)(6) Dep. CU SOBE 90:10–91:5; Dep. Tuttle (5/5/26) 27:8–22, ECF No. 256.8; *see also* ECF No. 256.6 at Ex. 98.)

7. Throughout this period, Tuttle did not contribute capital to CU SOBE or otherwise make any investment toward its planned Miami restaurant. According to Whalen, Tuttle's first installment was due in June 2023. As the date approached, Tuttle asked Whalen via text message, "Would it put us in a bind if I made a $300k cap contribution 8/1 (combining June/July/August)?" Whalen responded, "Nope." Then, in July 2023, Whalen emailed Tuttle a far different proposal concerning several restaurants. The proposal stated, among other things, that an entity called Fifth Street Group (not CU SOBE) "elected to postpone construction of [the Miami restaurant] until, at the earliest, January 2025. Tuttle and [Fifth Street Group] agreed to a $2,000,000.00 investment from Tuttle towards the construction and launch of [the Miami restaurant]; but at this time there are no funds required for this project." Days later, Whalen emailed again to "rescind the proposal," stating that "we are planning on proceeding with [the Miami restaurant], but on a longer timeline." Whalen also asked if Tuttle "intended to continue with [his] participation in that project" and "agree[d] wholeheartedly in the need to paper all this properly." Meanwhile, Tuttle retained counsel and began raising concerns that his previous investments in Whalen's restaurants had been diverted to other businesses. (ECF No. 276.7; 30(b)(6) Dep. CU SOBE Exs. 47, 48.)

8. This sequence of communications led to a meeting between Whalen and Tuttle, which Whalen secretly recorded. It was contentious. Whalen accused Tuttle of breaking his promise to fund the Miami restaurant; Tuttle responded that he recalled "saying [he] could commit $2,000,000 to Miami" and that he "was not reneging." (ECF No. 276, Ex. 2 at 4:44–4:52, 1:10:37–1:10:43.)

9. There were more discussions later in 2023, but the relationship between Whalen and Tuttle was beyond repair. Tuttle never contributed any capital to CU SOBE, the Miami restaurant never opened, and Whalen and CU SOBE have canceled plans to move forward with the project. In April 2024, the parties mediated not only their disputes related to CU SOBE but also those related to Tuttle's investments in Whalen's other restaurant businesses, producing a tentative settlement that proved too fragile to avoid litigation. (*See, e.g.*, 30(b)(6) Dep. CU SOBE 186:19–187:13; 30(b)(6) Dep. CU SOBE Exs. 49, 50; ECF No. 10.1.)

10. Following the mediation, Whalen and CU SOBE sued Tuttle for fraud, unfair trade practices, breach of contract, and more. Early motion practice narrowed the complaint, leaving just two contract claims.[1] *See generally Whalen v. Tuttle*, 2024 NCBC LEXIS 146 (N.C. Super. Ct. Nov. 19, 2024) (granting in part Tuttle's motion to dismiss). First, CU SOBE alone claims that Tuttle breached the alleged June 2022 oral contract with Whalen by failing to make his promised capital contribution. (*See* Compl. ¶¶ 103–11, ECF No. 3.) Second, CU SOBE and Whalen claim that Tuttle

[1] Tuttle has asserted his own counterclaims and third-party claims, widening the case to include many more individuals and entities. Because Tuttle's motion does not concern these claims, the Court will not summarize them here.

breached CU SOBE's operating agreement in various ways. (*See, e.g.*, Compl. ¶¶ 120, 122, 125.)

11. Tuttle seeks summary judgment on both contract claims. (ECF No. 254.) Following full briefing and a hearing on 8 October 2026, the motion is ripe.

II.
ANALYSIS

12. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). In making this determination, the Court must view the evidence "in the light most favorable to the nonmoving party." *Vizant Techs. LLC v. YRV Worldwide, Inc.*, 373 N.C. 549, 556 (2020). The moving party "bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 365 N.C. 871, 579 (2002). If the moving party carries this burden, the opposing party "may not rest upon the mere allegations or denials of his pleading," N.C. R. Civ. P. 56(e), but must instead "come forward with specific facts establishing the presence of a genuine factual dispute for trial," *Liberty Mut. Ins. Co.*, 356 N.C. at 579.

13. **Breach of Oral Contract.** Tuttle denies that he entered into an enforceable oral contract with Whalen in June 2022. Assuming Whalen and Tuttle formed a binding contract, though, Tuttle argues that CU SOBE did not exist at the time of the contract, is not a contractual party, and has no standing to enforce it.

14. It is undisputed that CU SOBE is not a party to the alleged June 2022 contract between Whalen and Tuttle. As CU SOBE admits, it was organized about five months after the time of the contract and therefore could not have been a contractual party. CU SOBE also admits that Whalen did not assign or transfer his contractual rights to it after its creation. (*See, e.g.*, 30(b)(6) Dep. CU SOBE 81:6–8; Dep. Whalen 208:2–5; Art. of Org.)

15. At the pleading stage, Tuttle argued that these facts were sufficient to show that CU SOBE lacks standing and moved to dismiss the claim. But the Court concluded that his argument "rest[ed] on a misreading of the claim." *Whalen*, 2024 NCBC LEXIS 146, at *9. In addition to alleging that Whalen and Tuttle formed an oral contract in mid-2022, the complaint alleges that they amended the contract about a year later, well after CU SOBE had been created. Construed liberally, the complaint supports a "fair inference" that CU SOBE became "a party to the amended contract" and obtained "the right to accelerate the balance owed by Tuttle" under the original contract. *Id.* The Court concluded that "these allegations"—the allegations related to the amended contract—were adequate to plead "that the company is a party to an oral contract with Tuttle and that it has standing to enforce its contractual rights." *Id.*[2]

[2] In paragraph 45, for example, the complaint refers to an "Acceleration Amendment" in which "Whalen agreed to [Tuttle's] requested two-month delay [of contribution payments] in exchange for [Tuttle's] agreement that CU SOBE would have the right to . . . accelerate the payments due . . . ." (Compl. ¶ 45.) Paragraph 46 goes on to state that this "constitutes an enforceable contract amendment between the parties." (Compl. ¶ 46.) And paragraph 108 alleges that Tuttle breached the oral contract "by refusing to pay the $2,000,000 in twenty monthly increments of $100,000, and by refusing to pay the accelerated $2,000,000 contribution in full." (Compl. ¶ 108.)

16. In his motion for summary judgment, Tuttle again challenges CU SOBE's standing. With the benefit of discovery, he contends that no evidence supports the existence of the alleged amended contract—whether to add CU SOBE as a contractual party, to add an acceleration clause, or to amend the June 2022 contract in any other fashion. That necessitates summary judgment, he says, because CU SOBE's claim is rooted entirely in the alleged amended contract.

17. The Court agrees. In his deposition, Whalen testified unequivocally that he and Tuttle never amended the June 2022 contract. (*See* Dep. Whalen 51:13–14 ("We have not amended the agreement, to my knowledge, at all."); *see also* Dep. Whalen 50:24–51:1 ("Q. Did you and Mr. Tuttle ever reach a new agreement with regard to Miami? A. No.").) At the hearing, CU SOBE's counsel conceded the point and stated that it was not pursuing a claim based on an amended contract. As a result, there is no genuine issue of material fact for a jury to decide as to CU SOBE's claim for breach of any alleged amended oral contract, and CU SOBE has abandoned the claim.

18. Even so, CU SOBE urges the Court to deny Tuttle's motion and allow it to pursue a claim for breach of the alleged June 2022 oral contract between Whalen and Tuttle. CU SOBE contends that it possesses rights under the oral contract—and has standing to enforce those rights—because it is a third-party beneficiary and because it ratified the contract after its formation. But the Court has already construed this claim, in the context of a dispositive motion, as a claim for breach of an amended contract, not as one for breach of the original June 2022 contract between Whalen and Tuttle. Following that decision, CU SOBE did not amend its complaint, seek

clarification, or move for reconsideration. A second dispositive motion, following lengthy discovery, is not the time to rethink past orders.

19. Regardless, a fresh look at the complaint does CU SOBE no favors. To start, the complaint is not forthright about when CU SOBE was formed and falsely states that CU SOBE took part in negotiating the alleged oral contract in June 2022, even though the company did not exist at that time. (*See* Compl. ¶ 27; *see also* Compl. ¶ 104.) The complaint then alleges that the parties, including CU SOBE, entered into "an enforceable contract amendment" in May 2023—an allegation that CU SOBE has abandoned. (Compl. ¶ 46; *see also* Compl. ¶ 105.) And the complaint also alleges that CU SOBE exercised its right to accelerate Tuttle's $2 million capital contribution under the amended contract—a right CU SOBE now admits that it never had. (*See* Compl. ¶ 47; *see also* Compl. ¶ 108.)

20. At no point does the complaint refer to CU SOBE as a third-party beneficiary of the oral contract between Whalen and Tuttle. This theory is new, and CU SOBE may not raise it for the first time at summary judgment. *See, e.g.*, *Exela Pharma Scis., LLC v. REI Automation, Inc.*, 2026 NCBC LEXIS 77, at *11–12 (N.C. Super. Ct. Apr. 2, 2026) (collecting cases).[3]

21. The complaint mentions ratification once with regard to the alleged oral contract. After stating that Whalen and Tuttle "formed an oral contract," paragraph

[3] Of note, Tuttle contends that CU SOBE could not have been a third-party beneficiary because it did not exist at the time of the alleged oral contract. It is not clear if any North Carolina court has addressed whether a yet-to-be-formed company can be a third-party beneficiary of a contract. Because CU SOBE did not plead the theory, this is not a suitable case to take up the issue.

28 alleges that "[i]n the alternative, a contract was implied in fact and/or ratified by the parties' course of conduct." (Compl. ¶ 28.) This allegation does not refer to CU SOBE, name it as the ratifying party, or identify the conduct that demonstrates ratification. It is conclusory. Although the word "ratified" appears a few more times in the complaint, including one reference to the contract amendment that CU SOBE has abandoned, (*see* Compl. ¶ 46), it is not used again to explain the alleged oral contract. Again, this is insufficient to give Tuttle notice of a ratification-based theory, and CU SOBE may not use its brief to cure its pleading deficiencies. *See Potts v. KEL, LLC*, 2019 NCBC LEXIS 61, at *24 (N.C. Super. Ct. Sept. 27, 2019) (stating parties should introduce new issues through amendment, not through briefing). Indeed, the Court is not sure whether CU SOBE's response brief means to argue that *it* ratified the alleged oral contract or that *Tuttle* did, underscoring the importance of notice pleading standards.

22. In sum, it is undisputed that CU SOBE was not a party to the alleged June 2022 oral contract between Whalen and Tuttle, assuming one existed. CU SOBE has not properly pleaded that it has rights to enforce that oral contract as a third-party beneficiary or through ratification, and it has abandoned its claim that Tuttle breached an alleged amended contract. Only CU SOBE has asserted this claim; Whalen has not done so. Accordingly, there are no genuine issues of material fact for a jury to decide, and Tuttle is entitled to summary judgment. The Court grants his motion as to CU SOBE's claim for breach of the oral contract. There is no need to

address Tuttle's additional argument that the terms of the alleged contract were indefinite and unenforceable.

23. **Breach of Operating Agreement.** The only other claim at issue is CU SOBE and Whalen's claim for breach of CU SOBE's operating agreement. According to Tuttle, this claim cannot stand alone, and entry of summary judgment on the claim for breach of the oral contract requires entry of summary judgment here as well. In a nutshell, Tuttle is bound by CU SOBE's operating agreement (assuming it has one) only if he is a member of the company. Tuttle's membership in CU SOBE, however, turns on the alleged June 2022 oral contract. Entry of summary judgment on the claim for breach of the oral contract means that Tuttle has prevailed against CU SOBE's attempt to establish his membership. CU SOBE and Whalen say nothing to the contrary in their brief and do not otherwise suggest that this claim should survive independently. The Court therefore considers this point to be uncontested. Accordingly, the Court grants Tuttle's motion for summary judgment as to this claim and need not address Tuttle's argument that CU SOBE has no operating agreement.

III.
CONCLUSION

24. For these reasons, the Court **GRANTS** Tuttle's motion for summary judgment, (ECF No. 254). Judgment is **ENTERED** in favor of Tuttle and against Whalen and CU SOBE on the complaint's second and third causes of action ("Alternative Claim for Breach of Contract" and "Breach of the Operating Agreement").

SO ORDERED, this the 19th day of November, 2026.

/s/ Adam M. Conrad
Adam M. Conrad
Chief Business Court Judge