

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 12836

JOSHUA MORGAN, both
Individually and Derivatively on
Behalf of ALPINE WASTE
SOLUTIONS, LLC,

Plaintiff,

v.

TURN-PRO MAINTENANCE
SERVICES, LLC, ROBERT
SINGLETERY, and ALPINE WASTE
SOLUTIONS, LLC,

Defendants.

**ORDER APPROVING VOLUNTARY
DISMISSAL OF DERIVATIVE CLAIMS
AND DISMISSAL OF DERIVATIVE
CLAIMS WITHOUT PREJUDICE**

1. **THIS MATTER** is before the Court on Plaintiff Joshua Morgan's ("Plaintiff" or "Morgan") Motion, brought both individually and derivatively on behalf of Alpine Waste Solution, LLC ("Alpine"), for Approval of Court to File Voluntary Dismissal Without Prejudice of Derivative Claims in the above-captioned case (the "Motion").

2. Plaintiff initiated this action on behalf of himself and Alpine on July 15, 2016 against Turn-Pro Maintenance Services, LLC ("Turn-Pro"); Robert Singletary ("Singletary"); and Alpine (ECF No. 1). Plaintiff asserted claims on behalf of Alpine against both Singletary and Turn-Pro for tortious interference with contract, tortious interference with prospective contract and economic advantage, usurpation of corporate opportunities, and unfair or deceptive trade practices; and against Singletary for breach of fiduciary duty, constructive fraud, and conversion. Plaintiff also sought to have a constructive trust imposed on Turn-Pro, an award of punitive

damages, judicial dissolution of Alpine pursuant to N.C. Gen. Stat. § 57D-6-02, and enforcement of information rights pursuant to N.C. Gen. Stat. § 57D-3-04.

3. On June 30, 2017, Plaintiff filed a Motion for Default Judgment or, in the Alternative, Summary Judgment (the “Motion for Default Judgment”) (ECF No. 27).

4. On July 30, 2017, Singletary filed a written response, arguing that Plaintiff’s failure to comply with the demand requirement under N.C. Gen. Stat. § 57D-8-01(a)(2) was fatal to Plaintiff’s derivative claims and necessarily defeated Plaintiff’s Motion for Default Judgment (ECF No. 31).

5. On August 1, 2017, the Court scheduled the Motion for Default Judgment for hearing on August 17, 2017 (ECF No. 32).

6. On August 9, 2017, Plaintiff filed a Notice of Voluntary Dismissal Without Prejudice, purporting to dismiss all of Plaintiff’s individual and derivative claims pursuant to Rule 41 of the North Carolina Rules of Civil Procedure (ECF No. 33). Plaintiff did not move for Court approval of the discontinuance of his derivative action as required by N.C. Gen. Stat. § 57D-8-04.

7. On August 14, 2017, the Court cancelled the August 17th hearing and ordered that should Plaintiff wish to dismiss his derivative claims on behalf of Alpine, Plaintiff should “file a motion to approve the voluntary dismissal of Plaintiff’s derivative claims and a supporting brief” because “Section 57D-8-04 of the North Carolina General Statutes provides that ‘[a] derivative proceeding may not be discontinued or settled without the court’s approval’ and [because] the court must direct that notice be given to the members ‘[i]f the court determines that a proposed

discontinuance or settlement will substantially affect the interests of the LLC's members” (ECF No. 34 at 1 (quoting N.C. Gen. Stat. § 57D-8-04)).

8. Plaintiff timely filed this Motion and a supporting brief on August 21, 2017 (ECF No. 35, 36).

9. Defendants were afforded an opportunity to file a response no later than August 28, 2017, and Defendants did not file a response.

10. To discontinue a derivative proceeding, Plaintiff must obtain approval from the Court, N.C. Gen. Stat. 57D-8-04, and the Court's order must dismiss the derivative claims “upon such terms and conditions as justice requires[,]” N.C. R. Civ. P. 41(a)(2). Plaintiff argues that the Court should approve the discontinuance of the derivative proceeding because “Plaintiff has not rested his case, good cause exists to permit the Motion and no prejudice will result to any member as a result of voluntary dismissal.” (ECF No. 36 at 1.) Specifically, “Plaintiff has identified a potential procedural defect concerning the written demand requirement pursuant to N.C. Gen. Stat. § 57D-8-01(a)(2) and desires to correct such defect.” (ECF No. 36 at 1.)

11. The Supreme Court of North Carolina has previously held that the language used in Gen. Stat. § 57D-8-04 directs “the court . . . to determine whether the interest of any shareholder will be substantially affected by the discontinuance, dismissal, compromise, or settlement of a derivative suit” but does “not specify what test the court must apply in making this determination[.]” *Alford v. Shaw*, 320 N.C. 465, 470–71, 358 S.E.2d 323, 326–27 (1987) (interpreting N.C. Gen. Stat. 55-55(c) (1987)

which stated that a shareholder's derivative action "shall not be discontinued, dismissed, compromised or settled without the approval of the court").

12. Although courts in North Carolina have set forth factors for the courts to consider when a plaintiff seeks to settle a derivative action, these factors are not relevant when the Court is seeking to determine if the interests of shareholders or members will be substantially affected by the discontinuance of the derivative proceeding upon voluntary dismissal. The Court's consideration of the effect of a discontinuance does not "lend itself to any formula-like approach," so it is ultimately for "the court to decide whether the case begun in the Superior Court will continue" based on the facts and circumstances of the case. *Alford v. Shaw*, 327 N.C. 526, 540–41, 398 S.E.2d 445, 453 (1990) (citation omitted).

13. Having reviewed the pleadings, the motions, the briefs, and the other circumstances before the Court, the Court concludes that, in the current circumstances, the continuance of the derivative proceeding is not in the best interests of the members of Alpine and the discontinuance will not substantially affect the interests of the members of Alpine. The Court also concludes that Morgan and Singletary, the only members of Alpine, have received notice of Plaintiff's Motion seeking Court approval to discontinue this action and to dismiss Plaintiff's derivative claims without prejudice as parties to this litigation, and neither has filed a response objecting to the discontinuance of the action. Therefore, the Court concludes that Plaintiff's Motion should be granted and Plaintiff's derivative claims dismissed without prejudice.

14. **WHEREFORE**, the Court hereby **GRANTS** the Motion and **ORDERS** that Plaintiff's derivative claims asserted on behalf of Alpine are hereby **DISMISSED** without prejudice.

SO ORDERED, this the 29th of August, 2017.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases