

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 7014

ROBERT GARY RABON, JAMES
MIKLOSKO,

Plaintiffs,

v.

JOHN NORMENT,

Defendant,

v.

ROBERT GARY RABON, JAMES
MIKLOSKO, ADVANTAGE
LENDING LLC, CAVALIER
MORTGAGE GROUP, INC.,
STEEL HOLDINGS, LLC and
ADVANTAGE LENDING, a
common law partnership,

Counterclaim-Defendants

**ORDER ON NORMENT'S MOTION
TO STRIKE ANSWERS OF
CAVALIER MORTGAGE GROUP,
INC. AND STEEL HOLDINGS, LLC
AND TO DISQUALIFY COUNSEL**

THIS MATTER comes before the Court on Defendant/Counterclaim-Plaintiff John Norment's ("Norment") Motion to Strike Answers of Cavalier Mortgage Group, Inc. and Steel Holdings, LLC and to Disqualify Counsel. ("Motion," ECF No. 24.) In the Motion, Norment seeks to disqualify Richard Farrell ("Farrell") from representing Cavalier Mortgage Group, Inc. ("Cavalier") and Steel Holdings, LLC ("Steel") in this lawsuit, and additionally to strike all pleadings and papers filed by Farrell on behalf of Cavalier or Steel.

THE COURT, having carefully considered the Motion, the briefs filed in support of and in opposition to the Motion, Cavalier's By-Laws, the applicable law, and other appropriate matters of record, CONCLUDES, in its discretion, that the Motion should be GRANTED for the reasons set forth below.

A. Facts and Procedural History

1. Cavalier is a North Carolina corporation with its principal place of business in Wake County, North Carolina. Plaintiff James Miklosko ("Miklosko") and Norment are each 50% shareholders in Cavalier and are the two members of the Cavalier Board of Directors.

2. In 2000, Cavalier adopted a set of written "Bylaws of Cavalier Mortgage Group, Inc." ("By-Laws"). (ECF No. 25.1, at Ex. A.) The By-Laws provide the Board with broad authority to manage the business of Cavalier. The By-Laws provide that "[a]ll corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation shall be managed under the direction of, the Board of Directors." (By-Laws § 3.1.)

3. The By-Laws further provide that "a majority of the number of directors . . . shall constitute a quorum for the transaction of business at any meeting of the Board of Directors . . .", and that "the affirmative vote of a majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board of Directors." (By-Laws §§ 4.5, 4.6.)

4. The By-Laws similarly provide that "[a] majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group

for action on that matter,” and that the majority of the votes cast when a quorum exists determines whether an action is approved. (By-Laws §§ 2.9, 2.11.)

5. On October 1, 2000, Norment and Miklosko unanimously consented to amend the By-Laws to provide for two shareholders, directors, and officers: Norment and Miklosko. (Minutes of Shareholders and Directors of Cavalier, ECF No. 25.1, at Ex. A.) Accordingly, the By-Laws require the unanimous agreement of Miklosko and Norment to act on behalf of Cavalier.

6. Steel is a North Carolina limited liability company. Norment and Miklosko are each 50% members and managers of Steel. The Articles of Organization provide that all members are also managers of the company. (ECF No. 25.1 at Ex. B, ¶ 6.) Steel does not have an operating agreement that provides for how company decisions should be made.

7. Norment and Plaintiffs had previously been engaged in a dispute in Wake County Superior Court, Case No. 17-CV-8037, where Norment alleged individual claims and derivative claims on behalf of Advantage Lending, LLC, Cavalier, and Steel against Plaintiffs. The court in that case dismissed all the derivative claims, and Norment voluntarily dismissed without prejudice his remaining individual claims against Plaintiffs. (Complaint, ECF No. 3, at ¶¶ 5–30.)

8. On May 28, 2019, Plaintiffs filed a Complaint in Wake County Superior Court. The case was designated as a complex business case and assigned to the undersigned on July 8, 2019. In the Complaint, Plaintiffs raised claims against

Norment based on the parties' prior lawsuit for malicious prosecution and abuse of process. (ECF No. 3, at ¶¶ 31–40.)

9. Norment served his original Answer on Plaintiffs on July 5, 2019, an Amended Answer and Counterclaim on July 29, 2019, and a Second Amended Answer and Counterclaim on October 2, 2019 (“Second Amended Answer,” ECF No. 20). In the Second Amended Answer, Norment brings a variety of counterclaims against Plaintiffs.

10. Norment alleges that, *inter alia*, beginning in 2014, Miklosko took control over Cavalier and Steel's assets and operations and made decisions and took actions without Norment's involvement or consent. Miklosko retained an attorney, Richard Farrell, to represent him and also serve as corporate counsel for Cavalier and Steel in this dispute.

11. On October 3, 2019, Farrell filed a reply to Norment's Second Amended Answer on behalf of Plaintiffs, Advantage Lending LLC, Cavalier, and Steel.

12. On December 5, 2019, Plaintiffs filed a Notice of Voluntary Dismissal Without Prejudice, dismissing both their claims. (ECF No. 33.) Norment's counterclaims are all that remain.

13. On November 4, 2019, Norment filed the Motion (ECF No. 24) and a brief in support (ECF No. 26). Plaintiffs subsequently responded in opposition to the Motion (ECF No. 34), and Norment filed a reply in support (ECF No. 35). The Motion is now ripe for determination.

B. Analysis and Discussion

14. Norment moves to disqualify Farrell from representing Cavalier and Steel, and to have the Court strike Cavalier and Steel's filings, on two primary grounds:

- a. Plaintiffs lacked authority to retain Farrell to represent Cavalier and Steel because under Cavalier's By-Laws and the North Carolina Limited Liability Company Act such action required majority approval; and,
- b. Farrell has a conflict of interest under the North Carolina Rules of Professional Responsibility that prevents his representation of Cavalier and Steel.

15. Because the first ground for disqualification is dispositive, the Court will only address this argument.

16. Under Rule 12(f), the trial court may "strick[e] from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C.G.S. § 1A-1, Rule 12(f). "A motion to strike is addressed to the sound discretion of the trial court." *Kingsdown, Inc. v. Hinshaw*, 2016 NCBC LEXIS 15, at *8 (N.C. Super. Ct. Feb. 17, 2016). Likewise, "[d]ecisions regarding whether to disqualify counsel are within the discretion of the trial judge." *Robinson & Lawing, L.L.P. v. Sams*, 161 N.C. App. 338, 339, 587 S.E.2d 923, 925 (2003) (citation omitted).

17. Norment contends that hiring counsel to represent Cavalier and Steel is a corporate action that required the majority vote of the directors in Cavalier and the

managers in Steel. Section 3.1 of Cavalier's By-Laws provides the Board with broad authority to manage "[a]ll corporate powers" and "the business and affairs of the corporation." Section 4.6 unambiguously requires a majority vote and agreement of Norment and Miklosko to act for Cavalier. The North Carolina Limited Liability Company Act provides that "[e]ach manager has equal rights to participate in the management of the LLC and its business. Management decisions approved by a majority of the managers are controlling." N.C.G.S. § 57D-3-20(b). Norment and Plaintiffs made no agreement otherwise; Steel does not have an operating agreement.

18. This Court's decision in *Battles v. Bywater, LLC*, 2014 NCBC LEXIS 54 (N.C. Super. Ct. Oct. 31, 2014) appears to be directly on point with the facts of this case. In *Battles*, the plaintiff Chad A. Battles ("Battles") and James Rogers ("Rogers") were each 50% owners and member-managers of two separate LLCs, Bywater and Agiqua (collectively "the LLCs"). *Id.* at *1–2. Bywater had a written operating agreement that required majority approval of the members to take action for the corporation. *Id.* at *13–15. Agiqua did not have an operating agreement. *Id.* at *2. Battles and Rogers got into a dispute regarding the management of the businesses, and Rogers hired the Asheville Law Group ("ALG") to represent him in the dispute. *Id.* at *3–4. Subsequently, Battles filed a lawsuit against the LLCs alleging "numerous conflicts regarding the management and operation" of both companies and seeking judicial dissolution and the appointment of a receiver. *Id.* at *4–5. In response, Rogers terminated ALG as his personal counsel and hired them on behalf of the corporate defendants to defend the lawsuit and assert counterclaims against

the plaintiff. *Id.* at *5. Battles moved to disqualify ALG because Rogers lacked authority to hire counsel for the LLCs. *Id.* at *5.

19. In *Battles*, the Honorable Louis Bledsoe granted the motion to disqualify ALG from representing the LLCs, holding that Bywater's operating agreement and the North Carolina Limited Liability Company Act required majority consent of the members to retain counsel for the corporations. *Id.* at *13–17. In addition, the court struck all filings submitted by ALG on behalf of both corporate defendants. *Id.* at *17. In reaching its conclusions, the Court cited to holdings from other jurisdictions reaching similar results. *Id.* at *16 (citing *Maitland v. Int'l Registries, LLC*, 2008 Del. Ch. LEXIS 70, at *4–5 (Del. Ch. June 6, 2008); *Caplash v. Rochester Oral & Maxillofacial Surgery Assoc., LLC*, 867 N.Y.S.2d 15 (2008)).

20. The holding in *Battles* appears to be applicable to the facts presented in this case. *See also Gwaltney v. Gwaltney*, 2017 NCBC LEXIS 11 (N.C. Super. Ct. Feb. 8, 2017).

21. The By-Laws place the management of Cavalier in the Board, and require majority approval of the two directors. The North Carolina Limited Liability Company Act requires majority approval by the two managers of Steel. Thus, because Norment and Miklosko are Cavalier's only two directors and Steel's only two managers, business decisions must be unanimous. The decision to engage an outside attorney to represent Cavalier and Steel in a lawsuit is certainly the type of act that falls within the Board's authority for Cavalier, and the authority of the managers in

Steel, and accordingly requires unanimous consent of the two directors, Norment and Miklosko.

22. Plaintiffs' sole argument is based on waiver and estoppel. Plaintiffs argue that Norment ratified Miklosko's decision to hire Farrell as counsel by failing to object to Miklosko's retention of Farrell in the prior litigation between the parties. Plaintiffs cite no case law on point; Plaintiffs only cite to cases that "address efforts by third parties to hold companies responsible for obligations incurred in the ordinary course of company business by the president of the company." (Reply Br. in Supp., ECF No. 35, at p. 3.) The Court finds Plaintiffs' argument unpersuasive.

23. The Court concludes that pursuant to the By-Laws and the North Carolina Limited Liability Company Act, for Cavalier and Steel to retain an attorney to represent the respective companies in this lawsuit, the unanimous consent of the two directors is required. Miklosko, acting alone, did not have authority to retain Farrell on behalf of Cavalier and Steel. Norment's Motion should be GRANTED.

24. In addition, since Miklosko did not have authority to retain Farrell, the pleadings filed by Farrell on behalf of Cavalier and Steel should be stricken. Accordingly, all filings submitted by Farrell on behalf of Cavalier and Steel in this matter should be STRICKEN.

THEREFORE, IT IS ORDERED that the Motion is GRANTED and Richard Farrell is disqualified from representing Cavalier and Steel in this lawsuit. Additionally, to the extent that the following documents purport to be filed on behalf

of Cavalier and/or Steel, the names of Cavalier and Steel are hereby STRICKEN without prejudice:

1. Counterclaim Defendants' Answer, and Affirmative Defenses to Counterclaim Plaintiff's Counterclaim (ECF No. 16);
2. Counterclaim Defendants' Amended Answer, and Affirmative Defenses to Counterclaim Plaintiff's Amended Counterclaim (ECF No. 17);
3. Counterclaim Defendants' Answer, and Affirmative Defenses to Counterclaim Plaintiff's Second Amended Counterclaim (ECF No. 21);
4. Counterclaim Defendants' Motion for Summary Judgment (ECF No. 37);
and
5. Counterclaim Defendants' Memorandum of Law in Support of Motion for Summary Judgment (ECF No. 38).

SO ORDERED, this the 23rd day of March, 2020.

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