

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 7368

VILLAGE SQUARE, LLC,
Plaintiff,

v.

G.T.T. CORPORATION,
Defendant.

**ORDER REGARDING PLAINTIFF'S
NOTICE OF VOLUNTARY
DISMISSAL WITHOUT PREJUDICE**

1. THIS MATTER is before the Court following Plaintiff Village Square, LLC's filing, on August 21, 2020 of its Voluntary Dismissal Without Prejudice (the "Voluntary Dismissal") filed pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure (the "Rule(s)"). (ECF No. 49.) The Voluntary Dismissal states in total: "NOW COMES Plaintiff, Village Square, LLC, by and through undersigned counsel, pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure and hereby voluntarily dismisses all its remaining claims without prejudice."

2. The Voluntary Dismissal follows the Court's entry, on July 20, 2020 of the Court's Order and Opinion on Cross Motions for Summary Judgment (the "Order and Opinion"). (ECF No. 48.) In the Order and Opinion, the Court granted in part and denied in part Defendant's Motion for Partial Summary Judgment, (ECF No. 32), and denied Plaintiff's Motion for Partial Summary Judgment, (ECF No. 31), leaving for determination at a bench trial claims raised by Plaintiff and Defendant. The final paragraph of the Order and Opinion stated:

63. Notably, the Court must still decide numerous issues at trial, including, but not limited to: (1) whether, as contended by Plaintiff, Defendant and Plaintiff entered into a new contract to govern the

transactions at issue, or alternatively, modified the Lease Agreement and its amendments; (2) whether Defendant breached the Lease Agreement and its amendments, as drafted or as modified, when it refused to subordinate its interest for the \$19,975,000 loan and the \$13,600,000 loan; (3) whether Section 1 of the Fifth Amendment abrogates the reasonable approval provision in Paragraph 3 of the Fourth Amendment; and (4) damages that Plaintiff is entitled to, if any.

3. As the undersigned stated in *Foster Biodevice, LLC v. Cantrell*, 2016 NCBC

LEXIS 53, *6–7 (N.C. Super. Ct. July 11, 2016):

In general, plaintiffs have broad power under Rule 41(a) of the North Carolina Rules of Civil Procedure to voluntarily dismiss their claims, with or without the consent of opposing parties, at any time before they "rest" their case. N.C. R. Civ. P. 41(a)(1). Indeed, "[t]he general rule is that once a plaintiff takes a Rule 41(a)(1) dismissal, 'there is nothing the defendant can do to fan the ashes of that action into life[,] and the court has no role to play.'" *BB&T [BOLI Plan Trust v. Mass. Mut. Life Ins. Co.]*, 2016 NCBC LEXIS 36, at *12 [(N.C. Super. Ct. Apr. 29, 2016)] (quoting *Brisson v. Santoriello*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000)).

Despite this general rule, "a plaintiff may not dismiss his action by filing a notice of dismissal if to do so would defeat the rights of a defendant who has theretofore asserted some ground for affirmative relief, even though the plaintiff acts before resting his case." *Seagraves v. Seagraves*, 206 N.C. App. 333, 339, 698 S.E.2d 155, 161 (2010) (citing *McCarley v. McCarley*, 24 N.C. App. 373, 376, 210 S.E.2d 531, 533 (1975), *rev'd in part on other grounds*, 289 N.C. 109, 221 S.E.2d 490 (1976) (expressly agreeing with the Court of Appeals' Rule 41 holding)); *see also, e.g., Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 592, 248 S.E.2d 430, 433 (1978) ("Where defendant sets up a claim for affirmative relief against plaintiffs arising out of the same transactions alleged by plaintiffs, plaintiffs cannot take a voluntary dismissal under Rule 41 without the consent of defendant."); *Swygert v. Swygert*, 46 N.C. App. 173, 177, 264 S.E.2d 902, 904–05 (1980) (same).

4. Defendant filed an Answer and Counterclaim, (Answer and Counterclaim, ECF No. 9 ["Counterclaim"]), in response to Plaintiff's Complaint for Breach of Contract and Declaratory Judgment (the "Complaint"), (ECF No. 3), which Answer

and Counterclaim included an express affirmative claim for relief. The two relevant paragraphs of Defendant's "Claim for Relief (Declaratory Judgment)" state:

7. The allegations of Village Square's Complaint and G.T.T.'s Answer and Counterclaim reflect an actual and justiciable controversy between G.T.T. and Village Square with respect to the proper interpretation of the Ground Lease and the Fourth and Fifth Supplemental Lease Agreements concerning the scope of G.T.T.'s obligation to subordinate its fee interest for loans sought by Village Square and secured by the Property, and the extent to which such proposed loans are subject to G.T.T.'s approval and are limited by appraised value, by financing caps, and by purpose; and whether the scope of the obligation to execute and deliver requested loan documents is subject to "reasonableness."

8. Pursuant to the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.*, and Rule 57 of the North Carolina Rules of Civil Procedure, G.T.T. seeks a declaration from this Court to settle the rights and obligations of the parties to the Ground Lease and the Fourth and Fifth Supplemental Lease Agreements concerning loans secured by the Property.

(Counterclaim ¶¶ 7–8.)

5. In the prayer for relief in its Answer and Counterclaim, Defendant sought a declaration by the Court of its and Plaintiff's rights and obligations pursuant to a lease agreement, which is the same transaction which is the subject of the dispute asserted in Plaintiff's Complaint. Furthermore, at least some of the enumerated issues in the Order and Opinion that are still pending before this Court are issues that were expressly raised by Defendant's Answer and Counterclaim as requests for affirmative relief.

6. Plaintiff filed a Reply to Counterclaim, (ECF No. 11), and has at no time contended that Defendant has failed to seek affirmative relief. Plaintiff also does not

indicate in its Voluntary Dismissal whether Defendant consents to Plaintiff taking a voluntary dismissal without prejudice.

7. As a result, the Court must determine whether Plaintiff may, in the absence of the consent of the Defendant, file a voluntary dismissal without prejudice of its remaining claims pursuant to Rule 41(a)(1). *See Seagraves*, 206 N.C. App. at 340, 698 S.E.2d at 162 (“[B]ecause Defendants’ counterclaim remained pending after the entry of partial summary judgment, Plaintiff was not permitted to take a voluntary dismissal of his remaining claim without Defendants’ consent.”); *Layell v. Baker*, 46 N.C. App. 1, 6, 264 S.E.2d 406, 410 (1980) (“[W]e conclude that defendant’s assertion of that counterclaim . . . could effectively deprive plaintiff . . . of his right under Rule 41 to dismiss his own claim.”); *Maurice*, 38 N.C. App. at 592, 248 S.E.2d at 433 (“Plaintiffs’ effort to take a voluntary dismissal also fails for the reason that defendant had filed a counterclaim seeking affirmative relief against plaintiffs arising out of the same transaction alleged in plaintiffs’ complaint.”).

8. THEREFORE, the Court directs Defendant to file, on or before September 1, 2020, a position statement setting forth whether it consents to the filing by Plaintiff of a voluntary dismissal without prejudice and additionally whether it joins in the filing by submitting its own voluntary dismissal without prejudice of Defendant’s counterclaim or alternatively wishes to have its counterclaim proceed to trial. The Court will permit Plaintiff, if necessary in response to Defendant’s position, an

opportunity in an expedited fashion to set forth its position regarding its right to voluntarily dismiss its claims without prejudice.

SO ORDERED, this the 24th day of August, 2020.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases