STATE OF NORTH CAROLINA DAVIE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 182
CHARLES WILLARD and TRACY BARNES BLIMP WORKS, LLC, Plaintiffs, v. WILLIAM BARGER, individually; WILLIAM BARGER AS EXECUTOR OF THE ESTATE OF TRACY BARNES; and BLIMP WORKS, INC., Defendants.	**ORDER ON PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS IN CONNECTION WITH PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND ON PLAINTIFFS' MOTION TO SHIFT RECEIVER COSTS AND FOR FURTHER SANCTIONS**

1. **THIS MATTER** is before the Court on (i) Plaintiffs Charles Willard ("Willard") and Tracy Barnes Blimp Works, LLC's ("TBBW" or the "LLC") request for attorneys' fees and costs in connection with their Motion for Partial Summary Judgment as to the Counterclaims, for a Declaration that TBBW Owns the Subaru and for Attorneys' Fees Associated With This Motion (the "Summary Judgment Motion") filed December 6, 2019, (ECF No. 73), and (ii) Plaintiffs' Motion to Shift Receiver Costs and for Further Sanctions (the "Cost Shifting Motion"; together with the Summary Judgment Motion, the "Motions") filed January 15, 2020, (ECF No. 106), in the above-captioned case.

2. After full briefing, the Court held a hearing on the Motions and certain other motions on February 20, 2020 (the "Hearing"), at which all parties were represented by counsel.[1] On October 9, 2020, the Court issued an Order and Opinion granting in

[1] The Court also heard arguments at the Hearing on Defendants' Motion to Dismiss Notice of Lis Pendens, (ECF No. 97), Defendants' Motion for Summary Judgment, (ECF No. 78), and Plaintiffs' Motion for Partial Summary Judgment, (ECF No. 89).

part and denying in part the Motions ("October 9 Order"). (ECF No. 126.) As set forth in the October 9 Order, the Court advised that it would decide "by separate order the Cost Shifting Motion and other related requests for attorneys' fees and costs contained in certain of the other Motions." (Order & Op. Defs.' Mot. Dismiss Lis Pendens, Pls.' Mot. Partial Summ. J., & Defs.' Mot. Summ. J. 1 n.1 [hereinafter "Oct. 9 Order"], ECF No. 126.) This Order sets forth the Court's findings of fact and conclusions of law resolving these requests for attorneys' fees and costs and further sanctions.[2]

I.

FEES AND COSTS BASED ON THE SUMMARY JUDGMENT MOTION

3. Plaintiffs seek an award of attorneys' fees and costs under N.C.G.S. § 6-21.5 for the fees and costs incurred in connection with the Summary Judgment Motion. In determining whether to impose attorneys' fees under N.C.G.S. § 6-21.5, a court must make findings of fact and conclusions of law. *See Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991) (quoting N.C.G.S. § 6-21.5).

A. Findings of Fact

4. Plaintiffs initiated this action on April 1, 2019. (Compl., ECF No. 3.) Defendants thereafter asserted two counterclaims. (Ans., Further Defenses & Countercls. [hereinafter "Ans."], ECF No. 6.) Plaintiffs' Summary Judgment Motion sought the dismissal of both counterclaims.

[2] Any Finding of Fact that is more appropriately deemed a Conclusion of Law, and any Conclusion of Law that is more appropriately deemed a Finding of Fact, shall be so deemed and incorporated by reference as a finding of fact or conclusion of law, as appropriate.

5. In its first counterclaim, Defendant Blimp Works, Inc. ("BWI") sought a declaratory judgment that a 2014 Subaru in Willard's possession but titled in BWI's name was owned by BWI (the "First Counterclaim").[3] Alternatively, BWI sought payment from Willard for the Subaru's fair market value. (Amendment Ans. & Countercl. 1–2, Ex. 1 Certificate of Title, ECF No. 25; Defs.' Br. Resp. Pls.' Br. Supp. Mot. Partial Summ. J. & Att'y Fees 7, ECF No. 76.) As explained in the Court's October 9 Order, the Court declined to dismiss the First Counterclaim, concluding instead that disputed issues of material fact required that the Subaru's ownership be determined by a jury. (Oct. 9 Order 29.) Accordingly, the Court determined that Plaintiffs' request for attorneys' fees and costs based on Plaintiffs' contention that the First Counterclaim was frivolous necessarily failed. (Oct. 9 Order 29 n.16.)

6. Defendants' second counterclaim sought recovery of certain alleged loans Tracy Barnes ("Barnes") made to TBBW (the "Second Counterclaim"). Although Defendants voluntarily dismissed the Second Counterclaim on January 9, 2020, (ECF No. 96), Plaintiffs contend that Defendants knew or should have known that the counterclaim was meritless long before its dismissal and that Plaintiffs should therefore be permitted to recover their fees and costs under N.C.G.S. § 6-21.5 for seeking dismissal of that counterclaim, (Br. Supp. Pls.' Mot. Partial Summ. J. Countercls., Decl. TBBW Owns Subaru & Att'y Fees & Costs Associated Mot. 4 [hereinafter "Pls.' Br. Supp. Summ. J. Mot."], ECF No. 74).

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[3] The initial counterclaimant on the First Counterclaim was Defendant Estate of Tracy Barnes (the "Estate"). BWI was substituted as the counterclaimant on May 30, 2019. (ECF No. 25.)

7. For their support, Plaintiffs principally rely upon Defendant William Barger's ("Barger") deposition testimony from November 12, 2019. That testimony showed that although Barger authorized the filing of the Second Counterclaim, he did not know whether Barnes had loaned funds to TBBW—he merely assumed that Barnes's advances to TBBW were loans—and could not offer any evidence in support. (Pls.' Br. Supp. Summ. J. Mot. 2; Pls.' Summ. J. Mot. Ex. 1, at 86:1–89:25, ECF No. 73.1.) The day after Barger gave this testimony, Willard's counsel sent Defendants' counsel an e-mail demanding that the Second Counterclaim be dismissed for lack of evidence. (Pls.' Summ. J. Mot. Ex. 3, ECF No. 73.3.) Defendants did not respond to counsel's e-mail, and it was not until January 9, 2020, almost two months later, that Defendants voluntarily dismissed the Second Counterclaim.

8. At the Hearing, Defendants sought to justify their delay in dismissing the Second Counterclaim by contending for the first time that the counterclaim was well grounded in fact and that Defendants had erred in dismissing it. Defendants based their new argument on Article V, Section 5.5 of the of the Amended and Restated Operating Agreement of TBBW. (Feb. 20, 2020 Hearing Tr. 10:8–14:11 [hereinafter "Tr."], ECF No. 125.) That section provides that an advance shall be deemed a "loan" if the advance is agreed to by the majority owner of TBBW. (Aff. Charles M. Willard

[hereinafter "1st Willard Aff."] Ex. 1 Am. & Restated Operating Agreement TBBW Art. V § 5.5, ECF No. 73.2.)[4]

9. It is undisputed that Barnes was TBBW's majority owner until Willard became TBBW's majority owner on January 1, 2017. (1st Willard Aff. ¶ 15; Aff. Charles Willard [hereinafter "2nd Willard Aff."] Ex. 3 Am. & Restated Employment Agreement § 3(b)(i)(D), ECF No. 89.1.) Thus, for an advance to be considered a loan, section 5.5 required Barnes's agreement for an advance made prior to January 1, 2017 and Willard's agreement for an advance thereafter. While it is axiomatic that Barnes agreed to his own advances, Defendants neither allege nor offer evidence that Willard agreed to any advances Barnes made to TBBW after January 1, 2017. For his part, Willard avers that he never agreed to any advances by Barnes to TBBW. (1st Willard Aff. ¶¶ 13–17.)

10. Barnes's advances occurred between February 1, 2016 and December 2, 2018, (Ans. 18–19), and totaled $337,556.24. Of this amount, $209,940.54 was extended prior to January 1, 2017, and $127,615.70 was extended thereafter. (Deposits to the LLC from Tracy Barnes, ECF No. 118.) None of Barnes's advances

[4] Section 5.5 provides, in relevant part, as follows: "Certain of the Members may, *if agreed to by Members owning more than 50% of the Percentage Interests*, advance any additional moneys to the Company required to pay expenses . . . . *All such advances to the Company shall be deemed a loan* by the Members to the Company[.]" (1st Willard Aff. Ex. 1 Art. V § 5.5 (emphasis added).)

were reflected as loans, capital contributions, or liabilities in TBBW's records. (Aff. William D. Barger, Jr. ¶¶ 4, 6, ECF No. 36.)

B. Conclusions of Law

11. A trial court may award attorneys' fees to a prevailing party where there is "a complete absence of a justiciable issue of either law or fact[.]" N.C.G.S. § 6-21.5; *see also Fed. Point Yacht Club Ass'n v. Moore*, No. COA15-92, 2015 N.C. App. LEXIS 1028, at *11 (N.C. Ct. App. Dec. 15, 2015) ("Section 6-21.5 authorizes an award of attorneys' fees to a prevailing party who defends against any non-justiciable pleading[.]"). As explained by our Court of Appeals:

> A justiciable issue is one that is real and present, as opposed to imagined or fanciful. In order to find a complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. Under this deferential review of the pleadings, a plaintiff must either: (1) reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue; or (2) be found to have persisted in litigating the case after the point where [he] should reasonably have become aware that pleading [he] filed no longer contained a justiciable issue.

Coley v. Cowan, No. COA18-1020, 2019 N.C. App. LEXIS 439, at *8 (N.C. Ct. App. May 7, 2019) (quoting *McLennan v. Josey*, 247 N.C. App. 95, 98–99, 785 S.E.2d 144, 148 (2016)).

12. "[U]nder N.C.G.S. § 6-21.5, the party against whom attorneys' fees are being considered has 'a continuing duty to review the appropriateness of persisting in litigating a claim which [is] alleged [to lack a justiciable issue].' " *Bryson v. Sullivan*, 330 N.C. 644, 660, 412 S.E.2d 327, 335 (1992) (quoting *Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438).

13. "N.C.G.S. § 6-21.5 requires review of all relevant pleadings and documents in determining whether attorneys' fees should be awarded." *Id.* "The decision to award or deny attorney's fees under Section 6-21.5 is a matter left to the sound discretion of the trial court." *W&W Partners, Inc. v. Ferrell Land Co.*, 2019 NCBC LEXIS 104, at *11 (N.C. Super. Ct. Dec. 6, 2019) (quoting *Persis Nova Constr. v. Edwards*, 195 N.C. App. 55, 67, 671 S.E.2d 23, 30 (2009)).

14. Application of these principles here presents an interesting twist. The evidence of record suggests that the Estate and Barger brought the Second Counterclaim based on Barger's unsupported assumption that Barnes's advances to TBBW were made with an expectation of repayment and thus were in fact loans. Barger did not develop any evidence during the course of this litigation to suggest that Barnes's advances were intended as loans and testified to this effect at his deposition. Thus, it would appear that, at least as of November 12, 2019, Defendants did not think they could offer evidence showing that Barnes intended his advances to be loans. Given this lack of evidence, it would follow that the Estate had a duty to dismiss its counterclaim for lack of a justiciable issue.

15. The wrinkle is that, unbeknownst to Barger, section 5.5 permitted the Estate to reasonably contend that Barnes's advances prior to January 1, 2017 were in fact loans under that section since they were made with Barnes's approval. Accordingly, the Estate at all times had a reasonable basis to advance a substantial portion of its Second Counterclaim, but Barger did not know it.

16. The issue thus posed is whether the presence of a justiciable issue alone is sufficient to defeat a claim for attorneys' fees and costs under section 6-21.5 or whether a party's persistence in asserting a claim that the party believes he cannot support in law or fact justifies an award of fees and costs under that section. The Court reads North Carolina case law to hold the former. The relevant inquiry under section 6-21.5 is whether a justiciable issue is present. *See, e.g.*, *Brooks v. Giesey*, 334 N.C. 303, 310, 432 S.E.2d 339, 343 (1993) (noting that section 6-21.5 requires "a complete absence of a justiciable issue of either law or fact"). If there is, the moving party's motion must fail. If not, the court must then examine whether the non-moving party knew or should have known the claim was not justiciable. *See, e.g.*, *McLennan*, 247 N.C. App. at 98–99, 785 S.E.2d at 148. Because the Second Counterclaim presented a justiciable issue as to a substantial portion of the relief sought, the Court concludes, in the exercise of its discretion, that Plaintiffs' request for attorneys' fees and costs in connection with Defendants' Second Counterclaim should be denied.[5]

[5] The Court further concludes that sanctions under Rule 11 of the North Carolina Rules of Civil Procedure ("Rule(s)") based on Defendants' Second Counterclaim are not appropriate because the evidence outlined above shows that the Second Counterclaim was "(1) well grounded in fact; (2) warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); and (3) not interposed for any improper purpose." *Bryson*, 330 N.C. at 655, 412 S.E.2d at 332 (internal quotation marks omitted); *see also, e.g.*, *Twaddell v. Anderson*, 136 N.C. App. 56, 70, 523 S.E.2d 710, 720 (1999) ("[I]n determining compliance with Rule 11, courts should avoid hindsight and resolve all doubts in favor of the signer." (citation and internal quotation marks omitted)).

II.

PLAINTIFFS' COST SHIFTING MOTION

17. Plaintiffs ask the Court to shift the Receiver's fees and costs to Defendants, jointly and severally, and issue sanctions, including awarding Plaintiffs their attorneys' fees and costs, striking Defendants' Answer, and considering sanctions against Defendants' counsel, all for Defendants' failure to acknowledge until Barger's November 12, 2019 deposition that Barnes had conveyed TBBW's assets to BWI. Plaintiffs contend that Defendants' failure necessitates cost shifting under the Court's order appointing the Receiver and justifies sanctions for causing Plaintiffs to incur unnecessary time and expense in pursuing their claims. (Mot. Shift Receiver Costs & Further Sanctions 1, ECF No. 106.)

A. Findings of Fact

18. Upon motion by Willard, (ECF No. 21), and with Defendants' subsequent consent, (ECF Nos. 35, 49), the Court appointed Bert Davis, Jr., CPA ("Davis" or the "Receiver") as receiver for TBBW and BWI (the "Companies") on July 1, 2019 (the "Appointment Order"), (Order Pl. Willard's Mot. Appointment Receiver ¶ 6(a) [hereinafter "Appointment Order"], ECF No. 50).

19. In the Appointment Order, the Court directed Davis to take possession, custody, and control of the Companies' assets and conduct a current inventory. (Appointment Order ¶ 6(g)(iv)–(v).) The Court further directed Davis to "provide promptly an accounting of each Company's business activities since January 1, 2017, such accounting to include an investigation and determination concerning whether

assets of either Company were transferred, the identity of the recipients of any such transfers, and whether fair value was received for any such transfers." (Appointment Order ¶ 6(g)(vi).) The Court also required Davis to file monthly status reports regarding the current inventory of each Company's assets, the accounting of each Company's business activities, and Davis's best assessment of the continued viability of each Company as a going concern. (Appointment Order ¶ 6(g)(vii).)

20. The Appointment Order specifically provided that the Receiver's fees and costs would be paid as follows:

> The Receiver's fees shall be paid equally from the assets of BWI and TBBW initially, and, if those assets become exhausted, then by Willard; provided, however, that if the Receiver determines that Defendants made fraudulent conveyances to Willard's detriment, the Court, upon proper motion, will consider shifting responsibility for the Receiver's fees hereunder to one or more of the Defendants.

(Appointment Order ¶ 6(g)(ix–x).)

21. After accepting his appointment as Receiver on July 8, 2019, (ECF No. 54), Davis submitted monthly status reports to the Court concerning his investigation and forensic activities, (ECF Nos. 57, 60 (under seal), 63 (public), 65–66, 71), followed by a final report, (Report Court-Appointed Receiver [hereinafter "Final Report"], ECF No. 75). Based on his initial work, later confirmed in his final report, Davis determined that neither TBBW nor BWI was viable. (Final Report, at Item 6.)

22. Davis filed his final report on December 18, 2019 and was thereafter discharged from further service. (ECF Nos. 75, 82.) To obtain payment for his work, Davis submitted invoices in accordance with the Appointment Order totaling $14,275.28. (*See* ECF Nos. 58, 61, 67, 84; *see also* Appointment Order ¶ 6(g)(ix–x).)

Because the resources of TBBW and BWI have been exhausted, Willard has paid all of the Receiver's fees and costs to date. (Tr. 62:17–63:1.)

23. Plaintiffs contend that the Receiver concluded, supported by Barger's admissions at his November 12, 2019 deposition, that Barnes fraudulently conveyed TBBW's assets to BWI, triggering cost shifting under the Appointment Order and justifying further sanctions. (Br. Supp. Mot. Shift Receiver Costs & Further Sanctions 4–7, 10–12, ECF No. 107.) Defendants disagree, asserting that the Receiver did not determine that a fraudulent conveyance had been made and that, even if he had, the transfer was not "to Willard's detriment" as required for cost shifting under the Appointment Order. (Defs.' Resp. Pls.' Mot. Shift Receiver Costs & Further Sanctions 4, ECF No. 121.)

24. In its October 9 Order, the Court dismissed Plaintiffs' fraudulent conveyance claims, except to the extent those claims were based on Barnes's transfer of TBBW's good will to BWI in July 2018. As to those surviving claims, the Court entered judgment as to liability against the Estate of Barnes and BWI, but not against Barger individually. (Oct. 9 Order 14–15, 19 n.9.) In reaching its determination, the Court concluded the following concerning the Receiver's investigation:

> [T]he Receiver's investigation concluded that the assets were so intermingled between TBBW and BWI, and the accounting records were so vague and unclear, that it was impossible to determine whether assets ever belonged to TBBW or BWI and thus whether any of those assets were ever transferred from TBBW, fraudulently or otherwise.

(Oct. 9 Order 14.) The Court therefore agrees with Defendants that the Receiver did not determine that "Defendants made fraudulent conveyances to Willard's detriment" as required for cost shifting under the specific language of the Appointment Order.

25. At the time the Appointment Order was entered, however, neither Plaintiffs nor the Court had any reason to anticipate that Barger would testify to facts establishing that Barnes had transferred TBBW's good will to BWI. It was that testimony, rather than the Receiver's findings, that established liability on this aspect of Plaintiffs' claims.

26. As explained in the October 9 Order:

> 30. The undisputed evidence here shows that Barnes announced in or about July 2018 that TBBW's business would from then on be conducted through BWI. (Barger Dep. 33:17–34:21, 44:20–45:17, 181:13–24.) As Barger explained, "[i]t was a simple matter of one company's owner [Willard] disappeared, the company [TBBW] ceased to exist, so the original company [BWI] continued in its place." (Barger Dep. 136:19–22.)
>
> 31. While Plaintiffs' evidence of transfer otherwise fails because it is insufficient to show Plaintiffs' ownership of the assets prior to their alleged transfer, no such uncertainty or dispute exists concerning the ownership of TBBW's good will or Barnes's transfer of that good will to BWI. Indeed, it is undisputed that Barnes shut down the TBBW business in July 2018 and immediately and seamlessly continued through BWI that very same business in the very same building with the very same employees, equipment, inventory, customers, opportunities, and methods of doing business as TBBW without Willard's or TBBW's approval or consent and without compensation to TBBW of any kind. (Barger Dep. 33:17–34:21, 44:16–45:17, 181:13–24.) The undisputed evidence therefore shows as a matter of law that Barnes transferred TBBW's good will to BWI.

(Oct. 9 Order 15–16.)

27. Given that Barger was aware of these undisputed facts at the time the Appointment Order was entered in July 2019 yet failed to disclose them to anyone, including the Receiver, until his deposition in November, the Court agrees with Plaintiffs that Defendants caused Willard and the Receiver to incur unnecessary time and expense in performing their investigatory work that could have (and should have) been reduced, perhaps significantly, with timely disclosure.

B. Conclusions of Law

28. Under North Carolina law, the Court has "inherent authority 'to do all things that are reasonably necessary for the proper administration of justice.' " *Out of the Box Developers, LLC v. LogicBit Corp.*, 2014 NCBC LEXIS 7, at *9 (N.C. Super. Ct. Mar. 20, 2014) (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987)). That inherent authority extends to the compensation paid to duly appointed receivers. *See, e.g.*, *Lowder v. All Star Mills, Inc.*, 309 N.C. 695, 707, 309 S.E.2d 193, 201–02 (1983) ("In this state the allowance of counsel fees to a receiver by the superior court is prima facie correct. The Supreme Court will alter the same only when they are clearly inadequate or excessive, or based on the wrong principle." (citing *King v. Premo & King, Inc.*, 258 N.C. 701, 712, 129 S.E.2d 493, 500 (1963))).

29. The circumstances reflected by the undisputed evidence of record on the Motions and as set forth in the October 9 Order include (i) the intermingled and confused state of the Companies' books and records; (ii) the Receiver's excellent work in deciphering and extracting data from those books and records for the benefit of all parties and the Court; and (iii) the fact that the scope and amount of the Receiver's

work would have been reduced, perhaps significantly, had Defendants timely disclosed to the Receiver the facts establishing that Barnes had transferred TBBW's good will to BWI. In light of these circumstances, the Court concludes, in the exercise of its discretion, that it is an appropriate exercise of its inherent authority to order Willard and Defendants to pay the Receiver's fees and costs in equal shares and to hold each Defendant jointly and severally liable for Defendants' portion of those fees and costs.

30. Accordingly, the Court concludes that Willard should pay 50% of the Receiver's fees and costs in the total amount of $7,137.64 and that Defendants should likewise pay, jointly and severally, 50% of the Receiver's fees and costs in the total amount of $7,137.64. Because Willard has paid all of the Receiver's fees and costs to date, the Court further concludes that Defendants should pay to Willard the total amount of $7,137.64 so that Willard and Defendants shall have paid an equal share of the Receiver's fees and costs.

31. Additionally, the Court concludes, in the exercise of its discretion, that the sharing of the Receiver's fees and costs as ordered herein is a full and sufficient remedy for any prejudice incurred by Plaintiffs as a result of Defendants' conduct in these circumstances and therefore declines to impose further sanctions against Defendants or Defendants' counsel, including through a further award of attorneys' fees or costs or under Rule 11.

III.

CONCLUSION

32. **WHEREFORE**, for the reasons set forth above, and in the exercise of its discretion, the Court hereby **ORDERS** as follows:

a. Plaintiffs' request for attorneys' fees and costs under N.C.G.S. § 6-21.5 in connection with their Summary Judgment Motion is **DENIED**.

b. Plaintiffs' Cost Shifting Motion is **GRANTED in part** and **DENIED in part** as follows:

i. Plaintiffs' request to shift the Receiver's fees and costs to Defendants is **GRANTED in part**. Willard shall pay 50% of the Receiver's fees and costs in the total amount of $7,137.64, and Defendants, jointly and severally, shall pay 50% of the Receiver's fees and costs in the total amount of $7,137.64. Because Willard has paid all of the Receiver's fees and costs to date, Defendants shall pay to Willard the total amount of $7,137.64 no later than thirty (30) days from entry of this Order so that Willard and Defendants shall have paid an equal share of the Receiver's fees and costs.

ii. Plaintiffs' request for an award of attorneys' fees and costs and further sanctions against Defendants and Defendants' counsel, including under Rule 11, is **DENIED**.

SO ORDERED, this the 22nd day of January, 2021.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge