

Chi v. N. Riverfront Marina and Hotel LLLP; Feng v. N. Riverfront Marina and Hotel LLLP, 2023 NCBC Order 35.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NEW HANOVER COUNTY

21 CVS 4611

23 CVS 0062

HE CHI; BIAN YIDE; CAO YONGJIE;
CHEN MINZHI; CHENG TAO; HU
KUN; LIANG JINGQUAN; LUO
PENG; MA QIHONG; MA WEIGUO;
SONG YING; WANG JIAN; WANG
LING; WANG XUEHAI; XIE QIN; YE
XIAFEN; and ZHANG YUNLONG,

Plaintiffs,

v.

NORTHERN RIVERFRONT MARINA
AND HOTEL LLLP; NRMH
HOLDINGS LLC; NRMH HOTEL
HOLDINGS LLC; USA INVESTCO
LLC; PAC RIM VENTURE LTD.;
RIVERFRONT HOLDINGS II LLC;
WILMINGTON RIVERFRONT
DEVELOPMENT LLC; GOLDEN
MARINA LLC; CIRCLE MARINA
CARWASH, INC.; CHARLES J.
SCHONINGER; JOHN C. WANG;
JIANGKAI WU; CHRISTOPHER
ARDALAN; and GONGZHAN WU,

Defendants.

WANG FENG and ZHANG SHIXIONG,
Plaintiffs,

v.

NORTHERN RIVERFRONT MARINA
AND HOTEL LLLP; NRMH
HOLDINGS LLC; NRMH HOTEL
HOLDINGS LLC; USA INVESTCO
LLC; RIVERFRONT
HOLDINGS II LLC; WILMINGTON
RIVERFRONT DEVELOPMENT LLC;
GOLDEN MARINA LLC; CIRCLE
MARINA CARWASH, INC.; CHARLES
J. SCHONINGER; JOHN C. WANG;
JIANGKAI WU; and CHRISTOPHER
ARDALAN,

Defendants.

**ORDER ON MOVING DEFENDANTS'
MOTION FOR SANCTIONS**

1. THIS MATTER is before the Court on Defendants Northern Riverfront Marina and Hotel, LLLP; NRMH Holdings, LLC; NRMH Hotel Holdings LLC; USA Investco, LLC; Riverfront Holdings II, LLC; Wilmington Riverfront Development, LLC; Golden Marina, LLC; Circle Marina Carwash, Inc.; Charles J. Schoninger; John C. Wang; and Christopher Ardalan’s (collectively “Moving Defendants”) Motion for Sanctions, filed in both the *Chi et al.* action, ECF No. 113, and the *Feng et. al.* action, ECF No. 50, on 12 May 2023 (“the Motion”). The Motion was fully briefed, and on 10 July 2023, the Court entertained arguments at a hearing during which all parties were present through counsel.

I. FINDINGS OF FACT

2. Plaintiffs are nineteen (19) citizens of the People’s Republic of China who invested in a real estate development project in Wilmington, North Carolina.¹

3. On 18 May 2022, the Court entered a Case Management Order (“CMO”) in the *Chi* action directing the parties to complete an early mediation satisfying the requirements of Business Court Rule (“BCR”) 11.1 on or before 25 May 2022. The Court also ordered that, if necessary, a second mediation take place no later than 31 March 2023. (CMO, ECF No. 61). The Court subsequently extended the deadline for the second mediation to 31 October 2023. (ECF No. 97.)

4. On 25 April 2023, the Court issued a CMO in the *Feng* action, initially setting the deadline for mediation as 31 October 2023. (CMO, ECF No. 48).

¹ Seventeen of the investors filed the *Chi* action and two more investors filed the almost identical *Feng* action.

5. The Court has since amended the CMOs in both cases, extending the final mediation deadline in both matters to 30 April 2024. (*Chi* ECF No. 131, *Feng* ECF No. 68).

6. Early mediation in the *Chi* action was completed on 12 July 2022 and resulted in an impasse. (Mediator's Report, ECF No. 70.) Although Moving Defendants now argue that some *Chi* Plaintiffs should be sanctioned for failure to appear at the early mediation, Moving Defendants did not object to Plaintiffs' failure to appear at the time of the July 2022 mediation, or thereafter, until this Motion was filed some ten months later.

7. Plaintiffs' counsel recollects that the Moving Defendants agreed, through counsel, that some Plaintiffs would be excused from attending the July 2022 mediation given that they were not fluent in English and that there is a 12-hour time difference between North Carolina and China. (Aff. Of Katherine Burghardt Kramer ["Kramer Aff."] ¶ 4.)

8. The second mediation, this time involving the parties in both actions, occurred over a two-day period on 9-10 May 2023,² and was held remotely via Zoom. The parties agreed that all Plaintiffs would participate in the mediation and would have access to translation services. (Kramer Aff. ¶ 8.)

9. The mediator's report from the May 2023 mediation indicates that only eight of the nineteen plaintiffs participated: Xie Quin, Ye Xiafen, Bian Yide, Wang

² The parties and mediator agreed to hold two 4-hour sessions to accommodate the time difference between North Carolina and mainland China, where at least some of the Plaintiffs reside.

Feng, He Chi, Wang Ling, Cheng Tao, Luo Peng, and that each Plaintiff who participated attended only the first session held on 9 May 2023. (Mediator's Report, *Chi* ECF No. 132, *Feng* ECF No. 69.)

10. None of the eleven absent Plaintiffs submitted an affidavit explaining the reason for his or her absence. Their counsel, Katherine Burghardt Kramer, testified only that she and her partner had authorization to speak on behalf of the plaintiffs who did not attend, and that she understood that "several of the Plaintiffs had scheduling conflicts that precluded their attendance." (Kramer Aff. ¶¶ 10-11.)

11. Ms. Kramer also testified that at the conclusion of the first day of the May 2023 mediation, she understood from communications with the mediator that settlement would only be possible if Plaintiffs agreed to lower their demand to a specified range. Because Plaintiffs were not willing to do so, none of the plaintiffs appeared for the second day of mediation. Only counsel for Plaintiffs appeared, and only "to convey this apparent impasse." (Kramer Aff. ¶¶ 13-15.)

12. After learning that Moving Defendants intended to seek sanctions for Plaintiffs' failure to appear, on 10 May 2023, counsel for Plaintiffs contacted Defendants' counsel and offered to pay in full the fee for the mediator's services and to "willingly consider a request by Moving Defendants for Plaintiffs to pay some or all of the Moving Defendants' reasonable attorney's fees incurred for the May Mediation, if the offer to pay the mediator's costs was insufficient." (Kramer Aff. ¶¶ 16-18.)

13. Moving Defendants rejected the offer. (Kramer Aff. ¶ 20.) Consequently, on 11 May 2023, Plaintiffs' counsel made a second offer, this time making it clear that Plaintiffs would pay for the mediator's services and reimburse Moving Defendants for the attorney's fees they incurred. (Kramer Aff. ¶¶ 21-22.)

14. Moving Defendants rejected Plaintiffs' second offer. (Kramer ¶ 23.)³

II. CONCLUSIONS OF LAW

15. By statute, “[t]he parties to a superior court civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties’ claims *shall attend* the mediated settlement conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge.” N.C.G.S. § 7A-38.1(f) (emphasis added). Absent “good cause[,]” failure to attend an ordered mediation may result in sanctions. N.C.G.S. § 7A-38.1(g).

16. “Good cause” has been defined as “a party’s ‘inability to attend caused neither by its own conduct nor by circumstances within its control.’” *Triad Mack Sales & Servs., Inc. v. Clement Bros. Co.*, 113 N.C. App. 405, 408 (1994) (quoting *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 211 (1958)); see also *Perry v. GRP Fin. Servs. Corp.*, 196 N.C. App. 41, 50 (2009) (parties who failed to appear for mandatory mediation required to show good cause).

³ Defendant Samson Wu, not a Moving Defendant, received and accepted the same offer from Plaintiffs. Consequently, Plaintiffs (through their law firm) have paid the full mediator's fee as well as Defendant Wu's attorney's fees for the May mediation. (Kramer Aff. ¶¶ 24-25.)

17. Pursuant to N.C.G.S. § 7A-38.1, the Supreme Court of North Carolina promulgated Rules for Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (“MSC Rules”). MSC Rule 4 requires that individual parties to an action attend a mediated settlement conference. The Rule specifies that remote attendance is required unless the mediator and the parties agree or the court orders that the mediation be conducted in person.

18. MSC Rule 5 provides that any person who is required to attend a mediated settlement conference and fails to attend “without good cause” shall be subject to the contempt power of the court and any monetary sanctions imposed by the resident or presiding superior court judge. Monetary sanctions “may include, but are not limited to, the payment of fines, attorneys’ fees, the mediator’s fee, expenses, and loss of earnings incurred by persons attending the conference.”

19. Furthermore, MSC Rule 6(b)(3) makes plain that only the mediator may declare an impasse: “It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the conference.”

20. Rule 11.1 of the North Carolina Business Court Rules (“BCRs”) provides that “[a]ll mandatory complex business cases . . . are subject to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions.”

21. With respect to the early mediation conducted in July 2022, the Court concludes that while unsuccessful, early mediation was completed. As for some Plaintiffs' failure to appear, the Court concludes that the parties agreed with the mediator, either expressly or implicitly, to conduct this mediation without all Plaintiffs in attendance. The Court therefore declines to order sanctions with respect to the July 2022 mediation.

22. However, Plaintiffs concede that there was no agreement with opposing counsel and the mediator to excuse any Plaintiff from his or her obligation to attend the 9 May 2023 mediation session, and none of the plaintiffs who failed to appear (Cao Yongjie, Chen Minzhi, Hu Kun, Liang Jingquan, Ma Qihong, Ma Weiguo, Song Ying, Wang Jian, Wang Xuehai, Zhang Yunlong, and Zhang Shixiong), (collectively the "Absent Plaintiffs"), offer an explanation for their failure. The Court concludes that their counsel's understanding that several plaintiffs "had scheduling conflicts" does not establish good cause.

23. Because the record is devoid of any evidence that Plaintiffs were unable to attend the May 2023 mediation for any reason beyond their control, the Court concludes that the Absent Plaintiffs, each of whom failed to appear on 9 May 2023, are subject to sanctions. *Triad Mack Sales & Serv.*, 113 N.C. App at 409.

24. Furthermore, Plaintiffs admit that, at the conclusion of the 9 May 2023 mediation session, and at the direction of counsel, Plaintiffs unilaterally decided that an impasse was inevitable. Therefore, none of the plaintiffs attended the second mediation session on 10 May 2023, and counsel for Plaintiffs appeared only to

communicate the Plaintiffs' decision not to continue the mediation. The Court concludes that the authority to declare an impasse belongs to the mediator, not the parties, and Plaintiffs' unilateral decision not to appear for the 10 May 2023 mediation session violated MSC Rules 4, 5 and 6. This violation subjects all Plaintiffs to sanctions.

25. Accordingly, the Court, in the exercise of its discretion, GRANTS the Motion and ORDERS as follows:

- a. Plaintiffs are jointly and severally liable to pay the attorneys' fees incurred by Moving Defendants for the May 2023 mediation.⁴
- b. Unless the parties determine by mutual agreement the amount of Moving Defendants' attorneys' fees to be paid by Plaintiffs, by 20 July 2023, Moving Defendants may file a petition with supporting materials sufficient to allow the Court to make findings with respect to the amount and reasonableness of the fees to be assessed. By 31 July 2023, Plaintiffs may file their response to the petition.

⁴ The mediator's fee for the May 2023 mediation sessions has already been paid by Plaintiffs' counsel.

- c. All parties shall engage in a good faith effort to resolve this matter through mediation which shall be completed by 30 April 2024.
- d. Within ten days from entry of this Order, the parties shall contact the mediator to schedule the mediation, and they shall confer and propose to the mediator any agreement they are able to reach with respect to the logistics of the mediation that is to take place (e.g., attendance requirements, translation services, timing, attendance by Chinese advisors, etc.).
- e. Counsel are reminded that each party present at the mediation must have full authority to settle his/her/its claims.
- f. Counsel are directed to submit a joint report to the Court via email on or before 31 July 2023 confirming completion of the requirements in subsection (d) above.

IT IS SO ORDERED, this 11th day of July, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases