

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 5395

TRUIST FINANCIAL
CORPORATION and
GRANDBRIDGE REAL ESTATE
CAPITAL, LLC,

Plaintiffs,

v.

MATTHEW ROCCO; JOE LOVELL;
JOHN RANDALL; and COLLIERS
MORTGAGE HOLDINGS, LLC,

Defendants.

**ORDER ON PLAINTIFFS' MOTION
FOR LEAVE TO AMEND COMPLAINT
AND DEFENDANTS' MOTIONS TO
DISMISS, SCHEDULING ORDER,
AND NOTICE OF HEARING**

1. **THIS MATTER** is before the Court upon (i) Plaintiffs Truist Financial Corporation and Grandbridge Real Estate Capital, LLC's Motion for Leave to Amend Complaint, (ECF No. 34), (ii) Defendants Matthew Rocco, Joe Lovell, and John Randall's (collectively, "Executive Defendants") Motion to Dismiss, (ECF No. 25), (iii) Defendant Colliers Mortgage Holdings, LLC's ("Colliers") Motion to Dismiss Plaintiffs' Complaint, (ECF No. 28), and (iv) Defendant Colliers' Motion to Dismiss Plaintiffs' First Amended Complaint, (ECF No. 49), in the above-captioned case (collectively, the "Motions").

2. After full briefing, the Court held a hearing on the Motions on 19 September 2023, at which all parties were represented by counsel (the "Hearing"). This Order memorializes the Court's oral rulings at the Hearing.

3. To begin, Plaintiffs filed the Complaint initiating this action on 24 March 2023. (ECF No. 3.) The Executive Defendants and Colliers subsequently filed separate Motions to Dismiss the Complaint on 2 June 2023. (ECF Nos. 25, 28.) The

Executive Defendants also filed an Answer to Plaintiffs' Complaint that same day. (ECF No. 27.)

4. On 6 July 2023, Plaintiffs purported to file a First Amended Complaint, (ECF No. 33), as of right against Colliers under Rule 15 of the North Carolina Rules of Civil Procedure (the "Rule(s)") on grounds that Colliers had not filed a responsive pleading. The Executive Defendants and Colliers did not consent to the filing of the First Amended Complaint. (*See* Pls.' Br. in Supp. Mot. Leave to Amend, ECF No. 35, at 2.)

5. Also on 6 July 2023, Plaintiffs filed a Motion for Leave to file the First Amended Complaint ("Motion to Amend") against the Executive Defendants. (ECF No. 34.) In the brief supporting the Motion to Amend, Plaintiffs asserted that "[i]n the event the Court were to find that Plaintiffs could not amend their complaint against Colliers as a matter of course, Plaintiffs ask for leave to amend against Colliers for the same reason set forth in this Motion." (*See* Pls.' Br. in Supp. Mot. Leave to Amend, ECF No. 35, at 2 fn. 1.)

6. On 4 August 2023, the Executive Defendants filed a response opposing Plaintiffs' Motion to Amend on grounds of futility. (ECF No. 48.) Defendant Colliers did not respond to the Motion to Amend and instead filed a Motion to Dismiss the Amended Complaint on 7 August 2023, citing numerous alleged pleading deficiencies in the First Amended Complaint. (ECF No. 49.) Colliers did not challenge in its briefing on the Motion to Dismiss Plaintiffs' claim that they had filed the First Amended Complaint as of right. (*See* Defs. Br. in Supp. Mot. to Dismiss Am. Compl.,

ECF. No. 50, Defs. Reply Br. in Supp. Mot. to Dismiss Am. Compl., ECF No. 59.) Nevertheless, Colliers did challenge Plaintiffs' right to amend as of right in Colliers' Reply in Support of its Motion to Dismiss the Complaint, which was filed three weeks before on 17 July 2023. (*See* Def. Colliers' Reply in Supp. Mot. to Dismiss, ECF 45.)

7. Rule 15(a) provides that “[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]” N.C. R. Civ. P. 15(a). “Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party[.]” *Id.* The Court of Appeals has interpreted Rule 15(a) to preclude a plaintiff's amendment as of right after any defendant files a responsive pleading:

Rule 15(a) refers only to a party's right to amend once as a matter of course ‘at any time before a responsive pleading is served’ and makes no distinction among how named parties should be treated under the rule. Thus, *plaintiffs' right to amend as a matter of course terminated when one of the parties filed a responsive pleading.*

Pinewood Homes, Inc. v. Harris, 184 N.C. App. 597, 608 (2007) (quoting Rule 15(a)) (cleaned up) (emphasis added).¹

¹ The Court notes that federal courts have frequently reached a contrary conclusion under Rule 15 of the Federal Rules of Civil Procedure. *See, e.g., See, e.g., Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1291 (11th Cir. 2007) (“If the case has more than one defendant, and not all have filed responsive pleadings, the plaintiff may amend the complaint as a matter of course with regard to those defendants that have yet to answer.”); *Barksdale v. King*, 699 F.2d 744, 747 (5th Cir. 1983) (“The rule is, however, that where some but not all defendants have answered, plaintiff may amend as of course claims asserted solely against the non-answering defendants.”) (cleaned up); *Williams v. Savage*, 569 F.Supp.2d 99, 104 (D.D.C. 2008) (to similar effect.); *see generally* 6 Wright & Miller, Fed. Practice and Procedure § 1481 (3d. Ed. 2023) (“If the amendment affects all defendants or one or more of those that have not responded, however, then it generally was held that a responsive pleading had not been served for purposes of [Federal Rule of Civil Procedure] 15(a)(1) and plaintiff could amend the complaint as of course with regard to those defendants that had not answered.”)).

8. Here, as noted above, the Executive Defendants filed their answer (i.e., a responsive pleading) on 2 June 2023, and neither the Executive Defendants nor Colliers provided written consent to the filing of the First Amended Complaint. As a result, Plaintiffs were not entitled to amend the Complaint as of right, and the First Amended Complaint is thus void and without legal effect. Colliers' Motion to Dismiss the First Amended Complaint is therefore premature and will be denied without prejudice.

9. After announcing this ruling at the Hearing, the Court discussed with the parties the procedural posture in which the remaining Motions were presented, including that Colliers had not filed an opposition to Plaintiffs' Motion to Amend but had advanced arguments in support of its Motion to Dismiss the Amended Complaint that would apply equally to oppose the Motion to Amend as futile under Rule 15. *See, e.g., Simply the Best Movers, LLC v. Morrins' Moving Sys.*, 2016 NCBC LEXIS 28, at **5-6 (N.C. Super. Ct. April 6, 2016) ("The futility standard under Rule 15 is essentially the same standard used in reviewing a motion to dismiss under Rule 12(b)(6), but provides the Court liberal discretion to find that an amendment lacks futility.").

10. After careful consideration and review, the Court ruled at the Hearing that the fair and impartial administration of justice and the interests of judicial efficiency and economy would be best served in this action by granting the Motion to Amend, without prejudice to Defendants' rights to seek dismissal of the First Amended Complaint under Rule 12. Accordingly, based on the above, the Court, in the exercise

of its discretion, concludes that (i) Plaintiffs' Motion for Leave to Amend should be granted without prejudice to the Defendants' rights to seek dismissal of the First Amended Complaint under Rule 12 and (ii) the First Amended Complaint should be deemed filed as of 19 September 2023.

11. With the Motion to Amend having been granted, and the First Amended Complaint having been filed, the Court further concludes that the Defendants' respective Motions to Dismiss the original Complaint are rendered moot and shall be denied. *See, e.g., Houston v. Tillman*, 234 N.C. App. 691, 695 (2014) (holding that plaintiff's amendment of the complaint rendered any argument regarding the original complaint moot); *Coastal Chem. Corp. v. Guardian Indus., Inc.*, 63 N.C. App. 176, 178 (1983) (noting that the trial court found defendant's motion to dismiss plaintiff's original complaint presented a "moot question" when the trial court granted plaintiff's motion to amend); *Mooring Capital Fund, LLC v. Comstock N.C., LLC*, 2009 NCBC LEXIS 32, at *4 n.2 (N.C. Super. Ct. Nov. 13, 2009) ("Plaintiff's subsequent filing of an Amended Complaint rendered moot the Defendants' initial Motion to Dismiss the Complaint, and therefore the court does not consider it herein.").

12. After issuing its oral rulings as set forth above, the Executive Defendants and Colliers each indicated that they intended to file motions to dismiss the First Amended Complaint. Accordingly, the Court and the parties reached an agreement concerning the briefing and hearing of these anticipated motions, which is set forth below.

13. **WHEREFORE**, based on the above, the Court, in the exercise of its discretion, hereby **ORDERS** as follows:

- a. Colliers' Motion to Dismiss the First Amended Complaint, (ECF No. 49), is hereby **DENIED without prejudice as premature**;
- b. Plaintiffs' Motion for Leave to Amend, (ECF No. 34), is hereby **GRANTED**, without prejudice to Defendants' rights to seek dismissal of the First Amended Complaint under Rule 12;
- c. The First Amended Complaint is hereby **DEEMED FILED** as of 19 September 2023;
- d. The Executive Defendants' Motion to Dismiss the original Complaint, (ECF No. 25), is hereby **DENIED as moot**.
- e. Colliers' Motion to Dismiss the original Complaint, (ECF No. 28), is hereby **DENIED as moot**;
- f. Defendants shall have through and including 26 September 2023 to file briefs in support of Defendants' anticipated motions to dismiss the First Amended Complaint;
- g. Plaintiffs shall have through and including 10 October 2023 to file responsive briefs in opposition to Defendants' anticipated motions to dismiss the First Amended Complaint;
- h. Defendants shall have through and including 20 October 2023 to file reply briefs in support of Defendants' anticipated motions to dismiss the First Amended Complaint;

- i. The parties shall meet and confer and thereafter file no later than 23 October 2023 a proposed Case Management Order, addressing, in particular, paragraphs 7–10, 13–18, 22, 30, 32, and 36 of the Court’s Case Management Order Template, which is attached as Exhibit 1 to the Interim Case Management Order (ECF No. 61.);
- j. The parties are to **TAKE NOTICE** that a hearing on Defendants’ anticipated motions to dismiss the First Amended Complaint and a continuation of the BCR 9.3 Case Management Conference to resolve any disputes concerning the parties’ Proposed Case Management Order shall be held on 25 October 2023 at 1:30 PM in Courtroom 6370 of the Mecklenburg County Courthouse, 832 East Fourth Street, Charlotte, North Carolina.

SO ORDERED, this the 20th day of September, 2023.

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