

Joint Ventures (and Any Duties Arising Therefrom) Require Sharing of Profits

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Where the relationship between two companies working in tandem does not evidence the actual sharing of profits, no joint venture is formed. [Vitaflow, Inc. v. Aeroflow, Inc.](#), 2020 N.C.B.C. 80 (J. Bledsoe). As a result, Plaintiff could not maintain claims based upon duties arising from a joint venture where its own allegations showed that the parties never intended to share profits or control of the purported joint operation.

Since 2012, Plaintiff had been in the business of manufacturing and selling various maternity related garments. Plaintiff spent significant time developing its products, sizing mechanisms and the necessary insurance codes to ensure its products would be covered by insurance. After ObamaCare mandated all insurance plans cover breast pumps, Plaintiff developed a business plan to team up with a nationwide breast pump distributor to further promote Plaintiff's own products. In 2018 Plaintiff approached Defendant, a nationwide distributor of breast pumps, and discussed the idea of teaming up together to sell Plaintiff's products through Defendant's distribution and sales channels. In a July 2018 phone call, Plaintiff's president and Defendant's head of distribution purportedly agreed that Plaintiff would share its trade secret and other confidential information with Defendant on the express condition that Defendant would maintain the confidential nature of the information and not share it with anyone. The parties did not sign any type of confidentiality or non-disclosure agreement. Plaintiff thereafter began sharing its trade secret and confidential business information with Defendant. But after Plaintiff had shared all of the information with Defendant, Defendant allegedly stopped working with Plaintiff, directed its subsidiary to begin copying Plaintiff's products and to then sell those products into the marketplace. Defendant allegedly sold Plaintiff's products as its own and also created knockoffs of Plaintiff's products and sold them under its subsidiary's name. Plaintiff filed suit, alleging numerous tort claims based upon its allegation that a joint venture existed between the companies. Defendant filed a motion to dismiss, contending that Plaintiff's own factual allegations showed the parties never had a joint venture.

The Business Court agreed. Noting that while a joint venture could be based upon either an express or an implied agreement, the Business Court held the agreement (whatever its form) must contain two terms to constitute a joint venture: a sharing of the profits and equal control over the venture. (Opinion, ¶ 19). Quoting from Plaintiff's first amended complaint, the Business Court held that Plaintiff had admitted the financial relationship between the two companies did not include a sharing of profits, but instead merely showed Plaintiff provided Defendant with volume discounts. Because no

joint venture existed, all claims that relied upon duties arising from the existence of a joint venture (i.e., breach of fiduciary duty and constructive fraud) were dismissed.

Based upon this decision, any business that believes it is in a joint business with another individual or company should take steps to ensure that the parties have agreed to share both profits and control over the venture, otherwise a court may not recognize the existence of a joint venture or any duties associated with such a venture.

Additional legal points from this decision:

- There is no requirement to assert a breach of contract claim in order to maintain a claim for breach of the implied covenant of good faith and fair dealing, although the two are often alleged together. (Opinion, ¶25).
- Whether reasonable efforts were taken to maintain the confidentiality of trade secrets is often a fact intensive inquiry and, as such, a plaintiff must plead facts that show more than a mere expectation of confidentiality; but a defendant's agreement to keep secret confidential and trade secret information is sufficient. (*Id.*, ¶39-40).
- In maintaining a fraud claim, a plaintiff may make certain allegations regarding fraudulent conduct upon "information and belief" if that information is particularly within the defendant's knowledge. (*Id.*, ¶53).
- When an unfair and deceptive trade practices claim is based upon fraud, the claim must be plead with particularity. (*Id.*, ¶71-72).
- Reverse passing-off (i.e., when a producer misrepresents someone else's actual products as its own) constitutes unlawful competition under North Carolina law; but merely knocking off a product constitutes a copyright infringement and not a state law UDTP claim. (*Id.*, ¶76-77, 82-83).

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