

**IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR BROWARD
COUNTY, FLORIDA**

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,
STATE OF FLORIDA,

Case No. 13-CA-014854(12)

Plaintiff,

vs.

NATIONWIDE POOLS, INC., a Florida corporation; NATIONWIDE POOLS OF DADE, INC., a Florida corporation; NATIONWIDE POOLS OF W. PALM BCH, INC., a Florida corporation; NATIONWIDE POOLS, GULF COAST, INC., a Florida corporation, f/k/a STUART POOLS, INC.; **KEITH LORING STUART, an individual; LYNN ANTONUCCI STUART, an individual; FELICIA JOSEPHINA MALLIA, an individual, TERRY LYNN EDWARDS, an individual,** and THE KINGS HIGHWAY GENERAL CONTRACTING INC., a Florida corporation n/k/a NATIONAL CONSTRUCTION GROUP INC.,

Defendants.

**ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO LIABILITY AGAINST INDIVIDUAL DEFENDANTS**

This matter having come before the Court on February 9, 2015 upon Plaintiff's Motion for Partial Summary Judgment as to Liability Against Individual Defendants dated January 16, 2015 and the Court reviewing the Plaintiff and Defendant's memoranda and being otherwise advised in the premises, finds as follows:

1. Under FDUTPA, unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. *Millennium Comm. & Fulfillment, Inc. v State, Off. of the Atty. Gen.*, 761 So. 2d 1256, 1260 (Fla.

3d DCA 2000). A violation of FDUTPA includes any violation of the act or rules adopted under the act, and may be based upon any of the following: “. . . (b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; (c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.” § 501.203(3), Fla. Stat.

2. Thus, a court may find a violation if the conduct in question is either: 1) unfair or deceptive, or 2) proscribed by existing standards, rules, or statutes and is therefore a “*per se*” FDUTPA violation. *See State, Off. of the Atty. Gen v. Father and Son Moving & Storage, Inc.*, 643 So. 2d 22 (Fla. 4th DCA 1994).

3. Under FDUTPA, intent to deceive is irrelevant. In *Millennium*, the Third District Court of Appeal held that because FDUTPA is the state counterpart to the Federal Trade Commission Act, a state court ‘in deciding whether an act or practice may be deemed deceptive . . . must give due consideration and great weight to the interpretations made by the Federal Trade Commission and the federal courts.’” 761 So. 2d at 1263. In this regard, it is clearly established under federal law and thus under FDUTPA that, “[g]iven that a practice may be deceptive without a showing of intent to deceive, it is apparent that a practice may be found unfair to consumers without a showing that the offending party intended to cause consumer injury.” *Orkin Exterminating Co v. FTC*, 849 F. 2d 1354, 1368 (11th Cir. 1988).

4. Further, under FDUTPA, once corporate liability is established, individual defendants may be liable “if they participated directly in the deceptive practices or acts or they possessed the authority to control them.” *State, Off. of the Atty. Gen. v. Wyndham Int’l, Inc.*, 869 So. 2d 592, 598 (Fla. 1st DCA 2004) (citing *FTC v Amy Travel Service, Inc.*, 875 F. 2d 564, 573 (7th Cir. 1989)); *see also KC Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1073-74 (Fla. 5th DCA

2008). Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. *Amy Travel Serv.*, 875 F. 2d at 573 (citation omitted).

5. As with corporate liability, the enforcing authority “need not demonstrate . . . that the individual defendants possessed the intent to defraud.” *Windward Mktg., Inc.*, 1997 WL 33642380, at *13 (N.D. Ga. Sept. 30, 1997) (quoting *FTC v. Jordan Ashley, Inc.*, No. 93-2257, 1994 WL 200775, at *3 (S.D. Fla. Apr. 5, 1994)). Rather, “[a]wareness of fraudulent practices and failure to act within one’s authority to control such practices is sufficient to establish liability.” *Id.* (quoting *FTC v. Atlantex Assocs.*, No. 87-45, 1987 WL 20384, at *11 (S.D. Fla. Nov. 25, 1987), *aff’d*, 872 F. 2d 966 (11th Cir.1989)).

6. Here, each of the Individual Defendants is liable for the actions of the Corporate Defendants, as the undisputed facts show that they each: 1) possessed the authority to control and did control the Corporate Defendants’ business operations, 2) directly participated in the subject acts and practices, and 3) failed to act within their authority to control them.

7. Plaintiff’s evidence of the Individual Defendants’ participation in the Corporate Defendants’ deceptive acts and practices is reinforced by their invocation of the Fifth Amendment privilege at their sworn statements/depositions. The Court can draw an adverse inference against the parties to a civil action refusing to testify on Fifth Amendment grounds. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *U.S. v. Two Parcels of Real Prop. Located in Russell County, Ala.*, 92 F. 3d 1123, 1129 (11th Cir. 1996); *Fraser v. Sec. & Inv. Corp.*, 615 So. 2d 841 (Fla. 4th DCA 1993).

8. The undisputed evidence shows that each of these Individual Defendants not only had awareness and knowledge of the Corporate Defendants’ deceptive acts and practices, but

were responsible for them. Thus, there is direct and competent evidence to support a finding of individual liability for injunctive and monetary relief against each of the Individual Defendants.

9. Defendant Keith Loring Stuart pled no contest to 2nd and 3rd degree grand theft charges arising out of the same acts and practices that form the basis for this civil action. As a result, Stuart is collaterally estopped from arguing that he is not personally liable in this action. *See FTC v. 1st Guar. Mortgage Corp.*, 2011 WL 1233207, at *15-16 (S.D. Fla. Mar. 30, 2011).

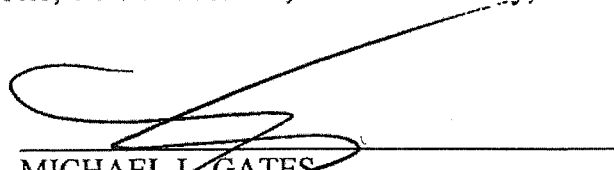
10. Finally, Individual Defendants' affirmative defenses are not legally valid defenses to an action under FDUTPA. Their defenses are immaterial to a FDUTPA claim, and they mainly consist of mere denials of the allegations of the Complaint, which are not legally sufficient as affirmative defenses. *See State v. Cohen*, 568 So. 2d 49, 51-52 (Fla. 1990).

It is thereupon

ORDERED AND ADJUDGED that Plaintiff's Motion for Partial Summary Judgment as to Liability Against Individual Defendants KEITH LORING STUART, LYNN ANTONUCCI STUART, FELICIA JOSEPHINA MALLIA and TERRY LYNN EDWARDS be and the same is hereby GRANTED.

DONE AND ORDERED in Chambers, Fort Lauderdale, Broward County, Florida this

11th day of February, 2015.


MICHAEL L. GATES
Circuit Judge

Copies furnished:

Pamela J. Bondi, Office of the Attorney General, Consumer Protection Division
Kristen Pesicek, Esq. Assistant Attorney General
110 S.E. 6th Street, Suite 900, Ft. Lauderdale, Florida 33301
Primary: Kristen.Pesicek@myfloridalegal.com
Secondary: Heidi.English@myfloridalegal.com

Keith Stuart
6423 NW 63 Way, Parkland, FL 33067
keithnwp13@gmail.com
Pro Se Defendant

Terry Edwards, Individually and as Owner/Registered Agent of
National Construction Group Inc.
5837 Sunberry Circle, Fort Pierce, FL 34951
[tedwardsncg@gmail.com](mailto:redwardsncg@gmail.com)
Pro Se Defendants

Lynn Stuart
6423 NW 63 Way
Parkland, FL 33067
Pro Se Defendant
Lsa1970@bellsouth.net

Felicia Mallia
15164 W. Tranquility Lake Drive
Delray Beach, FL 33446
Pro Se Defendant
feliciamallia@yahoo.com

Thomas L. Abrams, Esq.
1776 N. Pine Island Rd Suite 309
Fort Lauderdale, Florida 33322
tabrams@tabramslaw.com

Michael J. Ingino, Esq.
Moody, Jones & Ingino, P.A.
1333 S. University Drive, Suite 201
Plantation, FL 33324
mingino@moodyjones.com