BIOMILQ, Inc. v. Guiliano, 2023 NCBC 91.

STATE OF NORTH CAROLINA

ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 255

BIOMILQ, INC.,

Plaintiff and
Counterclaim Defendant,

v.

SHAYNE GUILIANO and 108LABS, LLC,

Defendants and
Counterclaim Plaintiffs,

v.

LEILA STRICKLAND; MICHELLE EGGER; BREAKTHROUGH ENERGY VENTURES, LLC; BEV JOHN DOES; BIOMILQ JOHN DOES; and GOODWIN PROCTER LLP,

Counterclaim Defendants.

ORDER AND OPINION ON GOODWIN PROCTER LLP'S MOTION TO DISMISS SECOND AMENDED COUNTERCLAIMS AND THIRD-PARTY CLAIM AND BIOMILQ AND LEILA STRICKLAND'S MOTION TO DISMISS SECOND AMENDED COUNTERCLAIMS

1. **THIS MATTER** is before the Court following the 4 August 2023 filing of two motions to dismiss: (1) Goodwin Procter, LLP's ("Goodwin") motion to dismiss Defendants and Counterclaim Plaintiffs' Second Amended Counterclaims[1] ("Goodwin's Motion to Dismiss") pursuant to Rules 12(b)(5) and 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), (Goodwin Procter LLP's Mot. Dismiss Second Am. Countercls. & Third-Party Claim, ECF No. 182 ["Goodwin Mot."]); and (2) Counterclaim Defendants BIOMILQ, Inc. ("BIOMILQ") and Leila Strickland's ("Strickland") motion to dismiss seeking (a) dismissal of the

[1] The counterclaims are contained in a filing titled "Defendants' First Amended Joint Partial Answer to Plaintiff's Second Amended Complaint and Second Amended Counterclaims," (the "Counterclaims"). (Second Am. Countercls., ECF No. 154 ["Second Am. Countercls."].)

counterclaims against Strickland pursuant to Rules 12(b)(5) and 12(b)(6) and (b) dismissal of the counterclaims against BIOMILQ pursuant to Rule 12(b)(6) ("BIOMILQ and Strickland's Motion to Dismiss", together with Goodwin's Motion to Dismiss, the "Motions"), (BIOMILQ & Leila Strickland's Mot. Dismiss Second Am. Countercls., ECF No. 185 ["BIOMILQ & Strickland Mot."]).[2]

2. This Order and Opinion addresses Goodwin and Strickland's arguments, made in the Motions pursuant to Rule 12(b)(5), that Counterclaim Plaintiffs Shayne Guiliano and 108Labs, LLC ("Counterclaim Plaintiffs") failed to properly effect service of the Counterclaims pursuant to Rule 4, thereby warranting their dismissal pursuant to Rule 12(b)(5).

3. For the reasons discussed below, the Court **GRANTS** in part and **DENIES** in part Goodwin's Motion to Dismiss, **GRANTS** in part and **DENIES** in part BIOMILQ and Strickland's Motion to Dismiss as to Strickland's defense of improper service, and **DEFERS** ruling on BIOMILQ and Strickland's Motion to Dismiss to the extent it seeks dismissal of the Counterclaims against BIOMILQ pursuant to Rule 12(b)(6).

Robinson, Bradshaw & Hinson, P.A. by J. Dickson Phillips and Stephen D. Feldman, and Goodwin Procter, LLP by Rachel M. Walsh, for Plaintiff BIOMILQ, Inc. and Counterclaim Defendant Leila Strickland.

Robinson, Bradshaw & Hinson, P.A. by J. Dickson Phillips, Stephen D. Feldman, and Brendan Biffany, for Counterclaim Defendant Goodwin Procter, LLP.

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[2] Identical copies of BIOMILQ and Strickland's Motion to Dismiss were filed at ECF Nos. 185–86.

Carnes Warwick, PLLC by Jonathan A. Carnes and Tara D. Warwick, for Defendants Shayne Guiliano and 108Labs, LLC.[3]

Wallis, Bowens, Averhart & Associates, PLLC by Stephon J. Bowens and Saleisha Averhart, for Defendant 108Labs, LLC.

Robinson, Judge.

I. BACKGROUND

4. This dispute began as one focused on the alleged misappropriation by Mr. Guiliano of trade secret information allegedly owned by BIOMILQ regarding a process to develop cell-cultured human milk. It has since expanded to encompass Mr. Guiliano's alleged ownership rights in 108Labs, LLC, a North Carolina limited liability company, that Mr. Guiliano contends developed antecedent technology. The factual background and procedural history of this matter is set forth in greater detail in the Court's 10 February 2023 Order and Opinion on Defendants' Joint Motion to Dismiss or in the Alternative Hold Proceedings in Abeyance. *See BIOMILQ, Inc. v. Guiliano*, 2023 NCBC LEXIS 24 (N.C. Super. Ct. Feb. 10, 2023). The Court sets forth herein only those portions of the factual and procedural background relevant and necessary to its determination of the Motions.

5. BIOMILQ initiated this action on 4 March 2022 by filing its Complaint, (ECF No. 3), and its Motion for Temporary Restraining Order and Preliminary Injunction, (ECF No. 4), against Mr. Guiliano. This matter was designated to the

[3] Following the filing of the Motions and briefing, Shayne Guiliano ("Mr. Guiliano") elected to proceed *pro se*. (*See* ECF No. 223.) On 29 November 2023, the Court permitted attorneys Tara D. Warwick and Jonathan A. Carnes of Carnes Warwick, PLLC to withdraw as counsel of record for Mr. Guiliano. (ECF No. 232.)

North Carolina Business Court on the same day, (ECF No. 7), and assigned to the undersigned on 7 March 2022, (ECF Nos. 1–2).

6. BIOMILQ filed its First Amended Complaint as of right on 13 April 2022, adding 108Labs, LLC ("108Labs") as a Defendant. (ECF No. 42.) Thereafter, on 15 June 2022, Counterclaim Plaintiffs filed their Joint Motion to Dismiss or in the Alternative Hold Proceedings in Abeyance. (*See* ECF No. 73.) On 10 February 2023, the Court granted Counterclaim Plaintiffs' motion in part, dismissing without prejudice some of BIOMILQ's claims. *BIOMILQ, Inc.*, 2023 NCBC LEXIS 24, at **30–32. Following permission of the Court, (*see* ECF Nos. 135–36), BIOMILQ filed the Second Amended Complaint (the "SAC") on 21 April 2023, (Second Am. Compl., ECF No. 137 ["SAC"]).

7. On 6 February 2023, Counterclaim Plaintiffs, filed a document entitled Answer and Counterclaims. (ECF No. 120.) In this filing, Counterclaim Plaintiffs failed to answer the allegations in the First Amended Complaint, but rather solely attempted to bring counterclaims against BIOMILQ and to raise additional claims against Strickland, Michelle Egger, Breakthrough Energy Ventures, LLC, and Goodwin. (*See* ECF No. 120.) Counterclaim Plaintiffs did not obtain a summons for either Strickland or Goodwin prior to or at the time of filing that document.

8. Counterclaim Plaintiffs filed Defendants' Amended Answer and Counterclaims ("First Amended Counterclaims") on 2 March 2023, (ECF No. 127), again without causing summonses to be issued by the Clerk of Superior Court for service upon either Goodwin or Strickland. After the Court inquired regarding the

status of the issuance of summonses at the Case Management Conference in April 2023, (*see* ECF No. 134), Counterclaim Plaintiffs secured the issuance of summonses for service upon Goodwin and Strickland on 20 April 2023,[4] (ECF Nos. 183.2, 187.2).

9. On 1 May 2023, Counterclaim Plaintiffs attempted to serve Strickland by sending the summons to her, along with the Answer and Counterclaims and the First Amended Counterclaims, by use of Federal Express Corporation's ("FedEx") "FedEx Express Saver" service. According to the tracking history filed with the Court by Counterclaim Plaintiffs, the materials were purportedly delivered to Strickland on 2 May 2023. (*See* Aff. Service, ECF No. 148 ["Aff. Serv."]; Ex. A, ECF No. 148.1 ["Strickland Receipt"].) Notably, the receipt for Strickland's package did not have or require a signature. (Strickland Receipt 1 ("Signed for by: S.IGNATURE [sic] NOT REQ").)

10. On 2 May 2023, Counterclaim Plaintiffs attempted to serve Goodwin by sending the summons directed to it, along with the Answer and Counterclaims and First Amended Counterclaims, to Goodwin's address in Boston, Massachusetts, using the same FedEx Express Saver service. (Aff. Serv.; Ex. F, ECF No. 148.6 ["Goodwin Receipt"].) The package was addressed to "Goodwin Procter LLP," but not to a specifically identified person. (Goodwin Receipt 1.) According to the tracking history filed with the Court by Counterclaim Plaintiffs, the package was delivered to

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[4] The Court may take judicial notice of the summonses issued against Goodwin and Strickland, including the date on which they were issued. *Kroger Ltd. P'ship I v. Guastello*, 177 N.C. App. 386, 395 (2006).

Goodwin's mailroom on 4 May 2023. (Goodwin Receipt 1.) The delivery receipt appears to have been signed by "T. Pisarevskaya". (Goodwin Receipt 1.)

11. Counterclaim Plaintiffs filed their Affidavit of Service with the Court on 31 May 2023, setting forth the process by which service on Strickland and Goodwin was purportedly effected. (*See* Aff. Serv.)

12. Counterclaim Plaintiffs thereafter filed the operative Counterclaims on 5 June 2023. (Second Am. Countercls.) No new summonses were issued in connection with the Counterclaims.

13. On 12 July 2023, in response to a timely motion consented to by all parties, the Court entered its Scheduling Order extending the time for Counterclaim Defendants, including Strickland and Goodwin, to file their responses to the Counterclaims and for Counterclaim Plaintiffs to file any response briefs. (ECF No. 175.) Accordingly, Goodwin, BIOMILQ, and Strickland filed the Motions now before the Court with supporting briefs on 4 August 2023. (*See* Goodwin Mot.; BIOMILQ & Strickland Mot.)

14. Having considered the Motions, briefing, and arguments by counsel at a hearing on 7 November 2022, at which all parties were present and represented through counsel, the Motions are now ripe for resolution. (*See* ECF No. 210.)

II. LEGAL STANDARD

15. "It is well established that a court may obtain personal jurisdiction over a defendant only by the issuance of summons and service of process by one of the statutorily specified methods." *Glover v. Farmer*, 127 N.C. App. 488, 490 (1997)

(citation omitted). Pursuant to Rule 12(b)(5), an action must be dismissed when service of process is not valid. *Draughon v. Harnett Cty. Bd. of Educ.*, 166 N.C. App. 449, 451 (2004); *see Glover*, 127 N.C. App. at 490.

16. "Rule 4 . . . provides the methods of service of summons and complaint necessary to obtain personal jurisdiction over a defendant[.]" *Grimsley v. Nelson*, 342 N.C. 542, 545 (1996) (citation omitted). Thus, Rule 4 provides several specific methods by which service may be properly achieved with respect to different types of persons and entities or the State and its various municipalities. N.C.G.S. § 1A-1, Rule 4(j).

17. Goodwin is a partnership. Service upon a partnership using FedEx, a delivery service, requires that the serving party deposit, "with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to any general partner or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf[.]" *Id.* Rule 4(j)(7)a.

18. Service on an individual, such as Strickland, is governed by a similar provision requiring the serving party to deposit, "with a designated delivery service authorized pursuant to 26 U.S.C § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt." *Id.* Rule 4(j)(1)d.

19. Service in a manner authorized by Rule 4(j) is mandatory. *Guthrie v. Ray*, 293 N.C. 67, 69 (1977) (citation omitted) ("Where a statute provides for service of

summons . . . by designated methods, the specified requirements must be complied with or there is no valid service."). Thus, a serving party must strictly comply with Rule 4 in serving the summons and complaint. *Id.*; *Grimsley*, 342 N.C. at 545. Actual notice is not a valid substitute for service that does not comply with Rule 4. *Stack v. Union Regional Mem'l Med. Ctr., Inc.*, 171 N.C. App. 322, 328 (2005) (citing *Guthrie*, 293 N.C. at 69); *Roshelli v. Sperry*, 57 N.C. App. 305, 307 (1982) (citations omitted) ("It is generally held that process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid even though a defendant had actual notice of the lawsuit.").

III. ANALYSIS

20. The record irrefutably discloses that, in attempting to serve the summonses and documents containing their counterclaims against Strickland and Goodwin, Counterclaim Plaintiffs used the FedEx Express Saver service. (Aff. Serv. 1.) Goodwin and Strickland argue in support of the Motions pursuant to Rule 12(b)(5), that FedEx Express Saver is a delivery service that does not comply with Rule 4 because it does not meet the definition of a "designated delivery service" as the term is used in Rule 4(j)(7)a. for Goodwin, or Rule 4(j)(1)d. for Strickland. (*See* Br. Supp. Goodwin Mot. 9–10, ECF No. 183 ["Br. Supp. Goodwin Mot."]; Br. Supp. BIOMILQ & Strickland Mot. 9–11, ECF No. 187 ["Br. Supp. BIOMILQ & Strickland Mot."].) The Court agrees.

21. By reference to and incorporation of 26 U.S.C. § 7502(f)(2), Rule 4 requires that a party effecting service under subsections 4(j)(1)d. or 4(j)(7)a. use a designated

delivery service approved by the Secretary of the Treasury. *See* 26 U.S.C. § 7502(f)(2) (providing that "the term 'designated delivery service' means any delivery service provided by a trade or business if such service is designated by the Secretary [of the Treasury] . . . ."). The list of such services is found in IRS Notice 2016-30. I.R.B. No. 2016-18, at 265 (Rev. May 2, 2016). This list does not include FedEx Express Saver. *Id.*

22. As a threshold matter, in opposition to the Motions, Counterclaim Plaintiffs argue that Notice 2016-30 "is not properly before the [C]ourt." (Countercl. Pls.' Br. Opp. Goodwin Mot. 10, ECF No. 205 ["Br. Opp. Goodwin Mot."]). However, North Carolina courts and federal courts routinely take judicial notice of public filings by federal agencies. *See, e.g., N. Carolina State Bar v. Talman*, 62 N.C. App. 355, 364 (1983) ("[W]e take judicial notice of the regulations of the Internal Revenue Service[.]"); *Shore v. Charlotte-Mecklenburg Hosp. Auth.*, 412 F. Supp. 3d 568, 573 (M.D.N.C. 2019) (similar). Here, the Court may properly, and does, take judicial notice of IRS Notice 2016-30 and determines that FedEx Express Saver is not an enumerated designated delivery service in that Notice.

23. Counterclaim Plaintiffs also argue that the services enumerated in IRS Notice 2016-30 are illustrative of those permitted by 26 U.S.C. § 7502(f)(2), not exhaustive. (Br. Opp. Goodwin Mot. 10.) However, Counterclaim Plaintiffs provide no legal support to warrant expansion of the delivery services that may be utilized beyond those expressly listed in IRS Notice 2016-30. *See Evans v. Diaz*, 333 N.C. 774, 779–80 (1993) ("Under the doctrine of *expressio unius est exclusio alterius*, when a

statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.").

24. Counterclaim Plaintiffs also argue that FedEx Express Saver "meets the minimum requirements under which the Secretary is authorized to designate" delivery services, and therefore, this Court should deem the service of process upon Strickland and Goodwin as proper and legally effective. (Countercl. Pls.' Br. Opp. BIOMILQ & Strickland Mot. 6, ECF No. 194 ["Br. Opp. BIOMILQ & Strickland Mot."].) In this regard, Counterclaim Plaintiffs focus the Court's attention on the portion of Section 7502 that states:

> The Secretary may designate a delivery service . . . only if the Secretary determines that such service—
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> (A) is available to the general public,
> (B) is at least as timely and reliable on a regular basis as the United States mail,
> (C) records electronically to its data base, kept in the regular course of its business, or marks on the cover in which any item referred to in this section is to be delivered, the date on which such item was given to such trade or business for delivery, and
> (D) meets such other criteria as the Secretary may prescribe.

26 U.S.C. § 7502(f)(2).

25. Section 7502(f)(2) is clear that, in addition to the prerequisites set forth above, a "designated delivery service" includes only those services that are *actually* "designated by the Secretary." 26 U.S.C. § 7502(f)(2) ("For purposes of this subsection, the term 'designated delivery service' means any delivery service provided by a trade or business *if* such service is designated by the Secretary for purposes of this section." (emphasis added)).

26. In arguing that the prerequisites alone are sufficient, Counterclaim Plaintiffs attempt to eliminate one of the five mandatory conditions in the definition of "designated delivery service." (*See* Br. Opp. BIOMILQ & Strickland Mot. 5.) Where, as here, "the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Lunsford v. Mills*, 367 N.C. 618, 623 (2014) (citations omitted). In addition, Counterclaim Plaintiffs' interpretation directly conflicts with the language of IRS Notice 2016-30, which states that "[o]nly the specific delivery services enumerated in this list are designated delivery services for purposes of § 7502(f). DHL Express, FedEx, and UPS are not designated with respect to any type of delivery service not enumerated in this list." I.R.B. No. 2016-18, at 265 (Rev. May 2, 2016); *see also Herzog v. Comm'r*, 643 F. App'x 942, 943–44 (11th Cir. 2016) (recognizing that FedEx Express Saver is not a designated delivery service under 26 U.S.C. § 7502(f)(2)).

27. Counterclaim Plaintiffs' position relies not on the plain language of the law, but rather on the factual assertion that Goodwin and Strickland received actual notice of the service of the summonses and pleadings upon them.[5] However, actual notice does not cure defective service. *Fulton v. Mickle*, 134 N.C. App. 620, 624 (1999) ("Although defective service of process may sufficiently give the defending party actual notice of the proceedings, such actual notice does not give the court jurisdiction

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[5] It is not clear when Goodwin had actual notice of the claims against it. Though Goodwin admits that it received the service package in its mailroom on 4 May 2023, it is unclear from the papers when a person authorized by law to accept service became aware of the filings in this matter.

over the party." (cleaned up)); *Jones v. Trinity Highway Prods., LLC*, 2021 N.C. App. LEXIS 741, at **17 (2021) (unpublished) (quoting *Fulton*, 134 N.C. App. at 624); *Bizrobe Trust by Doublebent, LLC v. InoLife Techs., Inc.*, 2019 NCBC LEXIS 3, at *15–16 (N.C. Super. Ct. Jan. 9, 2019) (dismissing complaint when plaintiff failed to comply with Rule 4 despite defendant actually receiving process).

28. Counterclaim Plaintiffs further argue that the policy set forth in N.C.G.S. § 1-75.1 should prevail over mechanical application of the law. (Br. Opp. Goodwin Mot. 6; Br. Opp. BIOMILQ & Strickland Mot. 4–5.) Section 1-75.1 expresses the legislative intent behind the statutes regarding jurisdiction, stating: "[t]his Article shall be liberally construed to the end that actions be speedily and finally determined on their merits." N.C.G.S. § 1-75.1. While Counterclaim Plaintiffs are indeed correct that N.C.G.S. § 1-75.1 greatly liberalizes the *grounds* for jurisdiction, they nonetheless incorrectly assert that the legislature's intent was also to liberalize how service might comport with Rule 4's specific requirements. In fact, in *Edwards v. Edwards*, our Court of Appeals explained that Rule 4 and N.C.G.S. § 1-75.1 are complementary to one another, with Rule 4's requirements regarding service of process tightened to ensure that the defendant receives actual notice of the controversy. 13 N.C. App. 166, 169 (1971).

29. Finally, Counterclaim Plaintiffs contend that a "rebuttable presumption" that service was proper applies to their attempted service of process on Strickland and Goodwin. However, Counterclaim Plaintiffs admit that such a presumption arises only "[o]nce proof of service is established[.]" (Br. Opp. Goodwin Mot. 6 (citing

Granville Med. Ctr., 160 N.C. App. at 489).) Because Counterclaim Plaintiffs' Affidavit of Service demonstrates that the method of service of process utilized by them is defective, they cannot take advantage of any presumption of valid service. (*See* Aff. Serv.) Notably, the case Counterclaim Plaintiffs rely on for support concerns the presumption found in Rule 4(j2)(2), which applies before a default judgment may be ordered. *Granville Med. Ctr.*, 160 N.C. App. at 490–91. This language is not found elsewhere in Rule 4.

30. For the reasons discussed herein, Counterclaim Plaintiffs' attempted service on Strickland and Goodwin using FedEx Express Saver failed to comply with the requirements of Rule 4. As such, service was insufficient and warrants dismissal of the action against both Goodwin and Strickland.

IV. CONCLUSION

31. **THEREFORE**, the Court hereby **GRANTS** in part Goodwin's Motion to Dismiss pursuant to Rule 12(b)(5), and **GRANTS** in part BIOMILQ and Strickland's Motion to Dismiss to the extent that motion requests dismissal of claims against Strickland pursuant to Rule 12(b)(5).

32. Having concluded that service on Goodwin and Strickland was insufficient under the requirements of Rule 4, and that the actions against them should be dismissed pursuant to Rule 12(b)(5), the Court determines that it does not have jurisdiction to rule on Goodwin's Motion to Dismiss and Strickland's Motion to Dismiss pursuant to Rule 12(b)(6) for failure to state a claim. Accordingly, the Court

DENIES as moot the remainder of Goodwin's Motion to Dismiss and **DENIES** as moot BIOMILQ and Strickland's Motion to Dismiss as it relates to Strickland.

33. The Court otherwise **DEFERS** ruling on BIOMILQ and Strickland's Motion to Dismiss to the extent BIOMILQ seeks dismissal of the Counterclaims against it pursuant to Rule 12(b)(6). The Court will address the remainder of that motion by separate order.

IT IS SO ORDERED, this the 28th day of December, 2023.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases