Cty. of Catawba v. Frye Reg'l Med. Ctr., 2015 NCBC Order 4.

STATE OF NORTH CAROLINA

CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
11 CVS 2780

COUNTY OF CATAWBA d/b/a CATAWBA VALLEY MEDICAL CENTER,

Plaintiff,

v.

FRYE REGIONAL MEDICAL CENTER, INC., and TATE SURGERY CENTER, LLC,

Defendants.

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

{1} **THIS MATTER** is before the Court upon Plaintiff County of Catawba's ("Plaintiff") Motion for Preliminary Injunction (the "Motion") in the above-captioned case. After considering the Motion, briefs in support of and in opposition to the Motion, and the arguments of counsel at the June 22, 2015 hearing on this matter, the Court **DENIES** Plaintiff's Motion.

I.

FACTUAL AND PROCEDURAL BACKGROUND

{2} The factual and procedural background of this case is recited in detail in *County of Catawba v. Frye Reg'l Med. Ctr., Inc.*, 2014 NCBC 27 (N.C. Super. Ct. June 26, 2014), www.ncbusinesscourt.net/opinions/2014_NCBC_27.pdf (granting in part and denying in part Defendants' Motion for Summary Judgment). The facts pertinent for purposes of resolving the Motion are set forth below.

{3} Plaintiff filed the Complaint in this action on September 8, 2011, asserting claims against Defendants Frye Regional Medical Center, Inc. ("Frye") and Tate Surgery Center, LLC ("Tate") (collectively, "Defendants") for breach of four separate contracts (claims 1–4), fraud (claim 5), and unfair and deceptive trade practices under N.C.G.S. § 1-75.1 ("UDTP") (claim 6). Defendants filed a Motion for Summary Judgment (the "SJ Motion") on October 21, 2013, seeking dismissal of each of Plaintiff's six claims.

{4} On June 27, 2014, this Court (Murphy, J.) issued an Order and Opinion granting Defendants' SJ Motion on Plaintiff's claims for fraud and unfair and deceptive trade practices (the "SJ Order"). *County of Catawba*, 2014 NCBC 27 at ¶¶ 57, 59. Judge Murphy did not

dismiss Plaintiff's fourth claim for relief – for breach of the parties' Private Party Settlement Agreement (the "PPSA") – stating that there was a "question of material fact as to whether the parties intended the PPSA to serve as a binding agreement obligating Frye to sell fifty percent (50%) of Tate to Plaintiff . . . ." *Id.* at ¶ 48. Plaintiff seeks specific performance of the PPSA as its primary relief and monetary damages in the alternative.

{5} On June 30, 2014, Judge Murphy retired from the bench upon expiration of his term as a Business Court judge (technically, a Special Superior Court Judge for Complex Business Cases). After denying subsequent motions for consideration and for reconsideration, the Court set this matter for a jury trial to begin on October 12, 2015.

{6} Plaintiff filed the Motion for Preliminary Injunction on May 18, 2015, requesting that this Court enjoin Defendant Frye from "selling or otherwise disposing of the Tate Assets pending conclusion of this lawsuit [and] requiring Frye to maintain the Tate Assets in their current condition, such that the assets can be contributed to Tate and utilized pursuant to the parties' settlement agreement and the Tate Certificate of Need ("CON")." (Pl.'s Mot. Prelim. Inj., p. 1.) In particular, Plaintiff has provided evidence that Frye's parent corporation, Tenet Healthcare Corporation ("Tenet"), has announced plans that may include selling Tate in the near future, and Plaintiff contends that a sale of Tate would irreparably harm Plaintiff and prevent the Court from ordering the specific performance Plaintiff requests in its Complaint.

{7} At the June 22, 2015 hearing, Frye informed the Court that Tenet is midway through a 60-day exclusive negotiation period with a prospective purchaser and that the contemplated transaction would involve a sale of Frye and all of its assets, including Tate, and potentially the sale of other Tenet assets.

{8} The Court held a hearing on June 22, 2015, at which all parties were represented by counsel.

II.

LEGAL STANDARD

{9} "A preliminary injunction . . . is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856 (1990) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)).

{10} Our courts have long held that a preliminary injunction should issue only where Plaintiff "is able to show *likelihood* of success on the merits of [its] case" and "is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [Plaintiff's] rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983) (citations omitted) (emphasis in original). Plaintiff challenges this long-standing statement of the applicable standard, contending that Plaintiff's motion, which Plaintiff has brought under N.C.G.S. § 1-485(2)[1] and not Rule 65 of the North Carolina Rules of Civil Procedure, permits the issuance of a preliminary injunction in proper circumstances on a lesser showing than "likelihood of success on the merits," specifically whether "(1) there is probable cause that [Plaintiff] will be able to establish the rights which [it] asserts and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect [its] rights during the litigation." *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975). Plaintiff's argument therefore centers on its contention that the Court may find "probable cause" on a lesser showing than the Court must find for "likelihood of success on the merits."

{11} The Court disagrees. First, our courts have defined "probable cause" as "a probability or substantial chance," *State v. Benters*, 367 N.C. 660, 664-65, 766 S.E.2d 593, 598 (2014), which the Court finds to mean substantially the same thing as "likelihood." *See* Webster's New Collegiate Dictionary, p. 666 (1977) (defining "likelihood" as "probability"). Moreover, in *A.E.P. Indus., Inc. v. McClure*, the case most frequently cited by our courts as stating the applicable preliminary injunction standard, the Supreme Court found that the trial court properly found "likelihood of success of the merits" when the trial court concluded that "there is probable cause to believe the plaintiff may prevail at the hearing," 308 N.C. at 401, 302 S.E.2d at 760, thus equating the two showings. As a result, the Court concludes that Plaintiff's contention for a lesser standard is without merit and that the oft-quoted standard in *A.E.P. Industries* applies to Plaintiff's Motion.

[1] N.C.G.S. § 1-485(2) provides that a preliminary injunction may be issued "[w]hen, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual."

{12} In addition, our courts have made clear that for purposes of a motion for a preliminary injunction, "[i]rreparable injury" is not necessarily an injury "beyond the possibility of repair or possible compensation in damages, but . . . one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949) (citations omitted). This Court must deny the Motion if irreparable injury is not shown. *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975). An injury is irreparable only "where the damages are estimable only by conjecture, and not by any accurate standard." *A.E.P. Indus.*, 308 N.C. at 407, 302 S.E.2d at 762.

{13} Furthermore, the Court must "engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted . . . ." *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16, 431 S.E.2d 828, 835 (1993) (citation and quotation omitted), *overruled on other grounds by Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999).

III.

ANALYSIS

1. Likelihood of Success on the Merits

{14} As noted, Plaintiff's claim for alleged breach of the PPSA is its only remaining cause of action in this matter. In North Carolina, a claim for breach of contract requires "(1) existence of a valid contract, and (2) breach of the terms of that contract." *Toomer v. Garrett*, 155 N.C. App. 462, 481, 574 S.E.2d 76, 91 (2002).

{15} Plaintiff argues that there is "no dispute that there is probable cause for the Court to conclude that [Plaintiff] will establish the claim upon which it bases its request for the issuance of a preliminary injunction – [Plaintiff's] claim that Frye breached the parties' [PPSA]." (Pl.'s Br. Supp. Mot., p. 7.) Specifically, Plaintiff argues that Judge Murphy's SJ Order established that there are "reasonable grounds on which it could be determined that [Plaintiff] is entitled to the relief it seeks with regard to the claim" and, therefore, that "it has already been judicially concluded in this case there is probable cause that [Plaintiff] will be able to establish the right it asserts, and the first criterion for the issuance of preliminary injunctive relief pursuant to [Plaintiff's] Motion is plainly met." (Pl.'s Br. Supp. Mot., p. 8.) The Court disagrees.

{16} First, assuming without deciding that the SJ Order has some relevance to the determination of the current Motion, the Court determines that the SJ Order's only conclusion concerning the PPSA – that there is an issue of fact as to whether the PPSA was an enforceable contract or merely an agreement to agree – hardly establishes Plaintiff's claim that Judge Murphy determined that probable cause exists that Plaintiff will be able to establish the right it asserts. *See SJ Order* ¶ 48. Moreover, the Court cannot conclude on the current record that Plaintiff is likely to succeed on its claim that the PPSA is an enforceable agreement or that Plaintiff is likely to show that it is entitled in these circumstances to specific performance if the PPSA is determined to be a valid and enforceable agreement. As a result, the Court concludes that Plaintiff, as the party with the burden to demonstrate specific facts supporting its request for preliminary injunction, has failed to demonstrate a likelihood of success on the merits of its remaining claim. As a result, Plaintiff's Motion must be denied. *See Sykes v. Health Network Solutions, Inc.*, 2013 NCBC 53 ¶ 43 (N.C. Super. Ct. Nov. 25, 2013), www.ncbusinesscourt.net/opinions/2013_NCBC_53.pdf (denying motion for preliminary injunction),

2. Irreparable Injury

{17} Although unnecessary in light of the Court's determination that Plaintiff has failed to show a likelihood of success on the merits of its remaining claim, the Court nonetheless further concludes that Plaintiff has also failed at this stage to show that it will suffer irreparable injury for which it has no adequate remedy at law should a preliminary injunction not issue. In particular, although Plaintiff contends that the Tate Assets are "unique and without substitute," Plaintiff has not shown that any injury Plaintiff may suffer from Tenet's sale of Tate cannot be adequately remedied through an award of monetary damages; to the contrary, the evidence of record shows that Plaintiff's expert is prepared to offer testimony concerning the specific and precise amount of Plaintiff's alleged monetary losses should Plaintiff not obtain specific performance in this matter to secure its claimed interest in Tate. *See, e.g., Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 480, 241 S.E.2d 700, 703 (1978) (denying preliminary injunction motion because "pecuniary standard exists for measurement of damages"); *A.E.P. Indus.,* 308 N.C. at 406-07, 302 S.E.2d at 762 ("[O]ne factor used in determining the adequacy of a remedy at law for money damages is the difficulty and uncertainty in determining the amount of damages to be awarded for defendant's breach.").

{18} Moreover, although Plaintiff contends that it would suffer irreparable injury because it would now be impossible for Plaintiff to obtain a certificate of need ("CON") for an ambulatory surgical center and thus that the Tate Assets are irreplaceable, Plaintiff's proof shows instead that the CON process would involve "a myriad of regulatory and legal challenges," not that it would be impossible for Plaintiff to obtain a CON.

3. Equitable Considerations

{19} The Court also concludes that equitable considerations weigh against a preliminary injunction on the current record. Based on the evidence of record and the arguments and briefs of counsel, the Court is persuaded that granting Plaintiff its requested relief at this time – relief focused on preserving under Frye's ownership four operating rooms now permitted to operate under Frye's hospital license – would likely result in effectively preventing Tenet from selling Frye and all of its assets, a disproportionate and unfair result in the circumstances shown here.

IV.

CONCLUSION

{20} On balance, and upon a review of the entire record before the Court at this time, the Court finds that Plaintiff has failed to present sufficient evidence to show that it is likely that it will succeed on the merits of its claim or either that Plaintiff will suffer irreparable harm if a preliminary injunction is not granted or that issuance of a preliminary injunction is necessary for the protection of Plaintiff's rights during the course of litigation.

{21} Accordingly, the Court concludes that a preliminary injunction should not issue and hereby **DENIES** Plaintiff's Motion for Preliminary Injunction.

SO ORDERED, this the 23rd day of June 2015.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases