Guardian Capital Advisors, LLC v. Gordon Asset Mgmt., LLC, 2019 NCBC Order 26.

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 6839

GUARDIAN CAPITAL ADVISORS, LLC; RUSSELL SMITH, TRUSTEE OF THE RUSSELL BRENTON SMITH REVOCABLE TRUST DATED MARCH 20, 2002; ASM CAPITAL CORP.; and CDK CAPITAL CORP.,

Plaintiffs,

v.

GORDON ASSET MANAGEMENT, LLC and GSM TRANSITION PLAN, LLC,

Defendants.

ORDER ON PLAINTIFFS' MOTION TO DISQUALIFY ACCOUNTING FIRM AND OTHER APPROPRIATE RELIEF AND REQUEST FOR EXPEDITED RULING

THIS MATTER comes before the Court upon Guardian Capital Advisors, LLC; ASM Capital Corp.; CDK Capital Corp.; Russell Smith, Trustee of The Russell Brenton Smith Revocable Trust's (collectively, "Plaintiffs") Motion to Disqualify Accounting Firm and Other Appropriate Relief and Request for Expedited Ruling. ("Motion", ECF No. 22.)

THE COURT, having considered the Motion, the evidentiary materials filed by the parties, the briefs filed in support of and in opposition to the Motion, the oral arguments of counsel at the hearing, and other appropriate matters of record, concludes, in its discretion, that the Motion should be DENIED, for the reasons set forth below.

I. FINDINGS OF FACT

1. As detailed thoroughly below, the Court must treat the Motion as a motion for a preliminary injunction. Accordingly, the Court makes the following findings of fact solely for purposes of deciding the Motion. These findings are not later binding on the Court. *E.g., Daimlerchrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 578, 561 S.E.2d 276, 282 (2002) ("[T]he findings of fact and other proceedings of the trial court which hears the application for a preliminary injunction are not binding at a trial on the merits.").

2. Plaintiffs are corporate entities and the trustee of a revocable trust. Guardian Capital Advisors, LLC is wholly owned by Michael Hensley ("Hensley"); ASM Capital Corp. is wholly owned by Todd Misenheimer ("Misenheimer"); CDK Capital Corp. is wholly owned Christian D. Keedy ("Keedy"); and Russell Smith ("Smith") is the trustee and grantor of the Russell Brenton Smith Revocable Trust ("Smith Trust").

3. Plaintiffs are all minority equity holders of Defendants Gordon Asset Management LLC and GSM Transition Plan LLC (collectively "GAM"). At all relevant times GAM has been managed by Joseph Gordon ("Gordon") who is also the trustee of the Jodaddy Revocable Trust ("Jodaddy"). Plaintiffs and Gordon, via Jodaddy, hold the following ownership interests in GAM:

- Jodaddy 42.72%
- ASM Capital Corp. 22%
- Guardian Capital Advisors, LLC 14.89%

- Smith Trust 13.58%
- CDK Capital Corp. 6.81%

4. In addition to holding equity ownership in GAM, Hensley, Smith, Misenheimer, and Keedy were also GAM employees.

5. Plaintiffs and Jodaddy executed a Second Amended and Restated Operating Agreement. ("Operating Agreement", ECF No. 19.3.) The Operating Agreement makes Gordon the sole manager of GAM and vests Gordon with broad authority, including authority to retain professionals and accountants for GAM. (ECF No. 19.3, at Art. III.)

6. Plaintiffs and Jodaddy are also parties to a Fourth Amended Equity Holder Agreement ("EHA"), which governs the buy-out of equity owners' interests upon the occurrence of certain events. In pertinent part, the EHA provides:

> Termination of Equity Owner Employment. Upon the voluntary or involuntary termination of the employment of an Equity Owner, or a grantor or an equity owner of an Equity Owner, as applicable, in [GAM] for any reason . . . all of the Equity Interests in [GAM] owned by such Equity Owner or the terminated employee's revocable trust or wholly-owned company, as applicable ("Terminated Minority Equity Owner") shall be sold and purchased as provided in this Section 6.
>
> (a) Minority Equity Owners' Offer to Company. Within thirty (30) days after the termination of a Minority Equity Owner's, or its grantor's or its equity owner's, employment with [GAM] for any reason . . . the Terminated Minority Equity Owner shall offer to sell all of the Terminated Minority Equity Owner's Equity Interest in [GAM] to [GAM].
>
> (b) Acceptance of Offer. [GAM] shall be obligated to purchase the Equity Interest of the Terminated Minority

> Equity Owner, and shall purchase all of the Equity Interest so offered.
>
> . . .
>
> (g) The closing of purchases and sales pursuant to this Section 6 shall take place within one hundred twenty (120) days after the receipt of an offer to sell all Equity Interest.

(ECF No. 4 at Ex. 1, § 6(a)–(b), (g).)

7. Section 9 of the EHA provides the means of calculating the purchase price of the minority equity owner's interest:

> Purchase Price. The total value . . . shall be determined by a Supermajority vote of the Equity Owners . . . on the date this Agreement is executed and at least annually thereafter . . .
>
> > [I]f the most recent agreement of value was not made within 365-days before (a) the date of written offer of sale, . . . (e) the date an Equity Owner's, or its grantor's or its owner's, employment with [GAM] is terminated, whichever is applicable (each, a "Valuation Date") and the seller and the purchaser(s) cannot agree, within thirty (30) days of the Valuation Date . . . [GAM's] public accounting firm shall make such determination of value and shall establish the purchase price . . . Such determination of value shall be binding and conclusive upon all parties to this Agreement. The seller and purchaser(s) shall share the cost of any appraisal equally.

(ECF No. 4 at Ex. 1, § 9.)

8. The EHA does not provide the specific methodology to be used by the accounting firm in determining the valuation, the information to be provided to the accounting firm, or who is permitted to provide information or participate in the valuation process.

9. Beginning in May 2016, Hensley, Smith, Misenheimer, Keedy, and Gordon engaged in discussions regarding GAM buying out Plaintiffs' ownership interests. The discussions proceeded for over two years but were ultimately unsuccessful.

10. On December 31, 2018, Gordon terminated Hensley, Smith, Misenheimer, and Keedy's employment with GAM. The termination triggered GAM's purchase obligations under Section 6 of the EHA.

11. On January 22, 2019, Plaintiffs, as "Terminated Minority Equity Owners," provided GAM with written offers to sell their respective equity interests. Accordingly, the closing was to be completed no later than May 21, 2019—120 days after January 22, 2019—pursuant to Section 6(g) of the EHA.

12. On January 31, 2019, GAM responded to Plaintiffs' offer by denying that any agreement had been reached on the value of Plaintiffs' interests pursuant to Section 9 of the EHA and that GAM was under no obligation to accept the January 22 offer. No supermajority vote had been taken on GAM's value in the year prior to December 31, 2018, and the parties could not agree on a price. Therefore, pursuant to Section 9 of the EHA, it was GAM's obligation to engage its public accounting firm, who at the time was Stewart Ingram ("SI"), to conduct a valuation of GAM. SI subsequently declined the engagement to conduct the valuation based, in part, on a perceived conflict of interest.

13. The EHA does not provide a method for choosing another public accounting firm if GAM's current public accounting firm declines to perform a

valuation. Plaintiffs, through counsel, attempted to work with GAM to select another accounting firm to conduct the valuation. However, GAM declined Plaintiffs' invitation to work together to choose a firm.

14. The closing did not take place on or before May 21, 2019. On May 22, 2019, Plaintiffs initiated this lawsuit by filing their Complaint in the Wake County Superior Court. ("Complaint", ECF No. 4.) At that time, GAM had not yet retained an accounting firm to conduct the valuation. In the Complaint, Plaintiffs state claims for breach of contract (Claims I & II) and violation of N.C.G.S § 57D-3-04 (Claim III). (ECF No. 4.)

15. Approximately eight days after Plaintiffs filed the lawsuit, GAM retained the public accounting firm of Cherry Bekaert ("CB") to conduct the valuation. Despite Plaintiffs' requests, however, GAM refused to identify CB to Plaintiffs as the firm that had been retained.

16. On June 17, 2019, Defendants sought to designate this matter as a mandatory complex business case. (ECF No. 8.) On June 17, 2019, this matter was designated as a mandatory complex business case and on June 18, 2019 assigned to the undersigned. (ECF Nos. 1, 2.)

17. Prior to designation and assignment, Plaintiffs filed a motion to compel SI to produce documents in compliance with a subpoena served on SI by Plaintiffs. ("Motion to Compel", ECF No. 6.) On June 24, 2019, the Court held a telephonic hearing with counsel regarding the dispute. During that call, GAM agreed to identify the accounting firm that GAM had engaged. Additionally, the Court instructed

counsel that Plaintiffs' counsel was entitled to contact the accounting firm, and make inquiries regarding the valuation process. On June 27, 2019, GAM disclosed that CB had been retained to complete the valuation. Plaintiffs' counsel did not subsequently contact CB.

18. During discovery, Plaintiffs obtained emails between Gordon and a CB employee. In the emails, Gordon encouraged CB to consider Hensley, Smith, Misenheimer, and Keedy's alleged misconduct prior to their terminations, and to the impact their terminations had on the value of GAM during the first half of 2019. Gordon made these requests despite the valuation date being set as December 31, 2018, pursuant to the EHA. In addition, Plaintiffs speculate, but have offered no proof, that Gordon had telephone conversations with CB in which he tried to tilt the valuation against Plaintiffs' interests. Based on the emails and speculation regarding further communications between Gordon and CB, Plaintiffs theorize that CB is compromised and incapable of performing a fair valuation.

19. CB conducted a valuation of GAM. GAM provided an affidavit from Dan Welborn, the CB project lead for the GAM valuation, in which Welborn states that CB did not consider 2019 financial performance or information regarding Hensley, Smith, Misenheimer, and Keedy's conduct provided by Gordon in performing the valuation. (Aff. of Daniel Welborn, ECF No. 48, at ¶¶ 3–7.)

20. On July 31, 2019, Plaintiffs filed the Motion and a Brief in Support. (ECF Nos. 22, 23.) On August 30, 2019, Defendants filed a Response to the Motion. (ECF No. 41.) On September 9, 2019, Plaintiffs filed a Reply Brief in Support of the

Motion. (ECF No. 43.) The Court held a hearing on October 1, 2019 and the Motion is now ripe for decision.

II. CONCLUSIONS OF LAW

21. Although the Motion is not styled as a motion for preliminary injunction, Plaintiffs expressly move pursuant to Rule 65 of the North Carolina Rules of Civil Procedure (hereinafter "Rules") to: (1) disqualify CB from performing the valuation of GAM; and (2) have the Court appoint an accounting firm or establish an alternative procedure for appointing an accounting firm. (ECF No. 23, at p. 1.) Because Plaintiffs move pursuant to Rule 65 and request mandatory injunctive relief, the Court will treat the Motion as a motion for preliminary injunction and apply the Rule 65 standard of review.

a. Standard of Review

22. A preliminary injunction may be issued during litigation when "it appears by affidavit that a party thereto is doing or threatens or is about to do . . . some act . . . in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual." N.C.G.S. § 1-485(2). A preliminary injunction is "an extraordinary remedy and will not be lightly granted." *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 692, 228 S.E.2d 478, 483 (1976). The movant bears the burden of establishing the right to a preliminary injunction. *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975).

23. To obtain a preliminary injunction, a movant must show "a likelihood of success on the merits of his case and . . . [that the movant] 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 his rights during the course of litigation." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 466, 579 S.E.2d 449, 452 (2003); *accord Looney v. Wilson*, 97 N.C. App. 304, 307–08, 388 S.E.2d 142, 144–45 (1990). "Mandatory injunctions are disfavored as an interlocutory remedy. 'As a general rule, since the purpose of an interlocutory injunction is solely to retain the status quo pending final resolution on the merits, only a prohibitory injunction is proper as opposed to a mandatory injunction, which would alter the status quo.'" *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 400, 474 S.E.2d 783, 787–88 (1996) (citation and brackets omitted).

24. "Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy." *Providence Volunteer Fire Dep't v. Town of Weddington*, 253 N.C. App. 126, 140, 800 S.E.2d 425, 435 (2017) (citing *City of Durham v. Public Serv. Co. of N.C., Inc.,* 257 N.C. 546, 557, 126 S.E.2d 315, 323–24 (1962)). Accordingly, "the court must decide whether the remedy sought by the plaintiff is the most appropriate for preserving and protecting its rights or whether there is an adequate remedy at law." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 406, 302 S.E.2d 754, 762 (1983).

25. The issuance of an injunction is "a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980).

A preliminary injunction "should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending." *Bd. of Provincial Elders v. Jones*, 273 N.C. 174, 182, 159 S.E.2d 545, 551–52 (1968); *accord Cty. of Johnston v. City of Wilson*, 136 N.C. App 775, 780, 525 S.E.2d 826, 829 (2000) (noting that a court should weigh "the advantages and disadvantages to the parties" in deciding whether to issue a preliminary injunction).

b. Likelihood of Success

26. Under the Rule 65 standard invoked by Plaintiffs as the basis for their Motion, Plaintiffs would need to establish a likelihood of success on its claims for breach of contract as stated in the Complaint. Plaintiffs appear to contend that Hensley, Smith, Misenheimer, Keedy, and Gordon intended for SI to conduct the valuation in the event that Section 9 of the EHA is triggered and that the EHA does not authorize Gordon to unilaterally select an accounting firm if SI does not perform the valuation. (ECF No. 23, at pp. 8–12.) Plaintiffs take the position, without providing any support beyond their own interpretation of the EHA, that if SI was unable to perform, Hensley, Smith, Misenheimer, Keedy, and Gordon would all jointly agree on an alternative accounting firm. (*Id.*) Consequently, Plaintiffs argue that Gordon's unilateral selection of CB is a breach of the EHA and the Court should intervene and appoint an independent firm. (ECF No. 23, at p. 12.)

27. However, the Court need not decide Plaintiffs' likelihood of success on their claims for breach of contract. Even if Plaintiffs can establish Gordon lacks authority to select CB to perform the valuation—which appears unlikely under the facts in this matter[1]—they have failed to establish that they will suffer irreparable harm if CB performs the valuation.

c. Irreparable Harm

28. Plaintiffs' arguments are unclear with respect to irreparable harm. Plaintiffs' primary contention appears to be that CB is hopelessly tainted by Gordon's communications with them and therefore cannot perform a fair valuation of GAM with regard to Plaintiffs' and Defendants' respective interests. (ECF No. 23, at pp. 8–13.) Plaintiffs also appear to argue that because they are required to share costs of the valuation with GAM under the EHA, they are entitled to participate in the firm selection process, and without an injunction they will be deprived of this alleged contractual right. (ECF No. 43, at pp. 8–9.) When seeking a preliminary injunction, the movant "must do more than merely allege that irreparable injury will occur[;] the applicant is required to set forth with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur." *DaimlerChrysler*

[1] A plain reading of the EHA reveals that there is no express provision making SI the accounting firm that would perform the valuation; nor does the EHA contain an express provision entitling Plaintiffs to participate in choosing another accounting firm in the event that SI was unable to perform the valuation. At the hearing on the Motion, Plaintiffs' counsel conceded that Gordon, as Manager of GAM, had authority under the Operating Agreement to terminate SI as GAM's public accounting firm and hire a different accounting firm at any time after the parties entered into the EHA. Likewise, Plaintiffs' counsel conceded there was no guarantee that SI would be GAM's accounting firm at the time that a purchase event took place.

Corp., 148 N.C. App. at 586, 561 S.E.2d at 286 (quoting *United Tel. Co. v. Universal Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975)). In this case, Plaintiffs' arguments lack any clear, discernable allegation of irreparable harm, let alone the facts to support such allegations.

29. Preliminarily, Plaintiffs don't argue or offer evidence that CB is not a professional and reputable public accounting firm. Here, Plaintiffs proffer nothing more than their own speculation that CB cannot perform a fair valuation under the circumstances in this case and that Plaintiffs will be harmed by the final report that CB publishes. Plaintiffs' evidence consists of communications between Gordon and CB stating his desire to have Hensley, Smith, Misenheimer, and Keedy's alleged pre-termination conduct and the 2019 financial impact of their departures from GAM considered in the valuation. (ECF No. 23.12.) However, Plaintiffs have produced no evidence that CB is biased in any way or that it relied on GAM's 2019 financial performance or any information Gordon provided to them about Hensley, Smith, Misenheimer, and Keedy's pre-termination conduct.

30. On the other hand, Defendants have presented evidence that CB did not consider Hensley, Smith, Misenheimer, and Keedy's conduct, or GAM's 2019 financial performance. (ECF No. 48.) Instead, while conducting the valuation, CB "only included GAM's historical financial performance from 2018 and years prior" and Gordon's personal frustration with Plaintiffs was not a factor in CB's valuation. (*See generally* ECF No. 48.)

31. The Court also notes that Plaintiffs failed to take advantage of the Court's instruction giving Plaintiffs the right to communicate with CB to ensure that the valuation was being performed fairly. Instead, Plaintiffs intentionally chose not to contact CB or participate in the valuation process. (ECF No. 43, at p. 6.)

32. Plaintiffs contend that whether or not CB is biased is irrelevant because, "Plaintiffs will never know what Mr. Gordon said in the phone calls he certainly had and meetings he may have had with Cherry Bekaert, but his narrative provided to the firm [through the emails] . . . is sufficient" to establish CB's bias. (*Id.* at p. 5.) This is simply not the case. Once CB's valuation report is produced to Plaintiffs, it will be apparent whether CB based the valuation on the proper economic data and used an accepted business valuation methodology. The numbers in the report will tell the story. If it turns out that CB considered information inappropriate to the valuation, and Welborn's affidavit testimony is not true, Plaintiffs will undoubtedly alert the Court and seek some type of remedial assistance.

33. In addition, the Court notes that Plaintiffs do not argue that had they participated in selecting an accounting firm to conduct the valuation that Gordon would not have provided the same information to CB and asked CB to consider it in making their valuation. In other words, there is no evidence that Gordon would not have engaged in the same conduct that Plaintiffs now claim creates CB's bias in favor of GAM.

34. Plaintiffs have not established that they will suffer irreparable harm or that an injunction is necessary to protect their rights during this litigation. *Roberts*,

344 N.C. at 400, 474 S.E.2d at 788 (Mandatory injunctions are properly issued only in situations where there will be "serious irreparable injury to the [movant] if the injunction is not granted, no substantial injury to the [non-movant] if the injunction is granted.") (quotation and citation omitted).

d. Balancing of the Equities

35. Finally, the balancing of the equities in this case falls in favor of GAM. The Court concludes that permitting CB to complete the valuation process and provide the parties with its valuation report is the most likely means of resolving this dispute. On this record, the Court finds that an injunction disqualifying CB from completing its valuation of GAM and issuing its report is unwarranted.

36. Therefore, the Court concludes that the equities in this case do not favor the issuance of a preliminary injunction.

III. CONCLUSION

37. Plaintiffs have failed to demonstrate that the issuance of an injunction is necessary to prevent irreparable harm or to protect their interests during litigation, and the Court concludes, in its discretion, that Plaintiffs' Motion should be DENIED.

THEREFORE, IT IS ORDERED that:

1. the Motion is DENIED, and Cherry Bekaert may proceed with the valuation of GAM and issue its report;
2. The Court's prior instruction directing that Cherry Bekaert not issue its report any earlier than October 23, 2019 is AMENDED,

and Cherry Bekaert may issue the valuation report IMMEDIATELY upon its completion.

SO ORDERED, this the 21st day of October, 2019.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge for
Complex Business Cases