Ford v. Jurgens, 2020 NCBC Order 22.

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 4896
JOHN FORD and CHRISTOPHER KISGEN, derivatively on behalf of TRIANGLE REAL ESTATE INVESTORS ASSOCIATION, INC., Plaintiffs, v. CARL ARNOLD JURGENS, JR.; KATHIE RUSSELL; TRIANGLE REAL ESTATE INVESTORS ASSOCIATION (TREIA), LLC; and TREIA FOUNDATION, INC., Defendants, v. TRIANGLE REAL ESTATE INVESTORS ASSOCIATION, INC. Nominal Defendant.	**ORDER ON DEFENDANTS' MOTIONS FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EXPEDITED BRIEFING SCHEDULE**

1. Pending are Defendants' motions for temporary injunctive relief.[1] Having considered all relevant matters, the Court denies the request.

2. This case began as a derivative action on behalf of a nonprofit real estate investors association, known as TREIA. The plaintiffs (John Ford and Christopher Kisgen) accuse two board members (Carl Jurgens and Kathie Russell) of misappropriating nearly $300,000 from the association. As alleged, Jurgens and

[1] There are four motions. Carl Jurgens and Kathie Russell jointly filed one. (ECF No. 14.) Each entity defendant—Triangle Real Estate Investors Association (TREIA), LLC; TREIA Foundation, Inc.; and Triangle Real Estate Investors Association, Inc.—filed its own. (ECF Nos. 21, 22, 23.) The motions are essentially identical, so the Court discusses them as a group. The Court also refers to the five defendants together as "Defendants."

Russell convinced TREIA's board to create a new for-profit arm, promising that it could be revoked at any time and that the nonprofit's assets would stay put. (*See* Am. Compl. ¶¶ 22, 24, 25, ECF No. 11.) Instead, Jurgens and Russell dissolved TREIA and transferred its assets to two new entities, including one entirely under their control. (*See* Am. Compl. ¶¶ 38, 43, 46–48.) Ford and Kisgen seek to void the dissolution, rewind any transfers from TREIA, and recover damages on its behalf.

3. More pertinent for present purposes are Defendants' counterclaims for defamation. They allege that the derivative suit is an extension of an ongoing smear campaign. According to Defendants, Ford and Kisgen voted to approve the restructuring, changed their mind, and then tried to convince TREIA's board to reverse it. When that effort failed, Ford and Kisgen went directly to TREIA's members and former members with false allegations that Jurgens and Russell had concealed conflicts of interest, misled TREIA's board, and forged documents, among other things. (*See* Aff. of Kathie L. Russell ["Russell Aff."] Ex. O, ECF No. 9.16.) Ford and Kisgen then broadcast these allegations on a website and Facebook page under the heading "Save TREIA" and repeated them in the derivative complaint. (*See* Russell Aff. Ex. O; Russell Aff. Ex. P, ECF No. 9.17.) Defendants claim that more than a dozen statements were defamatory.

4. Defendants now ask the Court for a temporary restraining order and preliminary injunction that would require Ford and Kisgen to remove the "Save TREIA" website and Facebook page and enjoin them from disseminating "any false

and/or defamatory information" about Defendants. (*E.g.*, ECF No. 14 at 57.)[2] Ford and Kisgen filed an opposition brief with supporting materials, (*see* ECF No. 20), and the Court held a telephonic hearing on May 4, 2020, at which all parties were represented. Given that all parties have had an opportunity to submit evidence and present argument, the Court treats the motions as motions for a preliminary injunction, rather than a temporary restraining order. *See Se. Anesthesiology Consultants, PLLC v. Charlotte-Mecklenburg Hosp. Auth.*, 2018 NCBC LEXIS 137, at *33 (N.C. Super. Ct. June 22, 2018).

5. 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). Its purpose "is ordinarily to preserve the *status quo* pending trial on the merits." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation omitted). The moving party must demonstrate not only a likelihood of success on the merits but also a likelihood of irreparable loss in the absence of an injunction. *See id.* at 401, 302 S.E.2d at 759–60. Here, Defendants seek, at least in part, a mandatory preliminary injunction, for which an even higher standard applies: the case must be "urgent"; the right must be "clear"; and the injury must be "immediate, pressing, irreparable, and clearly established." *Auto. Dealer Res., Inc. v.*

[2] This is the second time Defendants have sought relief. They jointly filed their first motion before filing their counterclaims. The Court denied that motion without prejudice, reasoning that "[a]bsent a primary claim for relief, there is no basis to impose a temporary restraining order or preliminary injunction as an ancillary remedy," (ECF No. 10). *See, e.g.*, *Brown v. Brown*, 91 N.C. App. 335, 339, 371 S.E.2d 752, 755 (1988) ("This Court later vacated the preliminary injunction for lack of a primary claim to which it could attach.").

Occidental Life Ins. Co., 15 N.C. App. 634, 639, 190 S.E.2d 729, 732 (1972) (citations and quotation marks omitted).

6. The burden to meet these standards is on Defendants. *See Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975). They have not done so.

7. To begin, courts are deeply skeptical of requests to enjoin speech and expression. Indeed, temporary injunctions "are classic examples of prior restraints," *Alexander v. United States*, 509 U.S. 544, 550 (1993), and "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Any such prior restraint is "presumptively unconstitutional." *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998); *accord Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (holding that any prior restraint carries "a 'heavy presumption' against its constitutional validity" (citation omitted)).

8. Defendants have not overcome this presumption. Their brief does not mention the First Amendment, much less attempt to show why this is the unusual and extraordinary case that might support a preliminary restraint on speech.

9. During the hearing, counsel for Defendants made two arguments. The first was that they were not in fact seeking a prior restraint because Ford and Kisgen had already made defamatory statements. The Court disagrees. Defendants seek to enjoin ongoing and future speech by Ford and Kisgen before a final judgment of liability. If granted, that would be a prior restraint. *See, e.g.*, *Alexander*, 509 U.S. at 550 (referring to temporary restraining orders as "classic examples of prior

restraints"); *Ameritech v. Voices for Choices, Inc.*, 2003 U.S. Dist. LEXIS 8023, at *2, 3–5 (N.D. Ill. May 9, 2003) (denying preliminary injunction even though defendants had made past, allegedly defamatory statements).

10. Second, counsel argued that defamatory statements may be enjoined because they are not protected by the First Amendment. Courts have repeatedly rejected that argument. It is widely accepted "that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases." *Metropolitan Opera Ass'n v. Local 100, Hotel Emps. Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001). Our Supreme Court has likewise described this as "the general rule." *Burke Transit Co. v. Queen City Coach Co.*, 228 N.C. 768, 772, 47 S.E.2d 297, 299 (1948).[3]

11. There are sound reasons for this. Many courts have recognized the difficulty in designing a restraint on unlawful speech that does not also chill protected speech. "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). That is why "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others

[3] After the hearing, counsel for the entity defendants sent a letter to the Court making additional arguments based on *Burke Transit*. These arguments are untimely. In any event, the case does not support Defendants' request for relief. It recites "the general rule" that courts should not grant injunctions in cases of libel, except in unusual circumstances that are not present here. *Burke Transit*, 228 N.C. at 772, 47 S.E.2d at 299.

beforehand." *Id.* (emphasis in original). As the United States Supreme Court has stressed,

> a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative. A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for a time.

Nebraska Press Ass'n, 427 U.S. at 559.[4]

12. The danger here is obvious. Defendants do not seek to enjoin specific defamatory statements. They ask the Court to censor the entire "Save TREIA" website and Facebook page, including any *non*defamatory statements made there. They also ask the Court to restrain any "false and/or defamatory" statements made "by any means" in the future. These restrictions would directly restrain some lawful speech and would certainly chill other protected speech, forcing Ford and Kisgen to choose between erring on the side of silence and facing charges of contempt. Defendants have given no justification for imposing such sweeping, overbroad

[4] *See also Miller v. Miller*, 2018 U.S. Dist. LEXIS 124240, at *6 (D. Conn. July 25, 2018) ("Courts that preliminarily enjoin future speech run a grave risk of suppressing protected speech."); *Oliver v. Skinner*, 2013 U.S. Dist. LEXIS 24518, at *29 (S.D. Miss. Feb. 22, 2013) ("[T]he public interest is better served by a cautious approach to injunctive relief in defamation cases."), *aff'd sub nom. Oliver v. Bankfirst*, 552 Fed. App'x 357 (2014) (per curiam); *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1124–25 (S.D.N.Y. 1980) ("A court of equity will not, except in special circumstances, issue an injunctive order restraining libel or slander or otherwise restricting free speech. To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment to the Constitution, and to historic principles of equity.").

restraints on speech and expression. The Court concludes that doing so would offend the First Amendment.

13. In addition, the Court concludes that Defendants have not shown irreparable harm. In their briefs, Defendants state that "[i]t does not take a great deal of imagination to envision the irreparable harm resulting from [the alleged] irresponsible and reckless conduct[,]" yet do not identify what that harm is. (Defs.' Br. in Supp. 16, ECF Nos. 16, 24.) When considering whether to impose an injunction (particularly one that threatens First Amendment rights), courts do not presume irreparable harm. It must be argued and supported with evidence, which Defendants have not done. *See, e.g.*, *Knightdale v. Vaughn*, 95 N.C. App. 649, 651, 383 S.E.2d 460, 461 (1989).

14. Likewise, an injunction will not issue when there is an adequate remedy at law. *See Lewis v. Goodman*, 14 N.C. App. 582, 583, 188 S.E.2d 709, 710 (1972). Compensatory damages, including damages for injury to reputation, are available in cases of defamation. *See Nguyen v. Taylor*, 219 N.C. App. 1, 10, 723 S.E.2d 551, 559 (2012); *Roth v. Greensboro News Co.*, 217 N.C. 13, 22–23, 6 S.E.2d 882, 888–89 (1940). Defendants have not shown that this remedy would be inadequate, making only the conclusory argument that they "do not have an adequate remedy at law related to the Plaintiff's [sic] defamatory and otherwise tortious publicity campaign." (Defs.' Br. in Supp. 16.)

15. The Court has also reviewed Defendants' evidence and finds it wanting. Russell, for example, claims to "have suffered irreparable harm" but does not explain

what that harm is. (Russell Aff. ¶ 62, ECF No. 9.) She states that business associates have seen the allegations against her but does not show that these individuals changed their perception of her or that her reputation suffered. (*See* Russell Aff. ¶ 62.) Likewise, Jurgens speculates that the statements made by Ford and Kisgen "could jeopardize" his new career as an insurance agent. (Aff. of Carl Arnold Jurgens, Jr. ¶ 7, ECF No. 8 ["Jurgens Aff."].) Apart from his own belief, Jurgens offers no support for that concern. Separately, Jurgens states that one unnamed educational speaker forwent "a speaking opportunity at TREIA because of a malicious email sent to her by Plaintiffs Ford and Kisgen." (Jurgens Aff. ¶ 8.) But there is no meaningful detail about this episode in the record—for example, what the "malicious email" said; whether the speaker had an existing relationship with TREIA; and whether the association was able to secure another speaker. Each of these assertions is either conclusory or otherwise insufficient to show irreparable harm. *See, e.g.*, *Pender Farm Dev. v. NDCO, LLC*, 2018 NCBC LEXIS 189, at *20 (N.C. Super. Ct. Mar. 12, 2018) (rejecting conclusory allegations of irreparable harm).

16. Having reviewed Defendants' evidence and arguments, the Court concludes that they have not shown a likelihood of irreparable harm. Certainly, they have not shown that the threatened injury is so "immediate, pressing, irreparable, and clearly established" that it warrants the extraordinary remedy of a mandatory injunction. *Auto. Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732 (citations and quotation marks omitted).

17. For these reasons, the Court **DENIES** Defendants' motions.

SO ORDERED, this the 6th day of May, 2020.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases