Ford v. Jurgens, 2020 NCBC Order 32.

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 MOTION FOR RECEIVER**

1. The plaintiffs, John Ford and Christopher Kisgen, have filed a motion to appoint a receiver. (ECF No. 12.) For the reasons discussed below, the Court **DENIES** the motion.

2. As described in an earlier order, this case is a derivative action on behalf of a nonprofit real estate investors association, known as TREIA. *See Ford v. Jurgens*, 2020 NCBC LEXIS 60, at *1–2 (N.C. Super. Ct. May 6, 2020). Ford and Kisgen are members of TREIA and, until recently, served on its board of directors. They accuse two other board members, Carl Jurgens and Kathie Russell, of a fraudulent scheme to wrest control of the organization and take its assets. The complaint alleges that

Jurgens and Russell proposed creating a new for-profit arm, promising not to use TREIA's assets and assuring its members that the reorganization could be reversed at any time. (*See* Am. Compl. ¶¶ 22, 25, ECF No. 11.) These assurances, Ford and Kisgen contend, were false: after members approved the proposal, Jurgens and Russell unilaterally dissolved TREIA, transferred its assets to two new entities (TREIA Foundation, Inc. and TREIA, LLC), and named themselves as the only members of the new LLC. (*See* Am. Compl. ¶¶ 38, 39, 41, 45–47.)

3. According to Ford and Kisgen, "no one would have ever voted in favor" of the reorganization if its "true nature" had been disclosed. (Am. Compl. ¶ 49.) They urged the board to revoke the dissolution and sent a demand letter asking it to take action against Jurgens and Russell. (*See* Am. Compl. ¶¶ 63, 66, Ex. 14.) Although the board revoked the articles of dissolution, it also reaffirmed the reorganization and the transfers of TREIA's assets at a called meeting in April 2020. (*See* Aff. Millon ¶¶ 11, 12, Ex. 1, ECF No. 31.1.) At the same meeting, the directors voted to remove Ford and Kisgen from the board. (*See* Aff. Millon ¶ 11; Am. Compl. ¶ 72.)

4. This suit followed just days later. Ford and Kisgen assert half a dozen claims, seeking damages on behalf of TREIA, declarations that the disputed transactions are void, and a court-ordered member meeting under N.C.G.S. § 55A-1-60. Jurgens, Russell, and the entity defendants (together, "Defendants") deny these allegations. They contend that the members and board approved (and reaffirmed) all the disputed transactions after full disclosure and in keeping with all procedures required by law.

5. Ford and Kisgen now ask the Court to exercise its inherent equitable authority to appoint a receiver over the three entity defendants—TREIA, the Foundation, and the LLC. (*See* Br. in Supp. 11–15, ECF No. 13.) They contend that a receivership is needed to protect TREIA until its members can meet and vote on its future. (*See* Br. in Supp. 1, 15.) Defendants respond that Ford and Kisgen are not likely to succeed on their claims because TREIA's members and directors approved the reorganization. (*See* Opp'n 11–12, ECF No. 31.) They further contend that a receivership is a drastic remedy and that other remedies are adequate to the task. (*See* Opp'n 12–13.)

6. The motion has been fully briefed, and on June 26, 2020, the Court held a telephonic hearing at which all parties were represented by counsel. After the hearing, each side submitted supplemental evidence. The record is now complete, and the motion is ripe for decision.

7. The appointment of a receiver is "a harsh remedy." *Neighbors v. Evans*, 210 N.C. 550, 554, 187 S.E. 796, 798 (1936). It "takes custody" of the disputed property out of the parties' hands "on an interlocutory order, before the court has had an opportunity to hear the merits of the case." *Woodall v. N.C. Joint Stock Land Bank*, 201 N.C. 428, 432, 160 S.E. 475, 478 (1931) (citation and quotation marks omitted). For that reason, "[t]he right to relief must be clearly shown and also . . . that there is no other safe and expedient remedy." *Neighbors*, 210 N.C. at 554, 187 S.E. at 798. Equity steps in only when there is a likelihood of irreparable harm and "no adequate remedy at law." *Jones v. Jones*, 187 N.C. 589, 592, 122 S.E. 370, 371 (1924); *see also*

Tai Sports, Inc. v. Hall, 2009 NCBC LEXIS 78, at *8–9 (N.C. Super. Ct. June 25, 2009) (denying receivership without threat of irreparable injury).

8. Ford and Kisgen have not shown that there is no other safe and expedient remedy or that irreparable harm would likely occur absent a receivership. Their primary concern appears to be membership attrition. (*See* Reply Br. 3, 6, ECF No. 34.) In a supplemental affidavit filed after the hearing, Kisgen attests that "membership participation dropped dramatically since the beginning of this governance dispute" and will continue to do so unless a neutral receiver replaces Jurgens, Russell, and the rest of the board. (Aff. Kisgen ¶¶ 16, 17, 20, ECF No. 44.) At best, the evidence is equivocal. These are not normal times, and the ongoing COVID-19 pandemic has surely affected participation. (*See* Aff. Kisgen ¶ 16; *see also* Aff. Ortiz ¶ 8, ECF No. 45.) One of the benefits of member meetings is the chance to network; that isn't possible now that videoconferencing has replaced in-person meetings. Even so, attendance records supplied by Defendants show that participation hasn't changed much, perhaps because videoconferencing makes it easier to attend. (*See* Aff. Ortiz Ex. B.)

9. Furthermore, although there is evidence of member unrest, it may not be as widespread as Ford and Kisgen contend. TREIA's bylaws allow members to call for a special meeting if just fifteen percent of the membership request it in writing. (*See* ECF No. 9.6, Art. V § 2.) That hasn't happened. Although Ford and Kisgen marshalled nearly a hundred affirmations from dissatisfied members, they still fall short of the mark. This is so despite an aggressive campaign to recruit dissenters.

On the whole, the evidence of member unrest does not show that TREIA's goodwill, membership, or reputation are likely to suffer irreparable harm absent the drastic step of appointing a receiver. *See, e.g.*, *Tai Sports*, 2009 NCBC LEXIS 78, at *8–9; *Mooring Capital Fund, LLC v. Comstock N.C., LLC*, 2009 NCBC LEXIS 32, at *31–34 (N.C. Super. Ct. Nov. 13, 2009).

10. Although not clear from their briefing, Ford and Kisgen also seem to worry that TREIA's assets are in danger of dissipation. In the right circumstances, a court might appoint a receiver to prevent waste. But Defendants have introduced evidence showing that the money transferred to the Foundation and the LLC is being preserved and has not been funneled to others. (*See* Aff. Curley ¶ 16, ECF No. 31.4; Aff. Millon ¶ 15; Aff. Ortiz ¶ 3.) Ford and Kisgen have not shown an imminent danger that these funds will be lost, destroyed, or wasted. *See Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 577, 273 S.E.2d 247, 256 (1981).

11. At bottom, Ford and Kisgen haven't shown the kind of urgent need that warrants appointment of a prejudgment receiver. Accordingly, the Court, in its discretion, **DENIES** the motion. *See 759 Ventures, LLC v. GCP Apt. Inv'rs, LLC*, 2018 NCBC LEXIS 44, at *12–13 (N.C. Super. Ct. May 9, 2018) (denying receivership in absence of "concrete evidence" threatening "imminent, irreparable harm").

SO ORDERED, this the 21st day of July, 2020.

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