STATE OF NORTH CAROLINA CABARRUS COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 3334
JOHN BLOXSOM; REBECCA BLOXSOM; HEATH DRYE; CAROLINE DRYE; TINTU PARAMESWAR; and DONNA PARAMESWAR, individually and derivatively on behalf of Saratoga Homeowners Association, Plaintiffs, v. NEAL CHOQUETTE; WENDY CHOQUETTE; GARY CHOQUETTE; AMERICAN LAND CORPORATION – CHARLOTTE, INC.; ATLANTIC GRADING CO. INC. f/k/a NO SNIVELING GRADING CO. INC.; CEDAR PROPERTY MANAGEMENT, LLC n/k/a AUSTERLITZ PROPERTY MANAGEMENT, LLC; and PAYNE ROCK INVESTMENTS, LLC, Defendants, and SARATOGA HOMEOWNERS ASSOCIATION, Nominal Defendant.	**ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

THIS MATTER is before the Court on Plaintiffs' Motion for Preliminary Injunction. ("Motion for Preliminary Injunction," ECF No. 55.)

THE COURT, having considered the Motion, the briefs and other submissions of the parties, the arguments of counsel, and all matters of record, CONCLUDES, in its discretion, that the Motion for Preliminary Injunction should be DENIED for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Court's factual findings are made solely for purposes of deciding the present Motion for Preliminary Injunction and are not binding in any subsequent proceedings in this action. *See Daimlerchrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 578 (2002) (citing *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16 (1993)).

2. In its September 15, 2021 Order and Opinion ruling on various motions to dismiss filed by the parties pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Court has previously set out in some detail the factual and procedural background of this case with the facts drawn from the Complaint (ECF No. 3). (*See* ECF No. 64; *see also Bloxsom v. Choquette*, 2021 NCBC LEXIS 78 (N.C. Super. Ct. Sept. 15, 2021).) Accordingly, the Court only recites herein those facts relevant to the Motion for Preliminary Injunction.

3. As succinctly put by this Court in its September 15 Order and Opinion:

> In the present action, six residents of a Cabarrus County neighborhood known as Saratoga have sued the members of their homeowners' association's board of directors . . . alleging a nefarious course of conduct rife with conflicts of interest, ineptitude, and retaliation. In response, Defendants have asserted counterclaims in which they accuse Plaintiffs of engaging in a concerted scheme to drive them out of the neighborhood.

Bloxsom, 2021 NCBC LEXIS 78, at *1.

4. The Complaint was filed in this action on November 6, 2020 on behalf of Plaintiffs John Bloxsom, Rebecca Bloxsom, Heath Drye, Caroline Drye, Tintu Parameswar, and Donna Parameswar. (ECF No. 3.) The Complaint states that it is

filed both individually and derivatively on behalf of the Saratoga Homeowners Association ("Saratoga"), which is named in this action as a nominal defendant. (*Id.* at p. 1.) The Complaint also names as defendants Neal Choquette, Wendy Choquette, and Gary Choquette (the "Choquettes")—all of whom currently serve on Saratoga's Board—as well as certain entities which the Choquettes are alleged to own and operate (the "Choquette Businesses").[1] (ECF No. 3, at ¶¶ 2–3, 5, 8.)

5. The Complaint contains five claims for relief: (i) a breach of fiduciary duty claim; (ii) a claim seeking an accounting of Saratoga's financial affairs; (iii) a claim requesting that this Court "pierce the corporate veil" as to the Choquette Businesses; (iv) a claim for slander of title; and (v) a claim requesting the Court enter a declaratory judgment that certain transactions conducted by the Choquettes are void on conflict-of-interest grounds. (*Id.* at ¶¶ 38–65.)[2] More broadly, the claims in Plaintiffs' Complaint are predicated on alleged violations by Defendants of certain provisions of Saratoga's governing documents[3] and North Carolina law as well as

[1] These entities include Defendants American Land Corporation—Charlotte, Inc. ("American Land"); Atlantic Grading Co. Inc. f/k/a No Sniveling Grading Co. Inc. ("AGC"); Cedar Property Management, LLC n/k/a Austerlitz Property Management, LLC ("CPM"); and Payne Rock Investments, LLC ("PRI").

[2] Plaintiffs also requested in their prayer for relief that the Court "appoint a receiver for [Saratoga] to operate [Saratoga] and to investigate the Choquettes' breach of fiduciary duties." (ECF No. 3, at p. 13.) However, on April 16, 2021, Plaintiffs withdrew their request for the appointment of a receiver. (ECF No. 51.)

[3] These governing documents include the Articles of Incorporation of Saratoga ("Articles," ECF No. 10.2); the Bylaws of Saratoga ("Bylaws," ECF No. 8.3); and the Declaration of Covenants, Conditions, and Restrictions for Saratoga Phase I and Saratoga Phase II ("Declaration," ECF No. 8.1).

alleged "arbitrary, malicious, and capricious enforcement of the Declaration and Bylaws" of Saratoga by Defendants. (*Id*. at ¶¶ 10–37.)

6. Prior to the filing of the Complaint, on or about March 13, 2020, Saratoga filed claims of liens for unpaid assessments against Plaintiffs in Cabarrus County. (*See* ECF No. 54.1.)

7. The assessments and resulting liens were not a focal point of the allegations in the Complaint. Nevertheless, the Complaint does contain allegations that "Defendants use levied assessments exclusively to their own benefit and wrongfully indemnify themselves when a genuine dispute arises over their own misconduct" (ECF No. 3, at ¶ 15(d)); "Defendants exceed the maximum annual assessment of seven hundred ninety-five dollars ($795.00) without meeting the requirements contained within the Declaration" (*Id*. at ¶ 15(e)); and "Defendants levied liens for non-payment of the attorneys' fees that the homeowners never should have been responsible for" (*Id*. at ¶ 34)). In addition, Plaintiffs' slander of title claim contains the allegation that Defendants "improperly imposed fees and liens on Plaintiffs' Properties which have no basis in law or fact." (*Id*. at ¶ 59.)

8. On or about July 26, 2021, Plaintiffs were each served with notice of a foreclosure hearing scheduled to take place before the Clerk of Court of Cabarrus County on September 15, 2021, based on the unpaid assessments. (ECF No. 54.1.)

9. In response to the notices of foreclosure hearings, Plaintiffs filed the present Motion for Preliminary Injunction on September 1, 2021. (ECF No. 55.) In their motion, Plaintiffs sought an order "enjoining the Defendants from pursuing its

erroneous claims to various fees and assessments by, *inter alia*, filing foreclosure actions against Plaintiffs."[4]

10. During a status conference between the Court and all counsel of record on September 2, 2021, counsel for Saratoga represented that Saratoga's separate counsel in the foreclosure actions would direct the Trustee to reschedule the pending foreclosure hearings such that they would occur no earlier than October 15, 2021. (ECF No. 58.)[5]

11. On October 1, 2021, the Court was informed that a settlement had been reached in this case as to all claims brought by Plaintiffs John Bloxsom, Rebecca Bloxsom, Caroline Drye, and Heath Drye, and that the Parameswars are the only parties still seeking the entry of a preliminary injunction.[6]

12. This matter came before the Court for a hearing on the Motion for Preliminary Injunction on October 6, 2021, and the Motion is now ripe for decision.

LEGAL STANDARD

13. A preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701 (1977). The plaintiff bears the burden to establish the "right

---

[4] The Court notes that although Plaintiffs' Complaint purported to contain a motion for preliminary injunction, no accompanying brief was filed as required by Rule 7.2 of the Business Court Rules and, for this reason, the motion was not considered by the Court.

[5] Counsel has since informed the Court that the foreclosure hearing has been rescheduled for October 29, 2021.

[6] For this reason, the Court's use of the term "Plaintiffs" throughout the remainder of this Order refers solely to Donna and Tintu Parameswar unless otherwise indicated.

to a preliminary injunction." *Pruitt v. Williams*, 288 N.C. 368, 372 (1975). Relief is warranted only when (1) the plaintiff can show a "likelihood of success on the merits of his case," and (2) the plaintiff 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 [the] plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983) (quoting *Ridge Cmty. Invs.*, 293 N.C. at 701). The Court must also weigh the potential harm a plaintiff will suffer if no injunction is entered against the potential harm to a defendant if the injunction is entered. *See Williams v. Greene*, 36 N.C. App. 80, 86 (1978); *see also State v. Fayetteville St. Christian School*, 299 N.C. 351, 357 (1980) (stating that the issuance of an injunction is "a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities").

ANALYSIS

A. Likelihood of Success on the Merits

14. The sole argument contained in Plaintiffs' brief in support of their Motion for Preliminary Injunction as to why they are likely to prevail on the merits is their contention that "[t]he principal harm to [Saratoga] as a whole stems from Defendants' failure to procure proper insurance to cover the costs of litigation that Defendants now seek to pass on to the rest of th[e] [Saratoga] community" by means of assessments. Therefore, the Court considers this argument alone in analyzing whether Plaintiffs have satisfied this prong of the test. *See Southeast Anesthesiology Consultants v. Charlotte-Mecklenburg Hosp. Auth.,* 2018 NCBC LEXIS 137, at *35

(N.C. Super. Ct. June 22, 2018) ("The Court considers here whether Plaintiffs have demonstrated a likelihood of success only as to those claim[s] for which they offered arguments in their briefs."); *see also Pender Farm Dev. v. Ndco,* 2018 NCBC LEXIS 189, at *21 (N.C. Super. Ct. Mar. 12, 2018) (stating that "the Court considers whether [the party seeking a preliminary injunction] has demonstrated a likelihood of success on the merits as to only those claims for which the [moving party] offered argument in its briefs").[7]

15. Plaintiffs' argument can be summarized as follows: (1) the Declaration requires that Saratoga obtain certain types of insurance—including insurance to protect itself against the dishonest acts of its officers and directors; (2) Saratoga failed to obtain said insurance; (3) the financial need for the assessments levied by Saratoga against Plaintiffs existed solely as a result of the accumulation of legal fees that Saratoga had incurred from prior litigation with some or all of the original Plaintiffs to this action stemming from the wrongful acts of the Choquettes; and (4) had Saratoga obtained the requisite insurance, it would not have incurred the legal fees and, accordingly, would have had no reason to levy the assessments against Plaintiffs.

[7] In their reply brief, Plaintiffs argue, for the first time, that Saratoga lacks standing to contest their Motion for Preliminary Injunction because it is merely a nominal defendant. (ECF No. 71, at pp. 2–3.) However, arguments raised for the first time in a party's reply brief will not be considered by the Court. *See Bayport Holdings v. Sisson*, 2021 NCBC LEXIS 58, at *20 (N.C. Super. Ct. June 25, 2021) (stating that "[t]he Court is not required to consider" novel arguments in a party's reply brief (citing *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 707–08 (2009) (holding that an argument raised for the first time in a reply brief was "not properly before the Court"))); *see also* BCR 7.7 ("A reply brief must be limited to discussion of matters newly raised in the responsive brief.").

16. In making this argument, Plaintiffs rely primarily on Section 5.1(c) of the Declaration, which states as follows:

> **(c) Fidelity Insuranc**e. The Association shall procure and maintain, or cause to be maintained, a policy or policies of insurance coverage to protect against dishonest acts on the part of officers, directors, volunteers, managers and employees of the Association and any other persons who handle or are responsible for the handling of funds of the Association. Any such fidelity insurance policy must name the Association as the named insured and shall be written in an amount as may be determined by the Association, but in no event less than one-half the annual budgeted amount of annual assessments.

(ECF No. 65.1, at § 5.1(c).) Plaintiffs further rely on Section 5.1(d) of the Declaration, which provides:

> **(d) Other Insurance.** The Board, or its duly authorized agent, shall have the authority to and shall obtain and maintain in effect such other insurance coverages as the Board shall determine from time to time to be desirable, specifically including, without limitation, directors and officers liability insurance, performance bonds, payment on labor and material bonds and maintenance bonds.

(*Id.* at § 5.1(d).)

17. The Court concludes that Plaintiffs have failed to show a likelihood of success on the merits based on this argument. This is so for a number of reasons.

18. Most basically, there is no provision of the Declaration that conditions the ability of Saratoga to levy assessments upon its purchase of insurance as set out in Section 5. Section 4 of the Declaration expressly authorizes the levying of assessments by Saratoga. Nothing in Section 4 links this authority to compliance with the above-quoted insurance provisions in Section 5.

19. Moreover, the Court notes that Section 4.2 of the Declaration, titled "Purpose of Assessments," expressly lists "the employment of attorneys . . . to represent the Association when appropriate" as a permissible use of assessments. (ECF No. 65.1, at § 4.2.) Therefore, even assuming Plaintiffs are correct that budget overruns caused by the accumulation of attorneys' fees are what necessitated the levying of assessments, the Declaration—on its face—appears to permit the use of assessments for this purpose.

20. Indeed, Plaintiffs have failed to even put forth evidence sufficient to affirmatively establish what types of insurance Saratoga did or did not obtain. Although Plaintiffs speculate that Saratoga violated the above-quoted provisions of Chapter 5 of the Declaration by failing to obtain certain required types of insurance, the record is largely silent on this issue.

21. Finally, Plaintiffs have failed to provide any basis for this Court to determine whether any such insurance policies required by the Declaration would have actually provided coverage for the prior legal disputes between the parties to this action. As Saratoga notes, the primary legal proceeding involving the parties prior to the present action sought only the appointment of a receiver for Saratoga. Plaintiffs have not offered any evidence that the types of insurance they claim Saratoga improperly failed to obtain would, in fact, have kept Saratoga from incurring the legal fees that allegedly necessitated the levying of the assessments.

22. The Court observes that Plaintiffs appear to misunderstand the fact that the burden is on *them* to show a likelihood of success on the merits. *See Pruitt*, 288

N.C. at 372. Inexplicably, although this action has been pending for approximately eleven months, it appears that no discovery has been taken by the parties. Therefore, Plaintiffs' motion is unsupported by any deposition testimony or discovery responses. Although Plaintiffs have submitted several affidavits in support of their motion (ECF Nos. 54.2–3) that essentially reassert the same substantive allegations contained in the Complaint, Defendants have likewise submitted affidavits of their own that expressly deny the wrongful conduct alleged in the Complaint (ECF Nos. 66–69). As a result, major factual disputes currently exist as to the key issues relevant to this lawsuit.

23. Accordingly, Plaintiffs have failed to provide this Court with any grounds to conclude that they are likely to prevail on the merits of their claims against Defendants. While a plaintiff is certainly not required to conclusively prove its case at the preliminary injunction stage, it must produce some evidence to meet its burden of showing a reasonable likelihood of success on the merits that goes beyond a mere repetition of the allegations contained in its pleading. This simply has not occurred in the present case. Rather, Plaintiffs appear to be laboring under the misapprehension that the burden has somehow shifted to Saratoga to produce admissible evidence to prove that *Defendants* are likely to prevail on the merits. Not surprisingly, Plaintiffs have offered no legal authority supporting this novel formulation of the preliminary injunction standard.

24. Because Plaintiffs have failed to satisfy their burden of showing a likelihood of success on the merits, the Court need not reach the issue of whether they

have demonstrated irreparable harm. *See VisionAIR, Inc. v. James*, 167 N.C. App. 504, 511 (2004) ("Because [plaintiff] has failed to show its likely success on the merits of its claims subject to interlocutory review—a required element for a preliminary injunction—we do not reach the question of whether [plaintiff] established irreparable harm."); *Myers v. H. McBride Realty, Inc.*, 93 N.C. App. 689, 695 (1989) ("As plaintiff failed to show a likelihood of success on the merits of his request for a preliminary injunction, the trial court did not err in denying plaintiff's request for a preliminary injunction."); *Cty. Of Catawba v. Frye Reg'l Med. Ctr., Inc.*, 2015 NCBC LEXIS 168, at *8 (N.C. Super. Ct. June 23, 2015) ("[T]he Court concludes that [p]laintiff, 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, [p]laintiff's [m]otion must be denied.").

B. Balancing of the Equities

25. Finally, the Court must weigh the equitable considerations relating to Plaintiffs' motion. *Id.* at *6. The Court notes that although a consideration of the equities often favors a party who is the subject of a foreclosure proceeding, such a conclusion is less clear in the present case.

26. First, as noted above, the assessment-based liens against Plaintiffs have been in place since March 2020, yet Plaintiffs have made no serious effort to contest them until receiving notice of the foreclosure proceeding two and a half months ago. Second, Plaintiffs make no argument that they are unable to pay the overdue

assessments (so as to render moot the threat of foreclosure) and admit that if they prevail on their claims in the present action, they can be made whole by way of their recovery of monetary damages at trial. *See Current Med. Servs., LLC v. Current Dermatology, PLLC*, 2020 NCBC LEXIS 138, at *13 (N.C. Super. Ct. Nov. 30, 2020) (denying preliminary injunction where moving party "appears to have a full, complete and adequate remedy at law" (internal quotation and citation omitted)). Therefore, a consideration of the equities does not change the Court's determination that Plaintiffs have failed to show that they are entitled to a preliminary injunction.

CONCLUSION

THEREFORE, IT IS ORDERED that Plaintiffs' Motion for Preliminary Injunction is **DENIED**.[8]

SO ORDERED, this the 8th of October, 2021.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases

[8] The Court notes that this Order resolves only Plaintiffs' Motion for Preliminary Injunction in the present action and is without prejudice to Plaintiffs' right to assert any and all defenses permitted under the law in connection with Saratoga's separate foreclosure proceeding, which is currently scheduled for hearing before the Clerk of Court of Cabarrus County on or about October 29, 2021.