

STATE OF NORTH CAROLINA
BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 3546

HANDI-CLEAN PRODUCTS, INC.,

Plaintiff,

v.

MOMAR, INC. and JOHN
CATURANO,

Defendants.

**ORDER ON DEFENDANTS'
PARTIAL MOTION TO DISMISS**

1. THIS MATTER is before the Court on the 3 December 2020 filing by Defendants Momar, Inc. and John Caturano (collectively referred to herein as “Defendants”) of Defendants’ Partial Motion to Dismiss (the “Motion”). (ECF No. 18.) The Motion requests that the Court dismiss Plaintiff Handi-Clean Products, Inc.’s (“Plaintiff”) claims for tortious interference with contract, wrongful interference with prospective business relation, and civil conspiracy pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the “Rule(s”).
2. Plaintiff initiated this action on 9 October 2020 with the filing of its Complaint and Motion for Preliminary Injunction. (ECF No. 3.)
3. On 3 December 2020, Defendants filed Defendants Momar, Inc. and John Caturano’s Answer and Affirmative Defenses to Handi-Clean Products, Inc.’s Complaint (the “Answer”). (ECF No. 17.) The Answer, as filed on the Court’s e-docket, bears a time stamp of 16:32:18.

4. That same day, on 3 December 2020, Defendants filed the Motion and Defendants' Brief in Support of Partial Motion to Dismiss Pursuant to N.C.R. Civ. P. 12(b)(6). (ECF No. 19.) The Motion also bears a time stamp of 16:32:18.

5. Rule 12(b) clearly provides that a motion for failure to state a claim upon which relief can be granted "shall be made *before pleading* if a further pleading is permitted." N.C.G.S. § 1A-1, Rule 12(b) (emphasis added). This Court's holding and interpretation of Rule 12 in *New Friendship Used Clothing Collection, LLC v. Katz*, 2017 NCBC LEXIS 72, at *24–25 (N.C. Super. Ct. Aug. 18, 2017) is clear.

6. "This Court has held that in the absence of case law from appellate courts interpreting such language to mean otherwise, a Rule 12(b) motion to dismiss for failure to state a claim must be filed *prior* to an answer, not contemporaneously with or minutes after." *Johnston v. Johnston Props., Inc.*, 2018 NCBC LEXIS 119, at *13 (N.C. Super. Ct. Nov. 15, 2018) (emphasis in original) (citing *New Friendship Used Clothing Collection, LLC*, 2017 NCBC LEXIS 72, at *24). Evidenced by the time stamps on the filings, Defendants filed the Motion and the Answer contemporaneously.¹ Accordingly, the Motion is untimely.

7. Notably, in *New Friendship* this Court concluded that reading Rule 12(b)(6) and Rule 12(h) together, a post-answer Rule 12(b)(6) motion may be considered as a Rule 12(c) motion for judgment on the pleadings. *See New Friendship Used Clothing Collection, LLC*, 2017 NCBC LEXIS 72, at *25–26. However, Defendants solely

¹The Court further notes that the Answer is assigned ECF No. 17, and the Motion is assigned ECF No. 18. Based on the Court's filing system's assignment of a lower ECF Number to the Answer than the Motion, it appears that Defendants organized its filings so that the Answer would be filed first.

requested dismissal of Plaintiff's claims pursuant to Rule 12(b)(6). (*See generally*, ECF Nos. 19, 26, 33.)² Accordingly, given the procedural posture of this case and absent a request from Defendants, the Court declines to consider the Motion as one for judgment on the pleadings pursuant to Rule 12(c). *See Encompass Servs., PLLC v. Maser Consulting P.A.*, 2019 NCBC LEXIS 67, at *3 (N.C. Super. Ct. Nov. 5, 2019) (declining to treat an untimely Rule 12(b)(6) motion as a Rule 12(c) motion when the movant did not request that the Rule 12(b)(6) motion be considered under Rule 12(c)).

8. Due to Defendants' untimely filing of the Motion and their failure to request that the Motion be considered pursuant to Rule 12(c), the Court concludes that the Motion is not properly before the Court pursuant to Rule 12 and the Motion should be denied.

9. THEREFORE, the Court DENIES the Motion without prejudice to Plaintiff filing a motion pursuant to Rule 12(c).

SO ORDERED, this the 6th day of April, 2021.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases

² Neither Plaintiff nor Defendants raised the procedural issues outlined in this Order in their briefing on the Motion. However, the Court, in its discretion, concludes that the untimeliness of Defendants' Motion is an appropriate ground on which to base its ruling herein.