

STATE OF NORTH CAROLINA
BRUNSWICK COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 371

RICHARD MERRITT and LISA
MERRITT,

Plaintiff,

v.

S&S MANAGEMENT GROUP, LLC
d/b/a GUARDONE SECURITY,

Defendant/
Counterclaim
Plaintiff,

v.

RICHARD MERRITT; LISA
MERRITT; and RAPTOR
PROTECTION GROUP, LLC,

Counterclaim
Defendants.

ORDER ON DESIGNATION

1. **THIS MATTER** is before the Court pursuant to the Determination Order issued on 27 April 2022 by the Honorable Paul Newby, Chief Justice of the Supreme Court of North Carolina, directing the undersigned to determine whether this action is properly designated as a mandatory complex business case in accord with N.C.G.S. § 7A-45.4(a). (*See* Determination Order.)

2. Plaintiffs Richard and Lisa Merritt (the “Merritts”) commenced this action on 1 March 2022 by filing an Application and Order Extending Time to File Complaint in Brunswick County Superior Court. (Appl. & Order Extending Time File Compl.) The Merritts subsequently filed the Complaint for Declaratory Judgment (the “Complaint”) on 18 March 2022, asserting a single claim for

declaratory judgment against Defendant S&S Management Group, LLC d/b/a GuardOne Security (“GuardOne”). (See Compl. Declaratory J. ¶¶ 17–32 [hereinafter “Compl.”].) GuardOne was served on 25 March 2022. (See Aff. Service Civil Summons & Compl.)

3. On 26 April 2022, GuardOne filed¹ its Counterclaims, asserting counterclaims for breach of fiduciary duty, breach of employment agreements, misappropriation of trade secrets, conversion, violations of North Carolina’s Unfair and Deceptive Trade Practices Act, and injunctive relief against the Merritts. (See Countercls. ¶¶ 32–65.) The next day, GuardOne filed² a NOD, contending that designation as a mandatory business case is proper under N.C.G.S. § 7A-45.4(a)(8).³ (See NOD 1–2.)

¹ Rule 5 of the North Carolina Rules of Civil Procedure expressly provides that: “The filing of *pleadings* and other papers with the court as required by these rules shall be made by filing them with the clerk of court . . .” N.C. R. Civ. P. 5(e)(1) (emphasis added). Although the date preceding the signature block on GuardOne’s Answer to Plaintiffs’ Complaint, Counterclaim, Motion to Join Raptor Protection Group, LLC as a Counterclaim Defendant, Motion for Temporary Restraining Order and Preliminary Injunction, and Motion for Expedited Discovery (the “Counterclaims”) is 25 April 2022, the Counterclaims were not “filed” until 26 April 2022, as evidenced by the file stamp from the Brunswick County Clerk of Superior Court that appears on the first page of the document. (See Def.’s Answer Pls.’ Compl., Def.’s Countercl., Def.’s Mot. Join Raptor Prot. Grp., LLC as Countercl. Def., Mot. TRO & Prelim. Inj., & Mot. Expedited Disc. 1 [hereinafter “Countercls.”].)

² Here again, although the date preceding the signature block on GuardOne’s Notice of Designation as a Mandatory Complex Business Case (the “NOD”) is 25 April 2022, the NOD was not “filed” until 27 April 2022, as evidenced by the file stamp from the Brunswick County Clerk of Superior Court that appears on the first page of the document. (See Notice Designation Mandatory Complex Bus. Case 1 [hereinafter “NOD”].)

³ Although the NOD appears to seek designation pursuant to section 7A-45.4(a)(6), which is a repealed portion of the statute, it appears clear that GuardOne intends designation under 7A-45.4(a)(8), the section permitting mandatory complex business case designation for disputes involving trade secrets. (Compare NOD 2, with N.C.G.S. § 7A-45.4(a).)

4. “For a case to be certified as a mandatory complex business case, the pleading upon which designation is based must raise a material issue that falls within one of the categories specified in section 7A-45.4.” *Composite Fabrics of Am., LLC v. Edge Structural Composites, Inc.*, 2016 NCBC LEXIS 11, at *25 (N.C. Super. Ct. Feb. 5, 2016). According to the NOD, the basis for designation is GuardOne’s “counterclaim for misappropriation of trade secrets against Plaintiffs and Plaintiffs’ new employer, Raptor Protection Group, LLC (‘Raptor’). Plaintiffs’ misappropriation, with the assistance of Raptor, breaches their employment agreement with GuardOne and violates the North Carolina Trade Secrets Protection Act, N.C. Gen. Stat. § 66-12 *et seq.*” (NOD 3–4.)

5. This Court has previously determined that counterclaims may serve as a basis for mandatory complex business case designation. *See Composite Fabrics of Am., LLC*, 2016 NCBC LEXIS 11, at *9. “In the instance where a counterclaim is the basis for designation, for purposes of applying section 7A-45.4, the counterclaimant would be the ‘plaintiff[.]’ ” *Id.* at *7–8. On this basis, the NOD must be filed contemporaneously with the counterclaim to be timely. *See* N.C.G.S. § 7A-45.4(d)(1); *Prod. Recovery Mgmt., Inc. v. D.D. Williamson & Co.*, 2018 NCBC LEXIS 248, at *2 (N.C. Super. Ct. Dec. 21, 2018) (“[W]here a counterclaim is the first pleading to raise a material issue that falls within a category that qualifies for mandatory designation under section 7A-45.4(a) . . . the statutory time requirements for seeking designation are measured by the [counterclaim].”) (quoting *id.* at *9). Here, the NOD was filed

the day after the Counterclaims and is therefore untimely. (See Countercls. 1; NOD 1.)

6. But even if GuardOne had filed the NOD contemporaneously with its Counterclaims, the NOD would nevertheless have been untimely. When designation is based on a counterclaim, the Court must also determine whether the counterclaim states a basis for designation that the complaint does not. See *Performance Rehab Assocs., P.C. v. Wolverine Est. Ltd. Fam. Tr. XIV, LLC*, 2022 NCBC LEXIS 4, at *4 (N.C. Super. Ct. Jan. 21, 2022).

7. As alleged in the Complaint, the Merritts each entered into an employment agreement with GuardOne in October 2018. (See Compl. ¶ 7.) The Merritts allege that, after they resigned their positions in late 2021/early 2022, GuardOne sent them a cease-and-desist letter, accusing the Merritts of breaching the non-competition and non-solicitation clauses of their respective employment agreements and demanding that the Merritts “refrain from using Defendant’s confidential information and trade secrets while engaging third parties.” (Compl. ¶¶ 14–15.) The Merritts filed this lawsuit in response, seeking declaratory relief regarding the rights and obligations of the parties with respect to these issues under the employment agreements, specifically requesting a declaration that “Plaintiffs took no trade secrets of Defendant.” (Compl. ¶ 32; see also ¶¶ 17–31.)

8. The Counterclaims are based on the same conduct as that described in the Complaint. GuardOne alleges that the Merritts breached their employment agreements by failing to keep confidential the “pay rates to guards for particular

work, billing rates to clients for particular work, client points of contact . . . , [and] past proposals for business[.]” (Countercls. ¶ 7.) These types of information are included in the “laundry list” of confidential information described in section 7(d) of the employment agreements and referenced in the Complaint. (Compl. ¶ 28; *see also* Compl. Ex. A § 7(d); Compl. Ex. B § 7(d).) In addition, the Merritts’ alleged misappropriation of GuardOne’s trade secrets not only serves as the basis for its Chapter 66 counterclaim, but also for its other five counterclaims as well. (*See* Countercls. ¶¶ 32–41, 50–65.)

9. Because GuardOne’s Counterclaims and grounds for designation under section 7A-45.4(a)(8) are based on the same conduct at issue in the Complaint, the Counterclaims do not provide a basis for designation under that section different from that in the Complaint. As such, the Complaint was the first pleading to raise a basis for designation under section 7A-45.4(a)(8) and GuardOne was required to file the NOD by 25 April 2022. *See* N.C.G.S. § 7A-45.4(d)(3) (“The Notice of Designation shall be filed . . . [b]y any defendant or any other party within 30 days of receipt of service of the pleading seeking relief from the defendant or party.”). GuardOne’s 27 April 2022 NOD is therefore untimely.

10. The Court recognizes that this is a harsh result under either analysis, but N.C.G.S. § 7A-45.4(d) establishes fixed timelines for filing that the Court cannot alter. And although the statute does not contemplate using a counterclaim as a basis for designation, this Court has interpreted the statute to permit designation based on a counterclaim but only if it is the *first* pleading to raise a material issue that falls

within the categories for mandatory complex business case designation under section 7A-45.4(a). *See, e.g., Performance Rehab Assocs., P.C.*, 2022 NCBC LEXIS 4, at *3–5 (determining designation was improper where counterclaims did not provide a basis for designation not otherwise present in the complaint).

11. Based on the foregoing, the Court determines that this action is not properly designated as a mandatory complex business case in accord with N.C.G.S. § 7A-45.4(a)(8) and thus shall not be assigned to a Special Superior Court Judge for Complex Business Cases.

12. Consistent with the Determination Order, the Court hereby advises the Senior Resident Superior Court Judge of Judicial District 13B that this action is not properly designated as a mandatory complex business case so that the action may be treated as any other civil action, wherein the parties may pursue designation as a Rule 2.1 exceptional case with the Senior Resident Judge.

13. The Court's ruling is without prejudice to the right of any party to otherwise seek designation of this matter as a mandatory complex business case as provided under section 7A-45.4.

SO ORDERED, this the 28th day of April, 2022.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge