STATE OF NORTH CAROLINA SWAIN COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 178
THOMAS M. ANDERSON, PERRY POLSINELLI, RICHARD F. HUNTER, ANDREW JUBY, THOMAS T. SCHREIBER, and FRED R. YATES, in the right of the Mystic Lands Property Owners Association, Inc., a North Carolina Non-Profit Corporation, Plaintiffs, v. MICHAEL BERESNI; LOUIS JOHN BROWN; KEVIN BURKE; RAMON (RAY) DE LA CABADA; SCOTT LYDEN; JIM MOORE; ROBERT WUNDERLE; GREG GILROY; RANDY MILLS; AMI SHINITZKY; MYSTIC LANDS, INC.; and the MYSTIC LANDS PROPERTY OWNERS ASSOCIATION, INC., a nominal party, Defendants.	**ORDER ON MOTION FOR PRELIMINARY INJUNCTION**

THIS MATTER comes before the Court on Plaintiffs' Motion for Preliminary Injunction ("Motion," ECF No. 19).

THE COURT, having considered the Motion, the briefs, the affidavits and other submissions of the parties, the arguments of counsel, and all appropriate matters of record, CONCLUDES, in its discretion, that the Motion 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 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. Plaintiffs Thomas M. Anderson, Perry Polsinelli, Richard F. Hunter, Andrew Juby, Thomas T. Schreiber, and Fred R. Yates are all property owners in Mystic Lands, a planned community in Swain and Macon County, North Carolina. (Verified Am. Compl., ECF No. 15, ¶¶ 1, 3–8.) Plaintiffs are also members of Mystic Lands Property Owners Association, Inc. (the "Association"). (Am. Compl. ¶¶ 3–8.)

3. Defendants Michael Beresni, Louis John Brown, Kevin Burke, Ramon de la Cabada, Scott Lyden, Jim Moore, Robert Wunderle, Greg Gilroy, Randy Mills, and Ami Shinitzky are all current or former members of the board of directors of the Association. (Am. Compl. ¶¶ 11–20.)

4. Mystic Lands, Inc. ("MLI") is a Florida corporation registered to do business in North Carolina that owns lots within Mystic Lands. (Am. Compl. ¶ 22.) Shinitzky is the president and sole shareholder of MLI. (Am. Compl. ¶ 30.) MLI was the "successor developer and declarant . . . for Mystic Lands." (Am. Compl. ¶ 29.)

5. The origins of this litigation date back to 2015 when a group of property owners—including several of the Plaintiffs in the present action—sued MLI and Shinitzky, seeking, *inter alia*, a declaratory judgment "that MLI and Shinitzky lost declarant control" of Mystic Lands. (Schreiber Aff., ECF No. 4, ¶ 11.) In that lawsuit, the North Carolina Court of Appeals ultimately concluded that "by 2008, declarant control had reverted to the owners of the lots[.]" *Anderson v. Mystic Lands, Inc.*, 2020

N.C. App. LEXIS 973, at *56 (N.C. Ct. App. Dec. 31, 2020) (unpublished), *disc rev. denied*, 379 N.C. 145 (2021).

6. Based on the ruling from the Court of Appeals, Plaintiffs engaged in a series of communications with the Association based on their desire for its board to pursue the collection of certain unpaid assessments allegedly owed by MLI and Shinitzky relating to the lots they owned in Mystic Lands, which—according to Plaintiffs—had become due upon the loss of MLI's declarant control.

7. In response, counsel for MLI and Shinitzky informed the Association that his clients would assert various existing defenses to any efforts by the Board to collect any unpaid assessments from them. (Lyden Aff. Ex. C5, ECF No. 29, pp. 155–56.)

8. On 7 January 2022, counsel for Plaintiffs sent the Association a letter that valued the unpaid assessments at issue as being "in excess of One Million Dollars." (Am. Compl. Ex. G.) The 7 January letter demanded that the Association undertake "immediate and meaningful steps to levy and collect any and all past assessments that should have been levied on Lots owned by the Declarant, [Shinitzky], and any other entities controlled or owned by [Shinitzky]." (*Id.*)

9. However, no action was taken by the Association regarding the alleged unpaid assessments. Instead, an election was held to elect a new board of directors "on or about early February 2022." (Bailey Aff., ECF No. 18, ¶ 19.)

10. After the election, counsel for Plaintiffs sent counsel for the new board a letter containing a similar demand to that set out in the 7 January 2022 letter—

that is, that the board take immediate action to evaluate, investigate, and collect any unpaid assessments against MLI and Shinitzky. (Am. Compl. Ex. H.)

11. On 13 July 2022, counsel for Plaintiffs sent another letter to the board's counsel reiterating his prior demands. (Am. Compl. Ex. I.)

12. Counsel for the board sent Plaintiffs' counsel a letter dated 23 July 2022 stating that "the Board is getting closer to a decision regarding the pre-December 31, 2020 lots owned by Ami Shinitzky and/or his companies that could theoretically be assessed in light of the Court of Appeals decision." (Am. Compl. Ex. K.) The letter detailed efforts by the board to analyze information relating to the amounts to be collected, discussed the potential validity of MLI's equitable defenses, and noted the extensive costs that would be associated with potential litigation by the Association in order to collect the assessments. (*Id.*) The letter also invited cooperation between Plaintiffs and the board at a board meeting scheduled for 25 July 2022. (*Id.*)

13. Following that meeting, no immediate action was taken. (Am. Compl. ¶ 114.) Plaintiffs subsequently proposed that a mediation take place in which Plaintiffs, the board members, MLI, and Shinitzky would all participate. (Am. Comp. ¶ 143.) Counsel for the board initially agreed to this proposal, but—after communications with MLI and Shinitzky—ultimately responded that Plaintiffs would only be allowed to attend the opening session of the mediation. (Am. Compl. ¶¶ 147–48.) The board's counsel explained that MLI and Shinitzky had threatened not to participate at all in the mediation unless Plaintiffs' role was so limited. (Am. Compl. ¶ 150.)

14. Plaintiffs' counsel further requested that the board invoice MLI and Shinitzky for the amount of the unpaid assessments prior to the mediation, but counsel for the board—although at first receptive to the idea—later informed Plaintiffs of the board's unwillingness to do so after consultation with MLI and Shinitzky. (Am. Compl. ¶¶ 151–54.)

15. On 8 August 2022, Plaintiffs initiated this action by filing a Complaint in Swain County Superior Court. (Compl., ECF No. 3.) In their Complaint, Plaintiffs, on behalf of the Association, asserted derivative claims for breach of fiduciary duty against Beresni, Brown, de la Cabada, Lyden, Gilroy, Mills, and Shinitzky (the "2021 Board") along with a separate claim for breach of fiduciary duty against Beresni, Brown, Burke, de la Cabada, Lyden, Moore, and Wunderle (the "2022 Board"). In addition, Plaintiffs sought preliminary and permanent injunctive relief. (Compl. ¶¶ 163–210.)

16. The following day, the Honorable Lisa C. Bell issued a temporary restraining order enjoining the 2022 Board from conducting mediations or negotiations with MLI and Shinitzky regarding the unpaid assessments, accepting funds from MLI and Shinitzky in settlement of the dispute, or otherwise prejudicing the Association's ability to collect in full any assessment amounts owed by MLI and Shinitzky. (Temporary Restraining Order, ECF No. 7.) The temporary restraining order also prohibited the parties from proceeding with a mediation that had been scheduled to occur on 8 August 2022 without the participation of Plaintiffs. (Schreiber Aff., ECF No. 4, ¶ 56.)

17. This case was designated a mandatory complex business case and assigned to the undersigned on 14 September 2022. (ECF Nos. 1, 2.)

18. On 15 September 2022, this Court, with the consent of the parties, entered an order extending the temporary restraining order until such time as the Court ruled on Plaintiffs' forthcoming Motion for Preliminary Injunction. (Order and Notice of Hearing, ECF No. 13.)

19. Plaintiffs filed an Amended Complaint on 19 September 2022. The Amended Complaint contained the same claims as the original Complaint along with an additional claim for breach of contract against MLI. (Am. Compl. ¶¶ 173–226.)

20. On 7 October 2022, the Association filed an Answer and Crossclaim in which it asserted a claim seeking a declaratory judgment as to the amount of the unpaid assessments owed by MLI and Shinitzky along with a claim to collect any such amounts. (Association Answer and Crossclaim, ECF No. 23, pp. 41–42.)

21. Plaintiffs filed a Motion for Preliminary Injunction on 20 September 2022 (Mot. Prelim. Inj., ECF No. 19), which came before the Court for a hearing on 25 October 2022. The Motion for Preliminary Injunction is now ripe for resolution.

LEGAL STANDARD

22. 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 issuance of such injunctive relief "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357

(1980). The plaintiff bears the burden of establishing the right to a preliminary injunction. *Pruitt v. Williams*, 288 N.C. 368, 372 (1975). The entry of a preliminary injunction is proper only where the plaintiff is (1) able to show a "likelihood of success on the merits of his case," and (2) "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).

23. 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 issued. *See Williams v. Greene*, 36 N.C. App. 80, 86 (1978).

ANALYSIS

24. At the outset, the Court notes the seeming oddity of the injunctive relief Plaintiffs are seeking. This entire lawsuit is premised on the notion that the 2021 Board—and now the 2022 Board—failed to properly discharge their duty to the Association by refusing to pursue efforts to collect the unpaid assessments owed by MLI and Shinitzky. Yet in their request for injunctive relief, Plaintiffs seek the very opposite—that is, an order prohibiting the 2022 Board from taking any steps to recover the assessments due, whether by mediation, negotiations, or otherwise.[1]

25. Plaintiffs account for this contradiction by arguing that the 2022 Board cannot be trusted to negotiate with MLI and Shinitzky given its demonstrated failure

[1] Indeed, Plaintiffs were initially successful in this effort as they were able to obtain a temporary restraining order at the eleventh hour prohibiting the Board, MLI, and Shinitzky from proceeding with the mediation that was scheduled to take place on 8 August 2022.

to put the Association's interests ahead of the interests of MLI and Shinitzky. As a result, Plaintiffs contend, the injunction they seek is necessary to ensure that the 2022 Board will not settle the dispute for "pennies on the dollar," thereby preventing the Association from ever fully collecting the actual amount of assessments due.

26. In furtherance of this objective, Plaintiffs' Motion for Preliminary Injunction requests an order enjoining the 2022 Board from doing any of the following:

> a. Mediating and/or negotiating any settlement concerning past assessments due and owing by Defendant MLI and Defendant Shinitzky to the Association;
>
> b. Entering into any agreement with Defendant MLI and Defendant Shinitzky concerning past assessments due and owing by Defendant MLI and Defendant Shinitzky to the Association;
>
> c. Otherwise accepting any amount from Defendant MLI and Defendant Shinitzky concerning past assessments due and owing by Defendant MLI and Defendant Shinitzky to the Association; and
>
> d. Taking further action that prejudices and/or impacts, to the Association's detriment, the Association's ability to invoice and collect past assessments due and owing by Defendant MLI and Defendant Shinitzky to the Association.

(Mot. Prelim. Inj. pp. 16–17.)

27. Plaintiffs contend that the injunctive relief they seek is warranted because they are likely to succeed on their claim for breach of fiduciary duty against the members of the 2022 Board. Plaintiffs argue that this is so based on evidence in the record of numerous acts and omissions by the Board such as failing to properly conduct an investigation into the unpaid assessments, refusing to invoice MLI and Shinitzky for the assessments prior to the scheduled 8 August 2022 mediation,

favoring MLI and Shinitzky over other homeowners, and agreeing to a mediation process that would essentially exclude Plaintiffs to the detriment of the Association's ability to settle the dispute on favorable terms.

28. However, the Court need not decide whether Plaintiffs have demonstrated a likelihood of success on the merits because the Court concludes that Plaintiffs have failed to show irreparable harm from the denial of a preliminary injunction—a failure that is fatal to their efforts to obtain such relief.

29. Most basically, Plaintiffs have failed to demonstrate that they lack an adequate remedy at law—namely, monetary damages—that would make the Association whole if Plaintiffs should ultimately prevail in this action.

30. A plaintiff fails to establish its burden of demonstrating irreparable harm when "money damages are adequate to compensate for the loss [alleged]." *See Current Med. Servs., LLC v. Current Dermatology, PLLC*, 2020 NCBC LEXIS 138, at *10 (N.C. Super. Ct. Nov. 30, 2020); *see also Board of Light & Water Comm'rs v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 423 (1980) ("Where there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie.") (citations omitted), *disc rev. denied*, 301 N.C. 721; *Smith v. N.C. Motor Speedway, Inc.*, 1997 NCBC LEXIS 10, at **22 (N.C. Super. Ct. Nov. 12, 1997) (cleaned up) (denying a motion for a preliminary injunction where "an award of money damages would provide [the injured party] full relief.").

31. Plaintiffs are unable to provide an adequate explanation as to why their potential recovery of monetary damages if they prevail at trial on their damages

claims would not be sufficient to fully compensate the Association for any losses it has incurred. After all, this is not a case in which the status quo must be maintained in order to prevent an act from occurring that would result in injury for which no amount of monetary compensation could undo the harm suffered by the plaintiff. Rather, this is a case about money. Succinctly put, Plaintiffs claim that MLI and Shinitzky owe the Association certain sums and have sued (on behalf of the Association) the two of them along with the members of the Board in order to recover that money.

32. Whether such money is ultimately paid out of the pockets of MLI and Shinitzky or of the board members is beside the point. What matters is that an award of monetary damages will be sufficient to enable the Association to recover the funds to which it is allegedly entitled.

33. The denial of Plaintiffs' Motion is warranted on other grounds as well. Not surprisingly, Plaintiffs have failed to cite any case in which a court has enjoined parties to a dispute from seeking to settle the matter. Indeed, doing so would appear to conflict with our Supreme Court's recognition that "settlement of claims is favored in the law[.]" *Chappell v. Roth*, 353 N.C. 690, 692 (2001) (citations omitted).

34. Notably, as quoted above, Plaintiffs' requested injunction paints with a broad brush. Plaintiffs seek not merely to enjoin the 2022 Board from settling on terms that favor MLI and Shinitzky at the expense of the Association but rather to prohibit any settlement *at all*. Surely it is conceivable that a settlement could be reached that would both (1) fairly resolve the issue of unpaid assessments owed by

MLI and Shinitzky; and (2) prevent the further accumulation of attorneys' fees and other expenses inherent in litigation. However, granting Plaintiffs the relief they seek would prevent any chance of that scenario from coming to fruition.

35. Moreover, even if Plaintiffs were seeking a more limited injunction that merely prevented the Board from settling the claims at issue in a way that was not in the best interests of the Association, that request would be untenable for other reasons. Injunctions must be issued with specificity so that the enjoined party knows precisely what conduct is forbidden. *See Gunn Testamentary Tr. v. Bumgardner*, 276 N.C. App. 277, 279 (2021) (citing N.C. R. Civ. P. 65(d)) ("Under our Rules of Civil Procedure, a[n] . . . injunction must set forth the reasons for its issuance in specific terms and describe the scope of the injunction in detail[.]"). A vaguely worded injunction prohibiting the Board from attempting to settle these claims in a manner unfair to the Association would not only be legally improper but would provide no clear guidance to the Board as to what settlement terms are and are not permissible.

36. Finally, the Court is satisfied that a balancing of the respective equities in this case likewise supports the denial of Plaintiffs' Motion.

37. For all of these reasons, the Court concludes that Plaintiffs' Motion for Preliminary Injunction should be DENIED.

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Plaintiffs' Motion for Preliminary Injunction is DENIED.

2. The Temporary Restraining Order previously entered in this action on 8 August 2022 is hereby DISSOLVED.

SO ORDERED, this the 27th day of October, 2022.

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