

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 9285

FOUNDATION BUILDING
MATERIALS, LLC,

Plaintiff,

v.

CONKING & CALABRESE, CO., INC.;
CONKING & CALABRESE SE, INC.;
JEREMY CHAVIS; and DOUGLAS
CALABRESE,

Defendants.

v.

ROBERT HENSHAW, Individually,

Third-Party Defendant.

**ORDER ON MOTIONS FOR
TEMPORARY RESTRAINING ORDER
AND FOR EXPEDITED DISCOVERY**

1. **THIS MATTER** is before the Court on Defendants' Motion for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunctive Relief ("Motion for TRO") (ECF No. 48)¹, and Defendants' Motion for Expedited Discovery ("Motion for Expedited Discovery") (ECF No. 51) (together "the Motions").

2. Having considered Defendants' Counterclaims, the Motions, the affidavits filed in support of the Motions, and the arguments of counsel at a hearing

¹ At this time, the Court considers only the Motion for TRO and does not consider whether preliminary or permanent injunctive relief is appropriate.

on the Motions held 19 September 2023, the Court FINDS and CONCLUDES, solely for the narrow purposes of the Motions,² as follows:

FINDINGS OF FACT

I. Procedural History

3. Plaintiff Foundation Building Materials, LLC (“Plaintiff” or “FBM”) filed its Verified Complaint; Motion for Temporary, Preliminary, and Permanent Injunction; and Motion for Expedited Discovery in one combined pleading on 26 May 2023. The Verified Complaint purports to allege claims for misappropriation of trade secrets, tortious interference with prospective business relations, unjust enrichment, breach of fiduciary duty, constructive fraud, fraud, violation of the North Carolina Unfair and Deceptive Trade Practices Act, common law unfair competition, and injunctive relief. (*See generally* ECF No. 3.)

4. The case was designated as a complex business case on 30 May 2023 and assigned to the undersigned the same day. (ECF Nos. 1, 2.)

5. On 10 July 2023, Defendants filed a Motion to Dismiss, Answer, and Affirmative Defenses to Plaintiff’s Verified Complaint. Also included in their pleading are counterclaims against FBM, as well as a third-party complaint against Robert Henshaw (“Henshaw”), individually. (Defs.’ Mot. To Dismiss, Answer, and Aff. Defs. to Pl.’s Ver. Compl., and Counterclaims, and Third-Party Compl. [“Counterclaims/Third-Party Complaint”], ECF No. 32). Defendants’ counterclaims

² It is well settled that neither findings of fact nor conclusions of law made during a preliminary injunction proceeding are binding upon the Court at a trial on the merits. *Lohrmann v. Iredell Mem’l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) (citing *Huggins v. Wake Cnty. Bd. Of Educ.*, 272 N.C. 33, 40-41 (1967)).

include tortious interference with business relations or prospective contract, unfair and deceptive trade practices, and common law unfair competition. The same claims are asserted against Henshaw almost verbatim in the Third-Party Complaint.

6. On 15 September 2023, Plaintiff filed a Motion to Dismiss Defendants' Counterclaims and Third-Party Complaint pursuant to Rule 12(b)(6). (ECF No. 46.) Defendants filed the Motions the same day.

II. Relevant Facts

7. Defendant Conking & Calabrese, Co., Inc. ("Conking NY") was formed in or around 1975 in the State of New York, by and through members of Defendant Calabrese's family. (Affidavit of Douglas Calabrese ["Calabrese Affidavit"] ¶ 4, ECF No. 49.)

8. Conking NY distributes construction materials for commercial and residential projects, primarily those in or around the State of New York. (Calabrese Affidavit ¶ 5.)

9. Conking & Calabrese, SE, Inc. ("Conking SE") was formed in the State of New York on or about 27 January 2023, and on or about 9 March 2023, Conking SE was formed in the State of North Carolina. (Calabrese Affidavit ¶ 10.)

10. In the material supply or distribution industry, (the "industry"), it is typical for customers to maintain relationships with a variety of suppliers and to regularly utilize multiple suppliers for a job. (Calabrese Affidavit ¶¶ 18-19; Affidavit of Jeremy Chavis ["Chavis Affidavit"] ¶¶ 21-22, ECF No. 54.) Likewise, it is typical

for multiple suppliers to do business with the same customer on a job. (Calabrese Affidavit ¶ 20; Chavis Affidavit ¶ 23.)

11. For their first counterclaim/third-party claim, Defendants allege that FBM/Henshaw wrongfully or tortiously interfered with business relations or prospective contracts by, among other things:

a. Without legal justification or an otherwise legitimate purpose, willfully, intentionally, and maliciously, or otherwise wrongfully, inducing and attempting to induce, or otherwise pressuring and attempting to pressure, various manufacturers and customers in the industry to refrain from entering into contractual relations and/or prospective contractual relations with Conking;

b. Without legal justification or an otherwise legitimate purpose, willfully, intentionally, and maliciously, or otherwise wrongfully, inducing and attempting to induce, or otherwise pressuring and attempting to pressure, various manufacturers and customers in the industry to cease doing business with Conking; and

c. Without legal justification or an otherwise legitimate purpose, willfully, intentionally, and maliciously, or otherwise wrongfully, inducing and attempting to induce, or otherwise pressuring and attempting to pressure, various manufacturers and customers in the industry to not engage or contract with Conking by, *inter alia*, placing or threatening to place said manufacturers or customers on nationwide “holds” directly with FBM (for doing, continuing to do, and/or attempting or negotiating to do business or otherwise contract with Conking.

(Calabrese Affidavit ¶ 35; Chavis Affidavit ¶ 38; Counterclaims/Third-Party Compl. pp. 22-24, 28-30.)

12. For their second and third counterclaims/third-party claims, Defendants allege that FBM/Henshaw engaged in statutory unfair and deceptive trade practices, and common law unfair competition, by, among other things:

a. Engaging in actions and conduct as previously set forth, and as further set forth in the Counterclaims/Third-Party Complaint; and

b. Without legal justification or an otherwise legitimate purpose, willfully, intentionally, and maliciously, or otherwise wrongfully, attempting to stifle FBM's competition (Conking in particular), to prevent Conking from competing in the North Carolina market (and markets generally), and to harm or otherwise damage Conking's business.

(Calabrese Affidavit ¶ 36; Chavis Affidavit ¶ 39; Counterclaims/Third-Party Compl. pp. 24-26, 30-33.)

13. Defendants Calabrese and Chavis allege that “starting at least as early as in or around May 2023, a number of customers and/or manufacturers (“Contact” or “Contacts”) have been contacted by FBM/[Henshaw], including at least one or more who have been contacted directly by [Henshaw], to induce, pressure, direct, or otherwise attempt to do so, such Contacts to not do, to cease doing, and/or to not do in the future, business with Conking—or otherwise face some form of retribution[.]” (Calabrese Affidavit ¶ 44; Chavis Affidavit ¶ 47.)

14. Defendants Calabrese and Chavis further allege that as of 15 September 2023, Conking was placed on a “hold” by at least one Contact in the industry and, on information and belief, the “hold” was the “result of the directions, inducements, or pressures made or exerted” by FBM/Henshaw. (Calabrese Affidavit ¶ 45; Chavis Affidavit ¶ 48.)

15. Additionally, in late May or early June of 2023, “one Contact, MBA Building Supplies, Inc. (“MBA”), informed Conking SE that it received email correspondence from FBM which, among other things, did or attempted to direct, demand, or pressure MBA not to do business, to cease doing business, and to otherwise not do business in the future, with Conking SE.” (Calabrese Affidavit ¶ 48;

Chavis Affidavit ¶ 51.) On 15 June 2023, MBA informed Conking that it was placing a business “hold” on or with Conking. (Calabrese Affidavit ¶ 49; Chavis Affidavit ¶ 52.) This “hold” was removed or reversed by MBA, and MBA thereafter contracted with Conking. (Calabrese Affidavit ¶ 50; Chavis Affidavit ¶ 53.)

16. However, in early August 2023, MBA again informed Conking that it had decided to place it on “hold” and that this decision was the direct result of “continued demands, pressure, and efforts from FBM not to do business, to cease doing business, and to otherwise not do business in the future, with Conking.” (Calabrese Affidavit ¶ 51; Chavis Affidavit ¶ 54.) This “hold” remains in place. (Calabrese Affidavit ¶ 55; Chavis Affidavit ¶ 58.)

17. Furthermore, on the morning of 6 September 2023, May Zambrano (“Zambrano”), the Director of Operations for Conking SE, observed a white Ford truck on the premises of Conking SE’s Charlotte office. (Affidavit of May Zambrano [“Zambrano Affidavit”] ¶ 9, ECF No. 50.) Two individuals, who Zambrano believes were Henshaw and Henshaw’s wife, were present in the truck. (Zambrano Affidavit ¶¶ 10-11.)³

18. Zambrano testified that the individuals in the truck were not authorized to be on the property, and he knows of no legitimate reason for them to have been there. (Zambrano Affidavit ¶¶ 14-15.)

³ Plaintiff conceded at the hearing that Mr. and Mrs. Henshaw were, in fact, the occupants of the truck.

CONCLUSIONS OF LAW

A. Motion for TRO

19. The purpose of a TRO “is to preserve the status quo until the motion for a preliminary injunction can, after notice, be brought on for hearing and decision.” *Lambe v. Smith*, 11 N.C. App. 580, 582 (1971) (citation omitted).

20. A TRO is a “drastic” procedure that “operates within an emergency context which recognizes the need for swift action[.]” *State ex rel. Gilchrist v. Hurley*, 48 N.C. App. 433, 448 (1980); *see also Leonard E. Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 76 (1984) (observing that a temporary restraining order has been called an “extraordinary privilege”).

21. Our courts have made clear that immediate injunctive relief should only be issued:

(1) if [Plaintiff] is able to show *likelihood* of success on the merits of [its] case and (2) [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 [Plaintiff's] rights during the course of litigation.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 401 (1983) (citations omitted) (emphasis in original). *See Wilson on North Carolina Civil Procedure*, § 65-3 (explaining that a plaintiff's likelihood of success on the merits must be considered by the court when ruling on a motion for temporary restraining order).

22. As to the first question, “likelihood of success” means a “reasonable likelihood[.]” *Id.* at 404. As to the second question, the inquiry is not limited to irreparable injury. “The injunction will issue if, in the opinion of the Court, issuance

is necessary for the protection of a plaintiff's rights during the course of litigation.” *Id.* at 405 (cleaned up).

23. Moreover, “[a] court of equity must weigh all relevant facts before resorting to the extraordinary remedy of an injunction.” *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 694 (1976). A trial court generally “should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted” *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16 (1993) (citation and quotation omitted), overruled on other grounds by *Sharpe v. Worland*, 351 N.C. 159 (1999).

24. In deciding whether to grant or deny a TRO, the Court “does so upon the evidence presented” before it. *Register v. Griffin*, 6 N.C. App. 572, 575 (1969). The burden is on the moving party to establish its right to a temporary restraining order, and the remedy “should not be lightly granted.” *Old Battleground Props. v. Cent. Carolina Surgical Eye Assocs., P.A.*, 2015 NCBC LEXIS 19, at **18 (N.C. Super. Ct. Feb. 25, 2015). In any event, the decision to grant or deny emergency injunctive relief rests in the Court’s discretion. *Lambe*, 11 N.C. App. at 583.

25. In this case, the Court concludes that Defendants have not met their burden to prove that emergency relief is necessary. Defendants assert that they have been aware of FBM/Henshaw’s alleged actions since at least May 2023. (Calabrese Affidavit ¶ 44; Chavis Affidavit ¶ 47.) They included allegations in counterclaims filed on 10 July 2023 that FBM/Henshaw both induced manufacturers and/or

customers not to engage or contract with Conking, and placed, or threatened to place, certain some manufacturers and/or customers on “holds.” Even so, Defendants waited until mid-September to file the Motions. Defendants’ delay undercuts their assertion that there is an immediate need for emergency relief. *See N. Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 79 (2009) (affirming trial court’s finding of no irreparable harm where “some two months elapsed without any contention by [plaintiffs] of an urgent threat of irreparable harm[.]”); *Global Textile All., Inc. v. TDI Worldwide, LLC*, 2017 NCBC LEXIS 108, at **30 (N.C. Super. Ct. Nov. 21, 2017) (“One significant measure of the need for immediate and irreparable harm is the haste with which the moving party seeks injunctive relief.”); *Am. Air Filter Co. v. Price*, 2017 NCBC LEXIS 9, at *13-14 (N.C. Super. Ct. Feb. 3, 2017) (denying a preliminary injunction after a delay of four months).

26. Additionally, Defendants’ allegations (on information and belief) that FBM and Henshaw have pressured customers and/or manufacturers not to do business with Conking by threatening retribution in the form of “holds” and “slow opens”⁴ are not supported by competent evidence. Defendants’ affidavits rely only on their speculation and hearsay. Neither is a sufficient evidentiary basis for a TRO.

27. As for Zambrano’s report that the Henshaws visited Conking’s facility, there is insufficient evidence to support Zambrano’s speculation that they were up to

⁴According to Defendants, a “hold” is an industry term for a decision by one party to “pause, discontinue or otherwise refrain” from doing business with another party, typically on a temporary basis. A “slow open” is commonly understood in the industry to mean a purposeful decision by an entity to do business slowly with another entity to impede the latter entity’s progress. *See Calabrese Affidavit*, fn. 1, 3.

no good. Nor is there evidence of actual harm caused by their presence. Zambrano testified that he observed a white truck parked on the edge of Conking's property, twenty feet from the exit. He does not say that the Henshaws entered the building, took possession of Conking's assets, or interfered with Conking's business operations. Certainly, Conking is within its rights to notify the Henshaws that they are not welcome on its private property and that any return to the property will be treated as a trespass. However, the Court does not conclude that this single event, now past, warrants the entry of a TRO.

28. Accordingly, in its discretion, the Court DENIES Defendants' Motion for TRO.

B. Motion for Expedited Discovery

29. Discovery sought on an expedited basis "is subject to a heightened standard, which requires a demonstration of good cause." *BioAgilytix Labs, LLC v. Alvandkouhi*, 2020 NCBC LEXIS 125, at *2 (N.C. Super. Ct. Oct. 19, 2020) (quoting *Corwin v. Brit. Am. Tobacco PLC*, 2015 NCBC LEXIS 2, at *10 (N.C. Super. Ct. Jan. 8, 2015)). To show good cause, a plaintiff must "articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited . . . proceeding." *Ehrenhaus v. Baker*, 2008 NCBC LEXIS 20, at **13 (N.C. Super. Ct. Nov. 3, 2008) (citation omitted).

30. Essentially, "the Court must undertake a balancing test in which it must determine both whether Plaintiff has demonstrated a substantial, colorable claim and

the magnitude of the possible burden or harm to Defendants that may result from imposing the expense and potential business delay attendant to expedition of discovery, including in that determination the possibility of motion practice following initial discovery.” *Raul v. Burke*, 2015 NCBC LEXIS 93, at **3-4 (N.C. Super. Ct. Oct. 8, 2015).

31. Balancing the considerations in this case, the Court observes that fact discovery in this case is underway and is not scheduled to conclude until 1 April 2024. (CMO, ECF No. 41.) Certainly, Defendants may pursue inquiries with respect to their counterclaims during this discovery period. However, based on the record before it, the Court does not find justification to expedite that discovery.

32. Accordingly, the Court, in its discretion DENIES Defendants’ Motion for Expedited Discovery.

CONCLUSION

33. WHEREFORE, based on the foregoing FINDINGS and CONCLUSIONS, it is ORDERED that the Motions are DENIED, but without prejudice to any party’s right to seek injunctive relief by separate motion with appropriate briefing and supporting evidence in accordance with Business Court Rule 7.

IT IS SO ORDERED, this the 19th day of September, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases