Gordon v. Gordon Recyclers, Inc., 2024 NCBC Order 76.

STATE OF NORTH CAROLINA

IREDELL COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24 CVS 3393

CRAIG R. GORDON,

Plaintiff,

v.

GORDON RECYCLERS, INC. and
GORDON INDUSTRIES, INC.,

The Companies'.

ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER is before the Court on Plaintiff Craig R. Gordon's ("Plaintiff") Motion for Preliminary Injunction ("PI Motion," ECF No. 15) against Defendants Gordon Recyclers, Inc. ("GRI") and Gordon Industries, Inc ("GII," and together with GRI, the "Companies"').

THE COURT, having considered the PI Motion, the briefs, affidavits and other submissions of the parties, the arguments of counsel, and all other applicable matters of record, **CONCLUDES**, in its discretion, that the PI Motion should be **GRANTED IN PART** and **DENIED IN PART** for the reasons set forth below.

Blanco Tackabery & Matamoros, P.A. by Elliot A. Fus and Ryan T. Dovel, and The Miller Law Firm, P.C. by Marc L. Newman for Plaintiff Craig R. Gordon.

Moore & Van Allen PLLC by Mark A. Nebrig and Darby M. Festa for Defendants Gordon Recyclers, Inc. and Gordon Industries, Inc.

Davis, Judge.

INTRODUCTION

1. This case arises from a dispute regarding the right of a shareholder to attend shareholders' meetings for a pair of companies. Plaintiff is a member of the

Gordon family, which founded, owns, and operates both GRI and GII. Plaintiff is a minority shareholder of both companies, but each company has refused to provide notice to him of upcoming shareholders' meetings or allow him to attend such meetings. Plaintiff has filed the present PI Motion seeking an injunction preventing the Companies from conducting any shareholders' meetings during the pendency of this litigation without giving him notice and the opportunity to attend via proxy.

FINDINGS OF FACT

2. The Court makes the following findings of fact solely for the purpose of resolving the present PI Motion. They are not binding in any subsequent proceedings in this action. *See Lehrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005), *disc. rev. denied*, 360 N.C. 364 (2006) (noting that "[i]t is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at trial on the merits").

3. GRI and GII are North Carolina corporations with their principal places of business in Iredell County, North Carolina. (Compl. ¶¶ 2–3.)

4. The Companies are owned and managed by members of the Gordon family, who are in the business of scrap metal salvage and recycling. (Compl. ¶ 4; Gordon Aff., at ¶ 2.)

5. Plaintiff is a resident of Mecklenburg County, North Carolina. (Compl. ¶¶ 1, 4; Pl.'s Aff. ¶ 1.) He owns 335 shares of Class B stock in GRI (representing approximately twelve percent of its outstanding shares) and 165 shares of Class B

stock in GII (representing less than one percent of its outstanding shares). (Compl. ¶¶ 5–6; Gordon Aff. ¶ 4.)

6. Plaintiff was formerly involved in the two Companies in the capacities of both an employee and an officer. (Pl.'s Aff. ¶¶ 2–3.) However, Plaintiff's positions in the Companies ended in 2002. (Compl. ¶ 4; Gordon Aff., ¶¶ 3–4.)

7. Since that time, Plaintiff has become distant from other members of the Gordon family and has been uninvolved in the operation and management of the Companies. (Pl.'s Aff. ¶¶ 5, 8; Gordon Aff., ¶¶ 3–4.)

8. Beginning in 2008, Plaintiff began attempting to obtain information about the financial condition of the Companies by making various shareholder inspection requests for corporate records. (Compl. ¶ 7; Gordon Aff. ¶ 5; Pl.'s Aff. ¶ 7.) In addition, until 2010, Plaintiff attended the Companies' shareholders' meetings. (Pl.'s Aff. ¶ 9.)

9. However, in or around 2010, Plaintiff was informed that he "was no longer welcome" at the Companies' meetings and thereafter stopped receiving notice of any shareholders' meetings. (Pl.'s Aff. ¶ 9.)

10. In March 2022, Plaintiff began making requests to inspect and copy the minutes of shareholders' meetings and board meetings. (Compl. ¶ 12; Gordon Aff. ¶ 7.)

11. The Companies complied with Plaintiff's requests by making various corporate documents available for inspection and copying—including minutes of shareholders' meetings dating back to 2019. (Compl. ¶ 12; Gordon Aff. ¶¶ 5–10.)

However, as a condition of providing such documents, the Companies' required that Plaintiff enter into a Confidentiality Agreement prohibiting him from disseminating their confidential financial information. (Gordon Aff. ¶ 8; Pl.'s Aff. ¶ 13.)

12. Beginning on or about 17 December 2023, Plaintiff, through counsel, contacted counsel for the Companies to demand that they provide him with notice of, and the opportunity to attend, the Companies' upcoming shareholders' meetings, including the annual meeting typically held in late December of each calendar year. (Compl. ¶¶ 12–13, Ex. C.) These demands were repeated to the Companies' counsel on 2 April 2024, 12 July 2024, and 1 October 2024. (Compl. Ex. C.)

13. To date, the Companies have refused to provide Plaintiff with either notice of—or the opportunity to attend—any shareholders' meetings, asserting that he "has received all of the information about the financial status and operations of [the Companies] that he is legally entitled to" and that Plaintiff "has no ascertainable motive to attend any annual shareholder meeting aside from inserting himself back into the Gordon family's affairs." (Compl. ¶ 11; Gordon Aff. ¶ 11.)

14. Plaintiff initiated this action by filing a Complaint for Declaratory Relief in Iredell County Superior Court on 12 November 2024. ("Complaint," ECF No. 3.) Plaintiff's sole claim for relief requests that the Court enter a judgment "declaring his rights as a shareholder to notice of, and the right to attend, the shareholder meetings" of the Companies. (Compl. ¶ 1.) Plaintiff subsequently filed a verification attesting to the truth of the allegations made in the Complaint. (ECF No. 17.)

15. This case was designated as a complex business case and assigned to the undersigned on 18 November 2024. (ECF Nos. 1–2.)

16. On 3 December 2024, Plaintiff filed the present PI Motion seeking an order from the Court enjoining the Companies from "holding shareholder meetings unless they (1) provide notice to Plaintiff and (2) allow Plaintiff to attend via proxy" during the pendency of the litigation. (PI Mot., at 1.)

17. On 4 December 2024, this Court entered an Order setting a briefing schedule and setting the matter for hearing. (ECF No. 20.)

18. On 11 December 2024, the Companies filed an affidavit from Richard Gordon ("Gordon Affidavit," ECF No. 23.3), the Chief Executive Officer of GRI and Vice-President of GII.

19. Plaintiff filed an affidavit of his own ("Plaintiff's Affidavit," ECF 24.1) on 13 December 2024.

20. The court conducted a hearing on 16 December 2024 via Webex at which all parties were represented by counsel.

21. Having been fully briefed, the PI Motion is now ripe for resolution.

CONCLUSIONS OF LAW

BASED UPON the foregoing **FINDINGS OF FACT**, the Court makes the following **CONCLUSIONS OF LAW**:

22. Any Finding of Fact that is more appropriately deemed a Conclusion of Law, and any Conclusion of Law that is more appropriately deemed a Finding of Fact,

shall be so deemed and incorporated by reference as a Finding of Fact or Conclusion of Law, as appropriate.

23. 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). Accordingly, the Court will only issue a preliminary injunction:

> (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a 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 a plaintiff's rights during the course of litigation.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 401 (1983) (cleaned up).

24. "The burden is on the moving party to establish its right to a preliminary injunction, and the remedy 'should not be lightly granted.'" *Comp. Design & Integration, LLC v. Brown*, 2017 NCBC LEXIS 8, at *19 (N.C. Super. Ct. Jan. 27, 2017) (quoting *GoRhinoGo, LLC v. Lewis*, 2011 NCBC LEXIS 39, at *17 (N.C. Super. Ct. Sept. 29, 2011)).

25. 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).

A. Likelihood of Success on the Merits

26. Although the parties agree that Plaintiff's status as a Class B shareholder does not confer voting rights upon him, he nevertheless asserts that he is entitled to a preliminary injunction based on language in the Companies' respective

articles of incorporation providing for identical treatment of voting and non-voting shareholders in all other respects.

27. In response, the Companies contend that their bylaws make clear that only voting shareholders are entitled to notice and attendance regarding shareholders' meetings.

28. North Carolina's Business Corporations Act provides that a corporation's "articles of incorporation must set forth: . . . [t]he number of shares the corporation is authorized to issue and any other information required by G.S. [§] 55-6-01." N.C.G.S. § 55-2-02(a)(2). N.C.G.S. § 55-6-01, in turn, states that:

> [t]he articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and, prior to the issuance of shares of a class, the preferences, limitations, and relative rights of that class must be described in the articles of incorporation.

N.C.G.S. § 55-6-01(a).

29. N.C.G.S. § 55-2-06 states that "[t]he bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is *not inconsistent with law or the articles of incorporation*." N.C.G.S. § 55-2-06(b) (emphasis added).

30. The Court must therefore examine the articles of incorporation and bylaws of each of the two Companies.

1. GRI

31. GRI's bylaws state in pertinent part the following:

> **<u>Section 5</u>**. <u>Notice of Meetings</u>. Written or printed notices stating the time and place of meeting shall be delivered not less than ten nor more than fifty days before the date thereof, either personally or by mail, by or at the direction of the president, the secretary or other person calling the meeting, *to each shareholder of record entitled to vote* at such meeting.

(Defs.' Br. in Opp'n Ex. A (emphasis added).)

32. However, the following language is contained in GRI's articles of incorporation:

> The preferences, limitations and relative rights in respect of the shares of each class are as follows:
>
> The Class A common stock and the Class B common stock *shall be identical in all respects*, except that the holders of Class B common stock shall have no voting power for any purpose whatsoever. The holders of the Class A common stock shall have full voting power for all purposes, to the exclusion of the holders of all other stock.

(Compl. Ex. A (emphasis added).)

33. Based on a plain meaning textual interpretation of the above-quoted provision of the articles of incorporation, the phrase "identical in all respects" means just that. *See Activision Blizzard v. Hayes*, 106 A.3d 1029, 1033 (Del. 2013) (noting that "the terms of a charter provision, like any other contract, are given their plain meaning"). The only enumerated exception on the face of the articles of incorporation is that Class A shareholders are entitled to vote, whereas Class B shareholders are not.

34. The broad scope of the phrase "identical in all respects," coupled with the lack of any corresponding limiting language, suggests that Class B shareholders are entitled to enjoy all other rights possessed by Class A shareholders—including the right to receive notice of, and attend, shareholders' meetings.

35. To the extent the bylaws purport to take away or otherwise diminish this right, they are inconsistent with the articles of incorporation, and therefore, cannot be given effect under N.C.G.S. § 55-2-06(b).

36. Therefore, Plaintiff has met his burden of showing a likelihood of success on the merits as to his declaratory judgment claim against GRI.[1]

2. GII

37. However, the Court reaches a different conclusion as to GII based on a key difference in the analogous language of its articles of incorporation.

> The total authorized capital stock of this corporation is $150,000.00, divided into 1,500 shares of the par value of $100.00 each. Of said stock, 500 shares of the par value of $100.00 each, shall be known and designated as Class A Stock and as such, shall have and enjoy the right to vote in all meetings of the stockholders of the corporation. The remaining 1,000 shares shall be known and designated as Class B Stock and the holders of the Class B Stock shall not be entitled to vote in meetings of the stockholders, but both the A Stock and the B Stock *shall participate equally in all earnings and dividends of the corporation, the only difference being that the Class B Stock has no voting power*.

(Compl. Ex. A (emphasis added).)

38. Plaintiff asserts that the phrase "the only difference" indicates that the shareholders of Class B stock are entitled to the same rights as the holders of Class A stock—other than the right to vote.

39. However, that phrase cannot be read in isolation. Rather, when read contextually with the preceding clause—"both the A Stock and the B Stock shall participate equally in all earnings and dividends of the corporation"—the phrase "the

[1] In so holding, the Court is not making a final ruling on this issue. Rather, the Court has simply determined that Plaintiff has met its burden of showing a reasonable likelihood of success on the merits as to its claim against GRI.

only difference" appears to be solely referencing the relative rights of shareholder classes concerning the earnings and dividends of the company.

40. Since the PI Motion does not concern Plaintiff's right to participate in the earnings and dividends of the company, the provision in the articles of incorporation relied upon by him does not appear to require identical treatment for Class A and Class B shareholders regarding notice and attendance as to shareholders' meetings.

41. Therefore, the Court must look elsewhere.

42. N.C.G.S. § 55-7-05 states:

> A corporation shall notify shareholders of the date, time, and place, if any, of each annual and special shareholders' meeting no fewer than [ten] nor more than [sixty] days before the meeting date. . . . Unless this Chapter or the articles of incorporation provide otherwise, the corporation is *required to give notice only to shareholders entitled to vote* at the meeting.

N.C.G.S. § 55-7-05(a) (emphasis added).

43. Such a result is consistent with the relevant language of GII's bylaws:

> **Section 5**. Notice of Meetings. Written or printed notices stating the time and place of meeting shall be delivered not less than ten nor more than fifty days before the date thereof, either personally or by mail, by or at the direction of the president, the secretary or other person calling the meeting, *to each shareholder of record entitled to vote* at such meeting.

(Defs.' Br. in Opp'n Ex. B (emphasis added).)

44. Accordingly, Plaintiff has failed to establish a likelihood of success on the merits of his declaratory judgment claim against GII.

B. Irreparable Harm

45. Because the Court has found the Plaintiff has not established a reasonable likelihood of success as to his claim for declaratory relief against GII, the Court need not address the issue of whether Plaintiff has shown the existence of irreparable harm if the Court does not issue injunctive relief as to that company. Instead, the Court need only address the irreparable harm element as it relates to GRI.

46. Plaintiff asserts that a shareholder's right to attend a shareholders' meeting is essential in that it provides a mechanism for ascertaining the financial condition of the company and the value of his investment.

47. GRI makes two arguments in support of its contention that Plaintiff has failed to satisfy his burden of showing irreparable harm.

48. First, GRI contends that Plaintiff does not need to exercise any right he may be found to possess regarding attendance at the company's shareholders' meetings because he has already achieved his desired goal of obtaining information about GRI's financial condition and the value of his shares through his inspection demands.

49. However, GRI cites to no legal authority to support the proposition that a shareholder's ability to inspect corporate records is a valid substitute for attending the company's shareholders' meetings. Nor does such a contention comport with logic. The Court therefore rejects this argument.

50. Second, GRI asserts that because Plaintiff has delayed in bringing the PI Motion, he necessarily cannot show that any harm he suffers in the absence of immediate injunctive relief would be irreparable.

51. In support of this argument, GRI points to the fact that Plaintiff was first informed that he would no longer be allowed to attend GRI's shareholders' meetings in 2010—approximately fourteen years before this action was filed. GRI argues that because Plaintiff has not attended shareholder meetings for the past fourteen years, he will not suffer irreparable harm if he is denied the right to attend the upcoming meeting as well.

52. However, this argument misunderstands the nature of the legal right at issue.

53. As Plaintiff asserts, each shareholders' meeting is an opportunity for a shareholder to obtain important information about the company. For purposes of showing irreparable harm regarding the upcoming meeting for this calendar year, it is irrelevant whether Plaintiff has or has not attended past annual meetings. Indeed, adoption of such an argument would have the perverse result of rewarding GRI for denying a right seemingly possessed by Plaintiff for the past fourteen years.

54. Moreover, the denial of his right to attend is not the sort of harm that can be remedied at law. Once denied the right to attend *this* meeting, that right will be gone forever. Attendance at next year's meeting would not make up for the harm suffered. *See generally First Citizens BancShares, Inc. v. KS Bancorp, Inc.*, 2018 NCBC LEXIS 23, at *29 (N.C. Super. Ct. Mar. 21, 2018) (finding irreparable harm

where "it would be extraordinarily difficult, if not impossible, to restore [plaintiff] to its prior position or to calculate an amount of damages that would compensate it for its injuries").[2]

55. For these reasons, the Court finds that Plaintiff has demonstrated that he will suffer irreparable harm if he is denied the right to attend GRI's upcoming shareholders' meetings.

C. Balancing of the Equities

56. A balancing of the respective equities likewise favors the issuance of the requested preliminary injunction against GRI.

57. The Court, in exercising its discretion on a preliminary injunction motion, "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 the injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86 (1978).

58. Here, as discussed above, a denial of Plaintiff's right to attend GRI's shareholders' meetings during the pendency of this litigation would irreparably deprive him of a right that he appears entitled to possess as a shareholder of GRI.

59. GRI argues that it would suffer "substantial and extreme harm" if a preliminary injunction order is issued. (Defs.' Br. in Opp'n, at 6.) The Court disagrees.

[2] Indeed, at the 16 December hearing, counsel for GRI conceded that a shareholder could be irreparably harmed by wrongfully being denied the right to attend a shareholders' meeting.

60. First, GRI asserts that it is concerned that if allowed to attend its shareholders' meeting, Plaintiff might act inappropriately or otherwise seek to disrupt the meeting. However, the Court does not accept this argument.

61. GRI has failed to offer more than mere conclusory assertions that Plaintiff has been disruptive at past shareholders' meetings or that there is a likelihood that he would engage in such conduct in the future. (Gordon Aff. ¶¶ 3, 11.)

62. Furthermore, Plaintiff has made clear that he would be satisfied with the issuance of a preliminary injunction order allowing him to attend by proxy in lieu of his personal attendance.

63. Second, GRI argues that the issuance of a preliminary injunction would prevent GRI from complying with its statutory duties under N.C.G.S. § 55-7-01, which mandates that "[a] corporation shall hold a meeting of shareholders annually[.]" N.C.G.S. § 55-7-01(a).

64. This argument is also unpersuasive. The PI Motion does not seek to categorically bar GRI from holding its annual shareholders' meeting. Rather, it simply seeks an injunction preventing GRI from doing so "unless [it] (1) provide[s] notice to Plaintiff and (2) allow[s] Plaintiff to attend via proxy." (PI Mot., at 1 (emphasis added).)

65. This language makes clear that GRI is free to conduct its planned shareholders' meetings and comply with the statutory requirements of N.C.G.S. § 55-7-01 *as long as* it provides notice to Plaintiff and allows him the opportunity to attend by proxy. Therefore, GRI's concern as to this issue is meritless.

66. Finally, GRI expresses concern that, if allowed to attend its shareholders' meetings, Plaintiff would "disseminate confidential documents to others, including the Gordon families' synagogue congregation, as he ha[s] done in the past." (Gordon Aff. ¶ 8.)

67. However, GRI undermines its own argument by admitting that the Companies "required that [Plaintiff] sign a Confidentiality Agreement" to prevent this exact type of harm. (Gordon Aff. ¶ 8; Pl.'s Aff. ¶ 13.) Such an agreement provides GRI with protection from—and a contractual remedy for—the exact harm it is concerned about.

68. Therefore, the Court finds that a balancing of the equities weighs in favor of granting the PI Motion as to GRI.

D. Bond

69. Although Rule 65(c) of the North Carolina Rules of Civil Procedure normally requires the posting of a bond upon the issuance of a preliminary injunction, a trial court possesses discretion to dispense with this requirement. *See Bolier & Co., LLC v. Decca Furniture (USA), Inc.*, 2015 NCBC LEXIS 55, at *32 (N.C. Super. Ct. May 26, 2015) (noting that under North Carolina law, "the trial court has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the party no material damage, and where the applicant for equitable relief has considerable assets and is able to respond in damages if the party does suffer damages by reason of a wrongful injunction" (cleaned up)); *see also Wake Cnty. Merz Pharms., LLC v. Thomas*, 2024 N.C. Super. LEXIS 47,

at *2 (N.C. Super. Ct. May 20, 2024) (declining to impose a bond under Rule 65(c) of the North Carolina Rules of Civil Procedure where the "[d]efendant [did] not request[] that [p]laintiff be required to post such a bond").[3]

70. Given the unique circumstances of this case, the Court determines, in its discretion, that no need for the posting of a bond exists.

CONCLUSION

THEREFORE, **THE COURT**, in its discretion, **CONCLUDES** that Plaintiff's Motion for Preliminary Injunction is **GRANTED IN PART** and **DENIED IN PART**, and **ORDERS** as follows:

1. Defendant GRI is hereby **ENJOINED** during the pendency of this litigation from holding any shareholders' meetings unless:
    a. GRI provides notice to Plaintiff at least ten (10)[4] days prior to the scheduled meeting; and
    b. GRI permits Plaintiff to attend said shareholders' meetings either personally or via proxy.
2. In all other respects, the PI Motion is **DENIED**.

SO ORDERED, this the 18th day of December, 2024.

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

[3] The Court notes that neither in its response brief nor at the 16 December hearing did the Companies request or argue for the imposition of a bond under Rule 65(c).

[4] A shorter period of advance notice shall be permissible *if agreed to by Plaintiff*.