

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
11-CVS-15111

LEGALZOOM.COM, INC.)
)
Plaintiff/Petitioner,)
)
v.)
)
THE NORTH CAROLINA STATE)
BAR,)
)
Defendant/Respondent)
)

**REPLY AND CLARIFICATION
OF ISSUES NEWLY RAISED
BY DEFENDANT'S RESPONSE
TO PLAINTIFF'S OPPOSITION TO
NOTICE OF DESIGNATION
AND MOTION TO REMAND**

NOW COMES Plaintiff LegalZoom.com, Inc., pursuant to N.C. Gen. Stat. § 7A-45.4(e) and (f), and Rule 3.3 of the North Carolina Business Court. In support of its December 2, 2011 Opposition to Notice of Designation and Motion to Remand, and in response to Defendant's Response to Plaintiff's Opposition to Notice of Designation and Motion to Remand, Plaintiff respectfully submits this Reply and Clarification of Issues Newly Raised by Defendant's Response to Plaintiff's Opposition to Notice of Designation and Motion to Remand.

INTRODUCTION

On December 27, 2011, the defendant, the North Carolina State Bar (the "State Bar") filed its Response to Plaintiff LegalZoom.com, Inc.'s ("LegalZoom") December 2, 2011 Opposition to Notice of Designation and Motion to Remand (the "Response to Opposition"). Plaintiff notes that, in the course of its arguments in support of designation of this case as a mandatory complex business case, the State Bar incorrectly interprets N.C. Gen. Stat. § 7A-

45.4(e) as providing the only and exclusive statutory method of opposition to a Notice of Designation filed under N.C. Gen. Stat. § 7A-45.4(d).

Further, the State Bar, in its Response to Opposition, intimated that LegalZoom had incorrectly filed an initial preliminary opposition to the State Bar's request to have this case designated as a mandatory complex business case. See State Bar's Response to Opposition at 7 ("Despite this statutorily-prescribed procedural scheme, . . . before the Chief Justice had ruled preliminarily on the designation of this case as a mandatory complex business case, LegalZoom filed a pleading directed to the Chief Justice . . ."); *id.* at 8 ("LegalZoom filed its Second Opposition with [the North Carolina Business Court] rather than with the Chief Justice.").

Ultimately, the Chief Justice of the North Carolina Supreme Court (the "Chief Justice") granted preliminary approval on the designation of this case as a mandatory complex business case by Designation Order date November 7, 2011. By Assignment Order dated November 7, 2011, Chief Special Superior Court Judge for Complex Business Cases John R. Jolly, Jr. assigned this case to Judge James L. Gale, but retained authority to receive objections to North Carolina Business Court ("Business Court") designation. ("Judge Jolly's November 7, 2011 Assignment Order" or the "November 7, 2011 Assignment Order").

An analysis of the procedural posture of this case thus far with specific reference to the applicable subsections of N.C. Gen. Stat. § 7A-45.4 will serve to clarify and underscore the fallacy of both the State Bar's interpretation of N.C. Gen. Stat. § 7A-45.4 and its assertion that LegalZoom failed somehow to follow the statutorily-prescribed method of opposition to designation. In addition, the State Bar, in its Response to Opposition, has made groundless and presumptive mischaracterizations of LegalZoom's motivation in opposing

designation of this case as a mandatory complex business case, which will be detailed below and are without any factual support.

THE PROCEDURAL POSTURE OF THE CASE WITH RESPECT TO ITS DESIGNATION AS A MANDATORY COMPLEX BUSINESS CASE

Pursuant to N.C. Gen. Stat. § 7A-45.4(d), on October 31, 2011 the State Bar filed a Notice of Designation of Action as Mandatory Complex Business Case with the Wake County Superior Court (“Notice of Designation”). The State Bar also concurrently served this pleading on counsel for LegalZoom and emailed it to the Chief Justice and the Business Court. As per the statutory requirement set forth by N.C. Gen. Stat. § 7A-45.4(f), the Chief Justice was then authorized to make a “preliminary decision” on the merits of the State Bar’s Notice of Designation following its filing.

In anticipation of and specifically with regard to the Chief Justice’s authority pursuant to N.C. Gen. Stat. § 7A-45.4(f) to render a preliminary decision as to whether this case could properly be approved as a mandatory complex business case, on November 2, 2011 LegalZoom filed a preemptive preliminary objection entitled Plaintiff’s Opposition to Notice of Designation (“Preliminary Opposition”). The Preliminary Opposition requested that the Chief Justice deny preliminary approval of the State Bar’s Notice of Designation. This filing was made, and so stated, specifically pursuant to N.C. Gen. Stat. § 7A-45.4(f). Indeed, LegalZoom made patently clear in its Preliminary Opposition the procedural foundation for its opposition, declaring conspicuously in the pleading that it was “seeking that the Court assert its discretion to deny preliminary approval under [N.C. Gen. Stat. § 7A-45.4(f)] so that the parties can proceed with litigation pursuant to the previous Order

entered by the Chief Justice on October 10, 2011 designating this case as ‘exceptional.’ ” Preliminary Opposition at note 1. The State Bar opposed LegalZoom’s Preliminary Opposition on November 3, 2011 by filing its Response to Plaintiff’s Opposition to Notice of Designation (“Response to Preliminary Opposition”).

On November 7, 2011, by Designation Order the Chief Justice granted preliminary approval of the State Bar’s Notice of Designation in accordance with N.C. Gen. Stat. § 7A-45.4(f) and designated this case as a mandatory complex business case in accordance with N.C. Gen. Stat. § 7A-45.4(b). Also on November 7, 2011, Judge Jolly entered the November 7, 2011 Assignment Order assigning this case to the Honorable James L. Gale, Special Superior Court Judge for Complex Business Cases. However, in his November 7, 2011 Assignment Order Judge Jolly stated that “[o]bjections to Business Court designation should be addressed to [him].”

Following the Chief Justice’s preliminary approval of the State Bar’s Notice of Designation and Designation Order, and the assignment of this case to Judge Gale, LegalZoom exercised its statutory right under N.C. Gen. Stat. § 7A-45.4(e) to “file and serve an opposition to the designation of the action as a mandatory business case.” On December 2, 2011, LegalZoom filed its Opposition to Notice of Designation and Motion to Remand (the “Opposition”) with Judge Jolly of the Business Court, per his November 7, 2011 Assignment Order. The State Bar responded to LegalZoom’s Opposition on December 27, 2011 with its Response to Opposition (confusingly entitled the “Response of the North Carolina State Bar to LegalZoom’s Opposition to Notice of Designation and Motion to Remand”).

Thus, the parties are currently awaiting a decision by Judge Jolly as to whether this case is properly designated as a mandatory complex business case. After Judge Jolly's ruling, the parties have the option to pursue their further right under N.C. Gen. Stat. § 7A-45.4(e) to appeal Judge Jolly's decision to the Chief Justice.

LEGALZOOM'S RESPONSE TO THE STATE BAR'S ASSERTIONS

Counsel for defendant State Bar, in its Response to Opposition, made a series of unfounded, presumptive and incorrect characterizations and assertions against LegalZoom, both in regard to LegalZoom's procedural methods of opposing the State Bar's initial Notice of Designation and the general nature of LegalZoom's opposition to the Business Court designation. First, the State Bar has asserted that LegalZoom's Preliminary Opposition, filed directly with the Chief Justice regarding her preliminary decision, was premature and not permitted by any statute or rule. Second, the State Bar has asserted that LegalZoom should have filed its subsequent Opposition with the Chief Justice, rather than with Judge Jolly. Third, Counsel for the State Bar, in its Response to Opposition, presumptively and negatively characterizes LegalZoom's motivation in opposing designation of this case as a mandatory complex business case.

a. The State Bar's Assertion that LegalZoom's Preliminary Opposition was Premature

In its Response to Opposition, the State Bar intimates that LegalZoom followed an incorrect procedure in filing its Preliminary Opposition before the Chief Justice had reached her preliminary approval decision through its assertion that "on November 2, 2011, before the Chief Justice had ruled preliminarily on the designation of this case as a mandatory complex business case, LegalZoom filed a pleading directed to the Chief Justice."

Response to Opposition at 7 (emphasis added). This assertion is substantially the same as the State Bar's argument in its Response to Preliminary Opposition that LegalZoom's Preliminary Opposition was "premature and . . . not permitted by any statute, rule of procedure or rule of court." Response to Preliminary Opposition at 2. Both of these assertions, however, are premised on fundamental misunderstandings of N.C. Gen. Stat. § 7A-45.4.

The State Bar's assertions in this regard appear to be premised on a belief that N.C. Gen. Stat. § 7A-45.4(e) provides the exclusive means of opposing a Notice of Designation filed pursuant to N.C. Gen. Stat. § 7A-45.4(d). A proper reading of N.C. Gen. Stat. § 7A-45.4, however, reveals no support for such a narrow reading of the statute. N.C. Gen. Stat. § 7A-45.4 does make clear however, that the statutorily-prescribed method of opposition detailed in subsection (e) is proper *after* preliminary approval by the Chief Justice and assignment to the Business Court judge. *See* N.C. Gen. Stat. § 7A-45.4(e) and (f). Indeed, given the statutory requirement of filing the opposition with the Business Court, it necessarily follows that the method of opposition detailed under N.C. Gen. Stat. § 7A-45.4(e) is not applicable until after the preliminary approval by the Chief Justice has been made and the case has been designated to the Business Court and a Business Court Judge assigned.

N.C. Gen. Stat. § 7A-45.4 does not bar the filing of such an objection to a Notice of Designation directly with the Chief Justice prior to her rendering a preliminary approval. In fact, N.C. Gen. Stat. § 7A-45.4 is silent as to whether such an objection can be filed. Further, common sense dictates no reason why such a pleading would be impermissible. In

the interests of fairness to the parties and judicial economy, and given the voluminous caseload of the Business Court, a case clearly not properly designated as a mandatory complex business case should remain in the court in which it was filed, and the Chief Justice should be made aware of all facts as necessary to render her preliminary decision. Contraintuitively, the State Bar appears to believe that N.C. Gen. Stat. § 7A-45.4's statutory silence on the right to oppose preliminary approval by the Chief Justice is indicative of its impermissibility. However, one would note that despite the statute's silence on the permissibility or impermissibility of filing a motion in response to an opposition to designation, the State Bar has filed two such pleadings.

b. The State Bar's Assertion that LegalZoom's Opposition Should Have Been Filed with the Chief Justice

The State Bar also asserts in its Response to Opposition that LegalZoom should have filed its Opposition with the Chief Justice, rather than with Judge Jolly. Again, this assertion by the State Bar is premised on its fundamental misunderstanding of: N.C. Gen. Stat. § 7A-45.4; the current procedural posture of this case; and Judge Jolly's November 7, 2011 Assignment Order.

As detailed above, LegalZoom's Preliminary Opposition was filed pursuant to N.C. Gen. Stat. § 7A-45.4(f). Following preliminary approval by the Chief Justice and designation of this case to the Business Court, LegalZoom exercised its statutory right pursuant to N.C. Gen. Stat. § 7A-45.4(e) to "file and serve an opposition to the designation of the action as a mandatory business case." As N.C. Gen. Stat. § 7A-45.4 and Judge Jolly's November 7, 2011 Assignment Order make clear, this filing must be made to the Business Court. The State Bar

seems to erroneously believe that LegalZoom's Opposition was supposed to have been an appeal pursuant to N.C. Gen. Stat. § 7A-45.4(e), which would be properly filed with the Chief Justice. *See* State Bar's Response to Opposition, p. 8, quoted at p. 2 *infra*. Indeed, both LegalZoom and the State Bar continue to have the statutory right to file an appeal with the Chief Justice following a ruling by Judge Jolly on the State Bar's Notice of Designation pursuant to N.C. Gen. Stat. § 7A-45.4(e).

c. The State Bar's Mischaracterization of LegalZoom's Opposition to and Motivation to Oppose Designation of This Case as a Mandatory Complex Business Case

In several instances in its Response to Opposition, the State Bar irresponsibly and presumptively mischaracterizes LegalZoom's motivation in opposing this case's designation as a mandatory complex business case. Specifically, the State Bar asserts that LegalZoom has become "focused on trying to avoid having this case heard in the Business Court," Response to Opposition at 10, and that "for some reason, LegalZoom does not want to have this case adjudicated in the Business Court. *Id.* at 16.

These assertions by the State Bar are incorrect, and made with reckless disregard to the truth of the matter asserted. Nothing in any of LegalZoom's filings to date, nor any correspondence between LegalZoom and the State Bar, provide any basis of fact for the State Bar's grossly negligent, if not intentionally wrong, assertion. LegalZoom maintains it has the right to exercise its statutory rights as a party to this action pursuant to N.C. Gen. Stat. § 7A-45.4, and in particular, its unfettered right to seek this Court's judgment as to the proper designation for this case and to advocate in good faith its position thereto. Further, LegalZoom, as party Plaintiff to this action, recognizes the right of the State Bar to assert its

rights as a party to this action pursuant to N.C. Gen. Stat. § 7A-45.4, and to seek this Court's judgment as to the proper designation of this case, all without (improperly) impugning or questioning the State Bar's motives in doing so. LegalZoom has respectfully honored and will continue to respectfully honor those rights.

CONCLUSION

LegalZoom respectfully submits to this honorable Court that the decision as to the matters before it are properly in its hands, and that whatever its judgment might be, LegalZoom will respectfully and in full compliance with this Court's judgment, proceed accordingly.

This the 9th day of January, 2012.

COUNSEL:

/s/ Alfred P. Carlton, Jr.

Alfred P. Carlton, Jr.
N.C. State Bar No. 6544
ALLEN, PINNIX & NICHOLS, P.A.
Attorney for Plaintiff
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: acarlton@allen-pinnix.com

CO-COUNSEL:

/s/ R. Daniel Boyce

R. Daniel Boyce
N.C. State Bar No. 12329
Attorney for Plaintiff
Post Office Drawer 30188
Raleigh, North Carolina 27622
Telephone: 919-755-1800
Facsimile: 919-833-7536
Email: DBoyce@nexsenpruet.com

CO-COUNSEL:

/s/ Eugene Boyce

Eugene Boyce
N.C. State Bar No. 0435
NEXSEN PRUET, PLLC
Attorney for Plaintiff
Post Office Drawer 30188
Raleigh, North Carolina 27622
Telephone: 919-755-1800
Facsimile: 919-833-7536
Email: GBoyce@nexsenpruet.com

CERTIFICATE OF SERVICE

I, the undersigned do hereby certify that I have this day served the foregoing **REPLY AND CLARIFICATION OF ISSUES NEWLY RAISED BY DEFENDANT'S RESPONSE TO PLAINTIFF'S OPPOSITION TO NOTICE OF DESIGNATION AND MOTION TO REMAND** by depositing a copy of the same in the United States mail, First Class, Certified Mail, Return Receipt Requested, postage prepaid, addressed as follows:

I. Faison Hicks, Esq.
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

This the 9th of January, 2012.

/s/ Alfred P. Carlton, Jr.
Alfred P. Carlton, Jr.