

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 1071

BRUCE ALLCORN, LEE BOST, ROGER)
CANDO, BILL CHERRY, JAY DECHESERE,)
TOMMY KING, and JOHN TINNEY,)
Plaintiffs,)
v.)
BRADLEY CREEK BOATOMINIUM, INC.,)
Defendants.)

AMENDED ORDER

THIS MATTER came before the Court on upon Plaintiffs' Verified Application for Court-Ordered Inspection of Corporate Records ("Motion for Inspection") and Defendant's Motion for Temporary Restraining Order ("Motion for TRO," together with Motion for Inspection, "Motions"). The Court held a hearing on these Motions on April 20, 2015.

THE COURT, having considered the pleadings, the Motions, the briefs in support of and opposition to the Motions, arguments of counsel, and other appropriate matters of record, finds, in its discretion, that the Motion to Inspect should be GRANTED, and the Motion for TRO should be DENIED, for the reasons stated herein

BACKGROUND

1. On March 30, 2015, Plaintiffs initiated this action by filing their Motion for Inspection pursuant to N.C. Gen. Stat. § 55A-16-04 (hereinafter, references to the General Statutes will be to "G.S"). The sole relief request in Plaintiffs' Motion for Inspection is that the Court order the production of Defendant's latest financial statements and minutes from meetings of Defendant's Board of Directors ("Board") from January 1, 2014 to the present.

2. On April 13, 2015, Defendant Bradley Creek Boatominium, Inc. ("Defendant" or "Marina") filed its Answer, Counterclaim, and Motion for Temporary Restraining Order and Preliminary and Permanent Injunction ("Answer and Counterclaim"). In the Answer and

Counterclaim, Defendant asserts seven claims for relief, including: Claim One (Corporate Disparagement); Claim Two (Tortious Interference with Business Relations); Claim Three (Tortious Interference with Prospective Business Advantage); Claim Four (Civil Conspiracy); Claim Five (Abuse of Process); Claim Six (Punitive Damages); and Claim Seven (Motion for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction).

3. On April 16, 2015, the Court noticed for hearing the Motion to Inspect and the Motion for TRO and a hearing on the Motions was held on April 20, 2015. The Motions have been fully briefed and argued, and are ripe for determination.¹

4. Defendant is a nonprofit corporation incorporated under Chapter 55A of the North Carolina General Statutes. Defendant operates a recreational boating marina in Wilmington, New Hanover County, North Carolina. Plaintiffs are each members of the Defendant and each own a boat slip at the Marina.² The Board consists of seven members of Defendant, all of whom are elected by Defendant's membership.

5. Beginning, at least, in early 2014, Plaintiffs began to communicate with the Marina membership to express their positions concerning the management of the Marina by the current Board. Among the communication sent by, or on behalf of, Plaintiffs was a letter dated May 12, 2014 ("May 12 Letter").³ In the May 12 Letter, Plaintiffs make a number of statements concerning the Board's management of the Marina and expressed concern over the Marina's financial condition. That letter indicated that the Marina has "accumulated approximately \$1,000,000 in losses over the past several years, and the current cash position

¹ On April 8, 2015, the parties were heard in New Hanover County before the Honorable Gary E. Trawick. At that hearing, Judge Trawick requested that the parties meet and attempt to resolve the issue of Plaintiffs' Motion for Inspection. In the event the parties could not reach agreement, they were to return to court on Thursday, April 16. Defendant filed its Notice of Designation to the Business Court on April 13, before the parties reached any agreement or appeared again before Judge Trawick.

² Motion for Inspection ¶ 1, Answer and Counterclaim p. 10, ¶¶ 2-3.

³ Cherry Aff. Ex. 1.

[of the Marina] is borrowed money."⁴ The May 12 Letter also indicated that the Board was improperly cast certain votes held by Defendant and that the Board had engaged in a conflict-of-interest transaction by hiring, without competitive bidding, the Board President to serve as general contractor on certain construction projects at the Marina.⁵

6. Following the circulation of the May 12 Letter to the Marina's membership, counsel for Defendant responded by sending a letter to the signatories of the May 12 Letter. This response refuted the factual contentions contained in the May 12 Letter, characterized that letter as defamatory, and threatened litigation should any individual make "any further false and defamatory statements."⁶

7. Following the Board's response, counsel for both parties continued to exchange correspondence regarding the dispute between Plaintiffs and the Board.⁷ This correspondence included a July 22, 2014, request for corporate records in which Plaintiffs sought, through counsel, a list of the Marina's members and the votes each is entitled to cast, and copies of certain meetings of members and the Board.⁸ After the Board refused, it appears that Plaintiffs abandoned this request.⁹ Also during this period, Plaintiffs began to circulate letters to the membership wherein Plaintiffs again voiced concerns regarding the Marina's management, albeit in a much less confrontational tone than the May 12 Letter, and solicited proxies from the membership in anticipation of the upcoming annual member meeting.¹⁰

⁴ *Id.*

⁵ *Id.*

⁶ Ans. and Counterclaim Ex. A.

⁷ *See* Memo. Supp. Def.'s Mot. TRO, Ex. C-D.

⁸ *Id.* Ex. C.

⁹ Not to be outdone by Plaintiffs' questionable statements to the membership, after receiving Plaintiffs' request for a list of the Marina's members, Defendant published a July 28, 2014, newsletter wherein Defendant characterized this request as one that would result in the membership's "personal investment information being released" and implied that the members could opt out of this request despite Plaintiffs' qualified right to this information under G.S. § 55A-16-02(b)(3). *See* Mot. Inspection Ex. 2.

¹⁰ Memo. Supp. Def.'s Mot. TRO Ex. G-H.

8. The Marina's 2015 annual meeting was originally scheduled for February 21, 2015. Prior to this meeting, the Board circulated an agenda which included "Confirm & Ratify the actions of the Board of Directors for 2014" as an item for consideration and vote by the membership.¹¹ Following a February 19, 2015, letter from counsel for Plaintiffs to counsel for Defendant concerning a number of issues related to the annual meeting, that meeting was postponed.¹²

9. The annual meeting has been scheduled for Saturday, April 25, 2015. In anticipation of the rescheduled annual meeting, on March 13, 2015, Plaintiffs requested, pursuant to G.S. Chapter 55A, Article 16, the Marina's most recent financial statement and copies of the minutes of Defendant's 2014 Board meetings. Defendant refused this request on the grounds that the financial statements for 2014 were not yet finalized and that the request for Board minutes was not made in good faith and for a proper purpose as required by Chapter 55A.

10. After Defendant's refusal to provide the requested records, Plaintiffs filed their Motion for Inspection. Shortly thereafter, Defendant filed its Answer for Counterclaim containing its Motion for TRO. The Motion to TRO seeks to enjoin Plaintiffs from "engaging in or disseminating any defamatory or otherwise false, disparaging or misleading communications about [Defendant's] financial health and/or its [Board] or management to any person or entity."¹³

¹¹ Motion for Inspection, Ex. 1.

¹² *Id.* Ex. 3-4.

¹³ Ans. and Countercl. p. 29, ¶ 100.

DISCUSSION

Motion to Inspect

11. In the Motion for Inspection, Plaintiffs seek an order pursuant to G.S. § 55A-16-04 requiring Defendant to make available for inspection and copying Defendant's most recent financial statement and 2014 Board of Directors meeting minutes. Plaintiffs also seek an award of attorneys' fees pursuant to G.S. § 55A-16-04.

12. The parties are in agreement that, as members of the Defendant, Plaintiffs are entitled to inspect Defendant's financial statements, as a matter of right, upon appropriate request. G.S. §§ 55A-16-01(e)(5); 55-16-02(a); 55-16-20. Plaintiffs also are entitled to inspect and copy the written minutes of Defendant's Board of Directors meetings if (a) the members' demand is made in good faith and for a proper purpose, (b) the members describe this purpose for which they seek the minutes "with reasonable particularity," and (c) the records are directly connected to the proper purpose. G.S. §55A-16-02(c). Proper purposes include, *inter alia*, to determine stock value, determine the financial condition of the corporation, or to investigate the conduct of management. *Carter v. Wilson Construction Co.*, 83 N.C. App 61, 65 (1986). A member enjoys a "presumption of good faith" that the corporation must overcome and "the mere possibility that a shareholder may abuse his may abuse his right to gain access to corporate information will not . . . justify a denial of a legal right." *Id.* at 65, 66.

13. Plaintiffs first requested, as discussed above, copies of minutes of Board meetings in July 2014. After apparently abandoning this initial request, on March 13, 2015, Plaintiffs' counsel sent Defendant's counsel a letter that requested the "copies of all board meeting minutes from January 1, 2014 to present" and "copies of the financial statements for

2014."¹⁴ The letter stated that the meeting minutes were requested "for the purpose of allowing [Plaintiffs] to determine whether to ratify the Board's actions through the date of the membership meeting."¹⁵ Defendant, conceding that the request for meeting minutes was for a proper purpose, has refused Plaintiffs' requests for the minutes of the directors meetings on the grounds that Plaintiffs have not requested the minutes in good faith.¹⁶ Even considering the discord between Plaintiffs and the Board, it appears to the Court that, given the close relationship between the agenda for the annual meeting and Plaintiffs' request, Defendant has not introduced sufficient evidence to rebut the presumption that Plaintiffs' request was made in good faith.

14. As to the most recent financial statements, Defendant contends that it has not produced the 2014 financial statements because they are not yet final. Defendant was prepared, however, to distribute the 2014 financial statements to members at the cancelled February 21, 2015, annual meeting, and Defendant has admitted that the 2014 financial statement certainly is complete enough to provide to Plaintiffs at this point in time.

15. The Court concludes that Plaintiffs have established that they are entitled to the requested financial statements as a matter of right, and have established that the minutes of Plaintiff's 2014 Board of Directors meetings have been requested in good faith and for a proper purpose. Accordingly, Plaintiff's Motion for Inspection should be GRANTED.

Motion for TRO

16. In its Counterclaim, Defendant requests that the Court issue a TRO, and preliminary and permanent injunctions, prohibiting Plaintiffs from "engaging in or

¹⁴ Mot. Inspection Ex. 6.

¹⁵ *Id.*

¹⁶ At the hearing, Defendant's counsel conceded that Plaintiffs had a proper purpose in requesting the board minutes given Defendant's intention to ask members to approve 2014 board action at the 2015 membership meeting.

disseminating any defamatory or otherwise false, disparaging or misleading communications about [Defendant's] financial health and/or its Board of Directors or management to any person or entity." In its Memorandum in Support of Motion for TRO, Defendant expands its requested relief to include an order:

1. Prohibiting Plaintiffs from distributing copies of the records or alleged summaries of the records to any person or entity, whether [Plaintiff] member or not;
2. Prohibiting Plaintiffs from sending any incomplete, misleading and defamatory communications to [Defendant's] membership as a whole regarding Plaintiffs opinions based on the records produced;
3. Prohibiting Plaintiffs' interpretation of the records produced in a manner that is misleading, incomplete and defamatory;
4. Prohibiting Plaintiffs from harassing [Plaintiff's] employees, workers and Board members[.]

17. A temporary restraining order ("TRO") may be granted if "it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition" N.C. R. Civ. P. 65(b); *see also Taylor v. Centura Bank*, 124 N.C. App. 661, 663 (1996) ("All TROs must be obtained pursuant to N.C. R. Civ. P. 65."). The purpose of an injunction "is ordinarily to preserve the *status quo* . . . [and i]ts issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400 (1983) (quoting *State v. School*, 299 N.C. 351, 357–58 (1980)). Moreover, a temporary restraining order 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, 269 S.E.2d 646, 655 (1980); *see also Register v. Griffin*, 6 N.C. App. 572, 575 (1969) ("The primary purpose of a temporary restraining order is usually to meet an emergency when it appears that any delay would materially affect the rights of a plaintiff."). Like a preliminary injunction, a

temporary restraining order is an extraordinary remedy. *See, e.g., Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977) ("a preliminary injunction . . . is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation"); *Leonard E. Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 76 (1984) (observing that a TRO has been called an "extraordinary privilege").

18. Assuming, for purposes of the Motion for TRO only, that Defendant has established a likelihood of success on at least one of its claims, the Court concludes Defendant has not established that it will suffer any irreparable harm if a TRO does not issue. To the contrary, Defendant has alleged several counterclaims under which it can recover damages from Plaintiffs for both past and future defamatory statements.¹⁷ *See Jolliff v. Winslow*, 24 N.C. App. 107, 108 (1974) (providing that a temporary restraining order "is entered only upon a showing of immediate and irreparable injury, loss, or damages").

19. In addition, the Court must balance the equities, and a preliminary injunction "should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending." *Id.*; *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 780 (2000) (noting that a court should weigh "the advantages and disadvantages to the parties" in deciding whether to issue a preliminary injunction). Particularly significant in this case is that Defendant's requested relief would require the Court to restrain Plaintiffs' rights to communicate with the Marina's membership

¹⁷ The Court is skeptical as to whether Defendant has established that Plaintiff made any statements following the May 12, 2014, letter that would rise to the level of defamation. See Ans. and Counterclaims ¶ 40 and Memo. Supp. Def.'s Mot. TRO Ex. J. In other words, Defendant has not provided compelling evidence or even allegations that Plaintiffs have engaged in a continuing campaign of defamatory behavior.

immediately prior to a vigorously contested board of director's election. While the Court recognizes that genuinely defamatory speech does not have absolute constitutional protection, the relief requested by Defendants goes far beyond protecting it against defamatory statements or communications by Plaintiffs and, effectively, asks the Court to insert itself into Defendant's upcoming Board elections as a referee. Defendant is now requesting that the Court prohibit Plaintiffs from making "incomplete" and "misleading" communications, from "interpretation of the records produced" by Defendant, and from "harassing" Defendant's employees. Such a prohibition on Plaintiffs' conduct would be both overly broad and would not adequately apprise Plaintiffs of the conduct from which they were prohibited in engaging. In addition, as a practical matter, such an order would be nearly impossible to enforce. Accordingly, the equities of the particular circumstances in this case weigh in favor of denying the TRO.

20. Finally, in balancing the equities, the Court must consider Defendant's conduct. It is well established that "one who seeks equity must do equity . . . [and that] [t]he conduct of both parties must be weighed in the balance of equity." *Federal Point Yacht Club, Inc. v. Moore*, __ N.C. App. __, __, 758 S.E.2d 1, 13 (2014). Here, both parties have engaged in aggressive "campaign" behavior during this ongoing proxy fight, and Defendant has not been above mischaracterizing and misstating the facts to press their position. For example, in a July 28, 2014, newsletter issued by Defendant, Defendant characterized Plaintiffs' request for a membership list, including the number of votes held by each member, as somehow improper despite the fact that North Carolina law clearly entitles Plaintiff to this exact information upon request.¹⁸ G.S. § 55A-16-02(b)(3). Under the circumstances, the equities simply do not favor issuance of a temporary restraining order in this matter.

¹⁸ Mot. Inspection ¶ 13, Ex. 2.

21. For these reasons, the Court concludes that the Motion for TRO should be DENIED.

THEREFORE, IT IS ORDERED that:

22. Plaintiff's Motion for Inspection is GRANTED.

a. On or before 5:00 p.m. on Wednesday, April 22, 2015, Defendant shall produce to Plaintiffs the Marina's financial statements for 2014, in whatever form Defendant currently possesses those statements.¹⁹

b. On or before 5:00 p.m. on Tuesday, April 28, 2015, counsel for Plaintiff shall file with the Court an affidavit specifying the reasonable costs, including attorneys' fees, sought in conjunction with the Motion for Inspection pursuant to G.S. § 55A-16-04(b).

23. Defendant's Motion for Temporary Restraining Order is DENIED.

24. This Amended Order shall supersede the Order on Motion for Inspection and Motion for Temporary Restraining Order issued this date. That Order is hereby WITHDRAWN.

This the 21st day of April, 2015.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge
for Complex Business Cases

¹⁹ At the hearing held on April 20, 2015, Defendant produced to Plaintiffs' counsel the requested minutes from the Board meetings at issue. To the extent any Board minutes responsive to Plaintiffs' request have not been provided, Defendant shall produce those minutes on or before 5:00 p.m. on Wednesday, April 21, 2015.