

STATE OF NORTH CAROLINA  
COUNTY OF JOHNSTON

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
12 CVS 853

KREICH, INC., a North Carolina Corporation,  
Plaintiff,  
v.  
TARHEEL PUBLISHING COMPANY, LLC; NORTH TECH 120, LLC; JKH ENTERPRISES, INC., a North Carolina Corporation and JEFFREY K. HAYES,  
Defendants.

**ORDER ON MOTION FOR  
PRELIMINARY INJUNCTION AND  
MOTIONS TO DISMISS**

{1} THIS MATTER is before the court on Plaintiff's motion for preliminary injunction and Defendants' motions to dismiss pursuant to Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure ("Rule(s)"). For the reasons stated below, each motion is DENIED.

*Law Offices of H. M. Whitesides, Jr. P.A., by H. M. Whitesides, Jr.; Kirk, Kirk, Howell, Cutler & Thomas, LLP, by Joseph T. Howell, for Plaintiff.*

*Considine Law Firm, PLLC, by Francis A. Considine, for Defendants.*

Gale, Judge.

I. SUMMARY OF DECISION

{2} The pending motions require the Court to consider whether the allegations in the Plaintiff's Verified Complaint and Application for Preliminary Injunction ("Complaint") show the existence of a payment obligation, a breach of that obligation, and Plaintiff's entitlement to enforce a Pledge Agreement securing the obligation. The court holds that the allegations of the Complaint, when taken

as true, are sufficient to state a claim for relief but that Plaintiff has not met its burden of showing a probability of success on the claims.

## II. PROCEDURAL BACKGROUND

{3} Plaintiff Kreich, Inc. (“Kreich”) filed its Complaint in Johnston County Superior Court on March 13, 2012. Kreich seeks: (1) to recover for an alleged breach of contract by Defendant Tarheel Publishing, Inc. (“Tarheel”) for failure to make timely payments on a payment obligation; and (2) to enforce rights granted under the Membership Interest Pledge Agreement (“Pledge Agreement”), executed by Defendants JKH Enterprises, Inc. (“JKH”) and Jeffrey K. Hayes (“Hayes”), as pledgors.

{4} Kreich’s motion for preliminary injunction requests the court to prohibit Defendants from disposing of any assets of Tarheel and Defendant North Tech 120, LLC (“North Tech,” and, together with Tarheel, the “Companies”) and from destroying any records of the Companies. In addition, Kreich requests the court to order Defendants to: (1) allow Kreich full management authority in the Companies pursuant to the Pledge Agreement (although the Pledge Agreement actually grants this right to Reichenbach); (2) provide Kreich or its designee access to the Companies’ books, records, accounts, accounts receivable, accounts payable, and bank account records; and (3) permit a valuation of the Companies in the manner dictated in the Pledge Agreement. Such an order would temporarily implement some of the ancillary remedies for late payment granted by the Pledge Agreement.

{5} On May 12, 2012, Defendants filed motions to dismiss the Complaint pursuant to Rules 12(b)(2), 12(b)(6), and 12(b)(7). They further challenged the motion for preliminary injunction pursuant to Rule 65(a) for lack of notice.

{6} Kreich’s motion for a preliminary injunction and Defendants’ motions to dismiss were argued before Honorable William L. Pittman in Johnston County Superior Court on May 21, 2012. During the hearing, Judge Pittman denied Defendants’ motion to dismiss under Rule 12(b)(2) and rejected the challenge based

on Rule 65(a). He otherwise withheld ruling on the motions pending further submissions.

{7} After the hearing, but before Judge Pittman's further ruling, this action was designated a complex business case by Order of Chief Justice Sarah Parker dated June 1, 2012. The matter was assigned to the undersigned on June 6, 2012. Judge Pittman elected to defer ruling on the pending motions. The court has reviewed the transcript of argument before Judge Pittman and has received all matters submitted to him.

### III. FACTUAL BACKGROUND

{8} When considering a motion to dismiss under Rule 12(b)(6), the court treats the factual allegations of the complaint as true. *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010). Because the court has not found it necessary to consider additional evidence in making its determination on Kreich's motion for preliminary injunction, the following summary of facts includes only the allegations of the Complaint.

{9} Kreich is a North Carolina corporation with a principal place of business in Johnston County, North Carolina. (Compl. ¶ 1.) Reichenbach is Kreich's sole shareholder. (Compl. ¶ 9.) JKH is a North Carolina corporation with a principal place of business in Johnston County, North Carolina. (Compl. ¶ 4.) Hayes is JKH's sole shareholder. (Compl. ¶ 9.) Tarheel is a North Carolina limited liability company with a principal place of business in Johnston County, North Carolina. (Compl. ¶ 2.) From 1998 until 2006, Kreich and JKH owned Tarheel jointly. (Compl. ¶ 9, Ex. A.) Since 2006, JKH has been Tarheel's sole member. Tarheel is located in a building leased from North Tech. (Compl. ¶ 9.) North Tech is a North Carolina limited liability company with a principal place of business in Johnston County, North Carolina. (Compl. ¶ 3.) Hayes is North Tech's sole member.

{10} In July 2006, Tarheel redeemed Kreich's fifty percent membership interest (Compl. ¶ 10), leaving JKH as Tarheel's sole remaining member. The terms of the transaction were specified in the Membership Interest Redemption

Agreement (“Redemption Agreement”), which provided that Tarheel would pay Kreich \$1.4 million. (Compl. Ex. A § 1.) The Redemption Agreement also specified that the purchase price would be paid in installments pursuant to the terms of a promissory note executed on the same day as the Redemption Agreement, and that the parties would enter into a mutually agreeable pledge agreement. (Compl. Ex. A § 1.)

{11} Pursuant to the terms of the Redemption Agreement, Hayes, as Tarheel’s manager, executed a promissory note in the amount of \$1.4 million (the “Note”). (Compl. ¶¶ 11, 12, Ex. D.) In addition, JKH and Hayes executed the Pledge Agreement, which secured Tarheel’s obligation under the Redemption Agreement and the Note. (Compl. ¶¶ 15–16, Ex. C.) The Pledge Agreement provides that in the event of a default under the Redemption Agreement or the Note, Kreich will receive title to a certain percentage, calculated by the method described in the Pledge Agreement, of JKH’s membership interest in Tarheel and Hayes’ membership interest in North Tech. (Compl. Ex. C § 4.) Furthermore, the Pledge Agreement specifies that upon default, management of Tarheel and North Tech will be shared equally between Hayes and Reichenbach. (Compl. Ex. C § 5.) The Pledgors also agreed not to transfer or assign any of the Pledged Interests. (Compl. Ex. C § 7.)

{12} The parties subsequently modified the terms of the Redemption Agreement. First, Tarheel executed a second promissory note on September 10, 2007, which reduced Tarheel’s obligation to \$1,169,757.70 and reduced the amount of Tarheel’s monthly payments on the obligation. (Compl. ¶ 17.) Second, in July 2009, Reichenbach and Hayes agreed in an e-mail exchange to the terms specified in an unexecuted promissory note dated July 29, 2009, which reduced the amount of the payment obligation to \$989,775.18 and again reduced Tarheel’s monthly payments. (Compl. ¶ 18.)

{13} Under the terms of the unexecuted note, payments are due on the first day of each month, with a ten-day cure period. (Compl. Ex. F.) Each payment due between April 1, 2011 and December 1, 2011 was paid between 25 and 70 days late.

(See Compl. ¶ 20.) On January 12, 2012, when the payment due January 1, 2012 was still outstanding, Kreich alleges that it sent Hayes a letter demanding payment of the sum of \$826,718.65 (the remaining unpaid balance) within fifteen days of the date of the letter. (Compl. ¶ 21.) According to the Complaint, Tarheel currently owes Kreich the sum of \$806,849.54. (Compl. ¶ 22.)

### III. MOTION FOR PRELIMINARY INJUNCTION

{14} The court will issue a preliminary injunction only if: (1) the plaintiff has demonstrated a likelihood of success on the merits of his case; and (2) either the plaintiff is likely to sustain an irreparable loss or the injunction is necessary for the protection of the plaintiff's rights during the pendency of the litigation. *N. Iredell Neighbors for Rural Life v. Iredell Cnty.*, 196 N.C. App. 68, 78–79, 674 S.E.2d 436, 443 (2009) (quoting *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). An injunction can be prohibitory or mandatory, but because preliminary injunctions are generally intended to preserve the status quo during the course of the litigation, mandatory preliminary injunctions are disfavored. *Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 399–400, 474 S.E.2d 783, 787–88 (1996).

{15} Kreich has not at this time demonstrated a likelihood of success on the merits of its claim for enforcement of the Pledge Agreement sufficient to support a preliminary injunction temporarily granting it some of the remedies provided by the Pledge Agreement because sufficient questions have been raised as to whether Kreich waived its right to timely payments and alternatively whether it was entitled to accelerate and has, in fact, accelerated the entire balance of the obligation.

{16} The intention to waive a contractual right may be implied “from acts or conduct that naturally leads the other party to believe that the right has been intentionally given up.” *Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 172, 652 S.E.2d 365, 368 (2007) (quoting *Patterson v. Patterson*, 137 N.C. App. 653, 667, 529 S.E.2d 484, 492 (2000)). Therefore, a party that has consistently accepted late payments can only enforce timely payment by first giving notice to the other

party of his intention to enforce the terms of the agreement in the future. *Meehan v. Cable*, 135 N.C. App. 715, 719, 523 S.E.2d 419, 422 (1999). This rule can apply even when the contract contains a non-waiver provision, as a non-waiver provision can itself be waived or modified through the conduct of the parties. *See 42 E., LLC v. D.R. Horton, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 722 S.E.2d 1, 6-7 (2012).

{17} Here, a jury may ultimately find that Kreich's acceptance of late payments and its pattern of renegotiating the payment schedule constituted an implied waiver of Kreich's right to timely payment on the first of every month. Kreich has not alleged or otherwise demonstrated that Tarheel was given notice prior to January 1, 2012 that Kreich intended to enforce its right to timely payment. Therefore, Tarheel may not have breached the contract by making a late payment on the payment due January 1, 2012. It is also unclear whether Kreich's January 12, 2012 letter demanded the January 2012 payment or instead intended to accelerate the obligation because of past defaults.

{18} Because Kreich has not at this time demonstrated a likelihood of success on the merits of its claims, it is not necessary for the court to separately consider as to each component of the requested injunctive relief whether Kreich may suffer irreparable harm in the absence of a preliminary injunction. However, given the reluctance of North Carolina courts to issue mandatory preliminary injunctions, the court concludes that the harm Kreich alleges it will suffer is not sufficient to justify giving Reichenbach equal management rights with Hayes during the course of this litigation.

{19} Moreover, Kreich has not at this time shown evidence that it will suffer irreparable harm without an order prohibiting Defendants from disposing of Tarheel and North Tech's assets or destroying the Companies' documents. There is no evidence of an imminent transfer of assets of the Companies or destruction of documents at this time. Moreover, Kreich is protected by N.C. Gen. Stat. § 39-23.4, which prohibits the transfer of property that is fraudulent as to the transferor's creditors, and by the doctrine of spoliation of evidence. The court's case management procedure further directs the parties to provide for document

preservation where necessary. The court reserves the right to reconsider Kreich's requests should a preliminary injunction appear necessary at a later time.

{20} Kreich's motion for a preliminary injunction is DENIED.

### III. MOTIONS TO DISMISS

#### A. Motion to Dismiss based on Capstone Bank's Absence from this Litigation

{21} Defendants argue that Kreich is not the real party in interest in this case because Kreich has not produced an executed note evidencing Tarheel's payment obligation. Defendants appear to understand the Complaint to allege that a negotiable instrument meeting the requirements of Article 3 of the Uniform Commercial Code exists. Moreover, they infer from Kreich's failure to produce the instrument that some other party is the holder and would be entitled to enforce the instrument. Defendants suggest that Capstone Bank ("Capstone") may be the holder because Kreich has pledged its right to payments from Tarheel to Capstone as security for two loans from Capstone (the "Capstone Loans").

{22} However, reading the Complaint liberally under the standard of notice pleading, the Complaint can reasonably be read to allege that an e-mail exchange between Hayes and Reichenbach contained an "electronic signature" of the unsigned promissory note and that no executed note exists.

{23} Under this reading of the Complaint, Kreich has not alleged the existence of an Article 3 negotiable instrument. Negotiable instruments must be signed. N.C. Gen. Stat. §§ 25-3-103(a)(9), 25-3-104(a). And, although the Uniform Electronic Transactions Act ("UETA") allows for an electronic signature in place of a physical signature for certain documents, *see* N.C. Gen. Stat. § 66-317(d), the UETA does not apply to transactions governed by Article 3 of Chapter 25, *see* N.C. Gen. Stat. § 66-313(b)(2). Therefore, if Kreich's allegation is that the promissory note was "signed" electronically, no negotiable instrument exists.

{24} In the absence of a negotiable instrument, which can be enforced by its holder, no third party is entitled to enforce any contractual payment obligation Tarheel may have to Kreich unless Kreich's right to payment has been assigned or transferred.

{25} While this relates to matters outside the pleadings but addressed at the hearing, the pledge Kreich made to Capstone is only the right to payments and not an assignment of enforcement.

{26} Defendants also argue that even if Kreich is the real party in interest, this case should be dismissed under Rule 12(b)(7) for failure to join Capstone as a necessary party. “A ‘necessary’ party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party.” *Godette v. Godette*, 146 N.C. App. 737, 739, 554 S.E.2d 8, 9 (2001). Capstone is not a necessary party because a determination in this case will not determine Capstone’s rights under the agreements Capstone has entered with Kreich. Whether Kreich has defaulted on the Capstone Loans, entitling Capstone to receive the payments from Tarheel, is a question that can be determined independently of the issues in this case. Therefore, Capstone does not need to be joined in this action in order to determine if Kreich is entitled to recover for Tarheel’s alleged failure to make timely payments or if Kreich may exercise its rights under the Pledge Agreement.

{27} Defendants’ motion to dismiss on these grounds is DENIED.

B. Motion to Dismiss Under Rule 12(b)(6)

{28} When considering a 12(b)(6) motion to dismiss, the Court must consider whether the allegations of the complaint, when liberally construed and treated as true, are sufficient to state a claim for which relief can be granted. *Country Club of Johnston Cnty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002).

{29} Although Kreich has not demonstrated a likelihood of success on the merits of its claims against the Defendants, the Complaint is nonetheless sufficient to state claims for relief under the notice pleading standard of Rule 8(a). Under this standard, “pleadings should be construed liberally and are sufficient if they give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial.” *Murdock v. Chatham Cnty.*, 198 N.C. App. 309, 316–17, 679 S.E.2d 850, 855 (2009). The Complaint is sufficient to allege:



(1) that there is a valid and enforceable contract between Kreich and Tarheel that obligates Tarheel to make payments to Kreich; (2) that Tarheel failed to make a timely payment in January 2012; and (3) that the Pledge Agreement is enforceable by Kreich in the event of a default on the payment obligation. Therefore, the Complaint is sufficient to state claims for breach of contract and enforcement of the Pledge Agreement.

**1. Existence of a valid and enforceable contract**

{30} For the reasons discussed above, Kreich has alleged facts sufficient to suggest that there is a valid contract between Tarheel and Kreich and that Kreich is entitled to enforce Tarheel's payment obligation under this contract, even though, as discussed above, Kreich has not produced a signed note.

{31} The alleged e-mail exchange between Reichenbach and Hayes may express mutual assent to a modification of the Redemption Agreement, which created the underlying payment obligation for the two earlier executed promissory notes, under the terms stated in the unexecuted note. Therefore, the Complaint is sufficient to allege that Tarheel has a payment obligation and that the modified terms of this obligation are specified in the unexecuted note. And, even if the e-mail exchange were found to be insufficient to modify the Redemption Agreement, the payment obligation specified in the Redemption Agreement might still be enforceable.

**2. Existence of a Default on Tarheel's Payment Obligation**

{32} As noted above, Kreich has not demonstrated at this time a likelihood of success on the question of whether Tarheel actually defaulted on its payment obligation because Kreich may have waived its right to timely payments. That does not lead to the conclusion that the Complaint must be dismissed. The Complaint alleges that Tarheel did not pay its January payment within the ten-day grace period provided by the contract. This allegation is sufficient to allege that there has been a default in payment.

### **3. Enforceability of the Pledge Agreement**

{33} The Complaint is sufficient to allege that Kreich is entitled to enforce the Pledge Agreement if there has been a default on Tarheel's payment obligation.

{34} Defendants argue that any pledge granting title to LLC membership interests or granting the rights or powers of an LLC member is unenforceable under N.C. Gen. Stat. § 57C-5-02. Section 57C-5-02 states that assignment of a membership interest only entitles the assignee to "the distributions and allocations to which the assignor would be entitled but for the assignment," and does not entitle the assignee to become a member or to exercise the rights of a member. However, N.C. Gen. Stat. § 57C-5-04 provides that an assignee may become a member with the unanimous consent of the members. Therefore, § 57C-5-02 does not, as Defendants argue, prohibit the grant of the rights of a member to an assignee. It simply clarifies that the assignment of membership interests does not automatically grant such rights to the assignee.

{35} Here, Kreich is not claiming rights of membership by virtue of an assignment of membership interests. Rather, Kreich is seeking to exercise management rights explicitly granted by the Pledge Agreement, which will spring into effect in the event of a default. Even if these management rights effectively make Kreich a member of Tarheel and JKH, the grant of these rights was accomplished through the unanimous consent of the members of Tarheel and North Tech, as required by § 57C-5-04, because JKH, the sole member of Tarheel, and Hayes, the sole member of North Tech, executed the Pledge Agreement.

{36} Defendants also argue that Kreich was required to allege that it obtained the Borrower's consent under N.C. Gen. Stat. § 25-9-620(c) and consent of junior lienholders under N.C. Gen. Stat. §§ 25-9-620(d) and 25-9-621 prior to foreclosing on its security interest. However, these provisions simply establish a process for a creditor's acceptance of the collateral as full or partial satisfaction of the obligation. The plain language of these provisions does not establish elements that a secured party would have to plead and prove when seeking judicial enforcement of a pledge, and Defendants do not cite any North Carolina case law

that reads the provisions in this manner. Therefore, the Complaint need not allege that Kreich has obtained consent from the Borrower or junior lienholders in order to state a claim for enforcement of its rights under the Pledge Agreement.

{37} Because Kreich has alleged facts sufficient to show that Tarheel has a payment obligation to Kreich, that Tarheel failed to make a timely payment in January 2012, and that Kreich is entitled to enforce the Pledge Agreement in the event of a default on the payment obligation, the Defendants' motion to dismiss for failure to state a claim under Rule 12(b)(6) is DENIED.

#### IV. CONCLUSION

{38} For the reasons stated, Kreich's motion for a preliminary injunction is DENIED and Defendants' motions to dismiss are DENIED.

IT IS SO ORDERED, this 9th day of August, 2012.

/s/ James L. Gale  
James L. Gale  
Special Superior Court Judge  
for Complex Business Cases