

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.)
)
)

**PLAINTIFF’S OPPOSITION TO
NOTICE OF DESIGNATION
AND MOTION TO REMAND**

NOW COMES Plaintiff LegalZoom.Com, Inc., pursuant to Rule 3.3 of the Business Court and NC Gen. Stat. § 7A-45.4(e), and opposes Defendant North Carolina State Bar's Notice of Designation of the above-captioned case as a "Complex Business Case" for the reasons set forth below. Plaintiff LegalZoom.Com, Inc. respectfully moves and requests that this honorable Court remand this matter, previously designated as an exceptional case pursuant to Rule 2.1 of the Superior Court, to the Wake County Superior Court, so designated by Order of the Chief Justice and to the Rule 2.1 Judge designated, the Honorable Paul Gessner.

STATEMENT OF CASE AND FACTS

This is a declaratory judgment and mandatory injunction action seeking a judicial ruling on whether the North Carolina State Bar, an agency of the State of North Carolina, as defined at N.C. Gen. Stat. § 84-15, has unlawfully and publicly charged and continues to unlawfully and publicly assert that Plaintiff LegalZoom is engaging in the

unauthorized practice of law in violation of N.C. Gen. Stat. § 84-7 and as such is “prohibited” from engaging in business in the State of North Carolina. This action also stems from the fact that, as part of Defendant’s charge and unlawful assertion, Defendant has unlawfully refused to register Plaintiff’s prepaid legal services plans which meet the statutory requirements for registration under N.C. Gen. Stat. § 84-23.1.

In the Complaint filed in Wake County Superior Court, Plaintiff cites the basis for jurisdiction and venue of the action and the various statutory and constitutional issues involved in the action (See Plaintiff’s Complaint, p. 3, para. 7). Plaintiff is seeking (among other things) a judicial ruling on whether a “Cease and Desist Letter” (e.g. Complaint Paragraph Para. 26 and Ex. 6) and subsequent statements by Defendant NC State Bar from 2008 through 2011 (e.g. Complaint Para’s 40, 45, 55(c) alleging that Plaintiff LegalZoom was engaged in the unauthorized practice of law and is prohibited from doing business in North Carolina is in error so that Plaintiff and the thousands of active customers who patronize LegalZoom nationally will know whether or not LegalZoom is operating lawfully within the State of North Carolina. In the alternative, Plaintiff is seeking a mandatory injunction ordering Defendant to withdraw its Cease and Desist Letter. Plaintiff is also seeking a (second) mandatory injunction ordering Defendant to register Plaintiff’s prepaid legal services plans pursuant to N.C. Gen. Stat. § 84-23.1, and a declaratory judgment that Defendant has disparaged Plaintiff’s products and services

Plaintiff shows unto the Court as follows:

1. On September 30, 2011 Plaintiff filed the Complaint against the North Carolina State Bar in Wake County Superior Court together with a Motion for

Recommended Designation of Exceptional Civil Case and Judge Pursuant To Superior Court Rule 2.1.

2. Rule 2.1 provides for designation of exceptional civil cases. The Rule provides that the Chief Justice may designate any case or group of cases as: (a) exceptional; or, (b) "complex business", and thereafter be assigned to a special superior court judge to hear and decided the case as allowed under Rule 2.2.

3. The reasons given in support of Plaintiff's Motion were that such designation and appointment was necessary to provide for the efficient and orderly administration of justice for a case involving "exceptional and complex constitutional, statutory and regulatory claims and law" and by its caption necessarily involved a state administrative agency, The North Carolina State Bar. Plaintiffs did not seek a ruling that the case was a "complex business" case.

4. On October 10, 2011, the Chief Justice granted Plaintiff's motion, designated this case as "exceptional" pursuant to Rule 2.1 and appointed the Honorable Superior Court Judge Paul Gessner as a Rule 2.1 Special Superior Court Judge.

5. On November 1, 2011, the North Carolina State Bar, through Special Deputy Attorney General I. Faison Hicks of the North Carolina Department of Justice filed a Notice Of Designation Of Action As Mandatory Complex Business Case under N.C. Gen. Stat. § 7A-45.4 to, in effect, remove jurisdiction of the case from the Superior Court of Wake County Special Superior Court Judge Gessner to the North Carolina Business Court. Mr. Hicks stated, "Attached hereto in accordance with N.C. Gen. Stat. §7A-45.4(b) is the North Carolina State Bar's designation of the above-referenced case as

a mandatory complex business case." For the reasons set forth below, Plaintiff opposes the designation and respectfully submits that the appropriate jurisdiction lies in Wake County Superior Court per the Order of October 10, 2011.

LEGAL ARGUMENT

I. As a general matter of law, the case is indeed an “exceptional” case but is not a “mandatory complex business case”

Plaintiff contends that this action has been and should be designated as an “exceptional” case under Rule 2.1 of The General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure. Plaintiff disagrees with opposing counsel's statement that this is a “mandatory complex business” case that is required to be heard in the Business Court. N.C. Gen. Stat. § 7A-45.4 (“Designation of mandatory complex business cases”) references specific qualifications on the types of cases to be filed in or removed to the Business Court. N.C. Gen. Stat. §7A-45.4(a) provides for the types of cases with "material issues” related to seven categories of cases including: (1) laws governing corporations; (2) securities law; (3) antitrust law; (4) trademark or unfair competition law; (5) intellectual property law; (6) the internet, electronic commerce and biotechnology; and (7) tax laws and disputes (the “Seven Categories”). It is very significant what N.C. Gen. Stat. § 7A-45.4 does not address or include. Nowhere does this statute make any reference to litigation of matters with the State or any State Agency--or any matters concerning regulation of private business by the State. The statute also makes no reference to constitutional issues involving the State or any State agency. Defendant concedes in its notice that the N.C. State Bar is a regulatory agency of the Government of the State of North Carolina and is not engaged in business or

commerce, and has no business or commercial disputes with the Plaintiff. The Defendant also concedes in its Notice that the N.C. State Bar is legislatively charged under N.C. Gen. Stat. §84-37 with the responsibility for investigating and prosecuting alleged instances of the unauthorized practice of law (see Defendants' Notice, p. 2), most certainly an exercise of the state's police power, in that the unauthorized practice of law is a violation of law and is classified as a Class 1 misdemeanor (see N.C. Gen. Stat. § 84-7, § 84-8 and §84-10). Defendant also acknowledges that the Complaint relates the State Bar's actions in interpreting and enforcing state laws and thus the prohibition against monopolies that are set forth in the North Carolina Constitution's Perpetuities and Monopolies Clause (N.C. Const. Art. I, § 34). This "anti-monopoly" provision of the Constitution is not an "antitrust statute" - it is a constitutional prohibition on activities undertaken in the market place which includes, but is not limited to, violations of antitrust law. This constitutional prohibition thus extends beyond "business and commerce" and captures monopolistic activity by non-business entities (e.g. State agencies) as well as activities and conduct outside the realm of interstate commerce – all in addition to garden variety antitrust activities.

Thus, these unique and complex issues do not fall within the confines of the Seven Categories (see below) nor within the general scope of N.C. Gen. Stat. § 7A-45.4, but instead are "exceptional" constitutional, governmental, public statutory and regulatory claims and law. As such it is entirely appropriate that, by her October 10, 2011 Order, the Chief Justice designated the case as "exceptional" instead of "complex business" and also designated Judge Gessner as a Special Superior Court Judge under Rule 2.1.

II. As a specific matter of law, the case does not fall within one of the seven enumerated categories which would result in its appropriate designation as a “mandatory complex business case”

Plaintiff asserts that this action is indeed an “exceptional” case pursuant to Rule 2.1. In addition, Plaintiff asserts that the case is neither the normal sense nor in a specific statutory sense, a "mandatory complex business case." This is because this action is a case primarily involving government regulation by an agency of the state of a private business, with constitutional and other legal ramifications, and where Plaintiff seeks a declaratory judgment as to Plaintiff's right to conduct business without regulatory interference by the North Carolina State Bar, an agency of the State.

An objective and studied review of the Complaint herein and the Seven Categories of cases comprising the Business Court’s jurisdictional purview of “specifically qualified” cases as set forth in NC Gen. Stat. § 7A-45.4(a) illustrates that this action does not contain any of the threshold “material issues” required for a “complex business case” designation -- under any of the seven statutory categories:

A summary review of the Complaint clearly demonstrates that this action *does not address* or involve:

- 1) Any question of laws governing corporations;
- 2) Any securities law;
- 3) Any antitrust law (see discussion above re: Anti-Monopoly Constitutional Prohibition, which is also addressed in the Complaint);
- 4) Any trademark of unfair competition law;
- 5) Any intellectual property law;

- 6) Any internet, electronic commerce and biotechnology law (as a matter of fact, LegalZoom is indeed an internet based information provider – but none of the “material issues” in the action address or involve any law relating to that fact); and,
- 7) Any tax laws and disputes.

If the Business Court were “in the business” of regularly litigating state agency matters, Defendant’s designation would perhaps be somewhat arguable. The Business Court, however, is clearly not in the business of litigating state agency matters or regulatory matters. It would be a completely foreign venue for such matters.

Counsel conducted a thorough review of the Business Court's Public Access Portal which is part of the Business Court's Case Management System available on its website. Counsel went throughout the filings listed on that database to determine whether a state agency has ever been named a lead party, plaintiff or defendant, in a Business Court case. Based on said research, of the roughly 270 filings on the website, none of the cases listed a North Carolina State regulatory agency as a lead party with the exception of the following:

- 1) Two related cases brought by the State of North Carolina where the State Agency listed, specifically and by consent, were designated for the Business Court. These cases relate to the multi-district tobacco business litigation involving private companies and numerous issues which may arguably have fallen in category 4;
- 2) One case brought against the North Carolina Secretary of Revenue under N.C. Gen. Stat. § 7A-45.4(a)(1)-- the designation for matters

involving the law governing corporations, partnerships, LLCs, and LLPs. In this case, Plaintiff brought suit for amounts demanded as refunds of taxes paid by Plaintiff. This case was filed on December 31, 2007. The seventh category designating tax cases to be brought in Business Court did not go into effect until January 1, 2008. Therefore, the likely reason that this case was brought under the corporate designation is due to the fact that the seventh designation was unavailable when it was filed; and

- 3) Various tax cases filed within category seven (tax fees and disputes).

Furthermore, the N.C. State Bar, as a “state agency,” is subject to N.C. General Statute Chapter 150B (The Administrative Procedures Act), whereby the appeal of any “final agency decision” is to the Office of Administrative Hearings (“OAH”), and not to the Courts. Any party wishing to appeal from a subsequent “final decision” of OAH must then appeal either to the courts or to the head of the state agency involved (see further discussion below).

Unlike all other State agencies, only tax cases brought against the North Carolina Department of Revenue are designated explicitly by statute under N.C. Gen. Stat. Section 7A-45.4(a)(7) for the Business Court (Counsel’s review of this Business Court’s access portal indicated there were approximately 10 of these cases).

Otherwise, all State agencies must follow administrative policies and procedures including jurisdictional requirements of cases appealable to OAH. Thus, any appeal of a final agency decision by the N.C. State Bar would be to OAH, unless otherwise directed

by N.C. Gen. Stat. Chapter 84. N.C. Gen. Stat. Chapter 84 provides for judicial intervention or appeal in two specific instances:

(1) judicial injunction or criminal prosecution as to determining whether or not the unauthorized practice of law has taken place (see NC Gen. Stat. § 84-37); and,

(2) appeals to the N.C. Court of Appeals from Disciplinary Hearing Commission matters (see NC Gen. Stat. § 84-28(h)).

Thus, any other “agency” matter that is the subject of a "final agency decision" by the N.C. State Bar is subject to the APA's procedural provisions and, if contested, appealable to OAH.

III. Allowing designation of this matter as “complex business” would exceed statutory limits on Business Court jurisdiction and potentially place a substantial caseload burden on the Business Court

It appears clearly that designating this action as a “complex business case” would: (1) require an overly broad reading of NC Gen. Stat. § 7A-45.4(a) (see above); (2) provide precedent for an extra-statutory expansion of the Business Court’s jurisdiction (see above); (3) ignore existing statutory jurisdictional directives to the N.C. State Bar regarding judicial determination of the unauthorized practice of law (see below); and (4) conceivably expose the Business Court to an untold but substantial increase in its case load (see below).

As to judicial determinations of the unauthorized practice of law: the case of *Disciplinary Hearing Commission v. Frazier*, 556 S.E.2d 262 (N.C. 2001) confirms LegalZoom’s position that this action involving the authorized practice of law is

specifically directed to general Superior Court jurisdiction by statute. The case states the following:

While the Disciplinary Hearing Commission ("DHC") does not have the authority to discipline a disbarred attorney or find a disbarred attorney in contempt, the DHC does have the means to help prevent the unauthorized or unlawful practice of law in this state. Under N.C.G.S. 84-37, the North Carolina State Bar may investigate 'any charges or complaints of unauthorized or unlawful practice of law.' N.C.G.S. 84-37(a) (1999). The North Carolina State Bar, after its investigation may seek a temporary injunction to restrain a defendant from the unauthorized or unlawful practice of law. N.C.G.S. 84-37(b). The North Carolina State Bar may also bring an action in its name for a final judgment in its favor that 'shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of.' N.C.G.S. 84-37(b). **Such actions shall be brought in the SUPERIOR COURT of any county in which the acts constituting unauthorized or unlawful practice of law are alleged to have been committed or in which there appear reasonable grounds that they will be committed or in the county where the defendants in the action reside or in Wake County. N.C.G.S. 84-37(c).** (emphasis added)

Counsel's review of the N.C. State Bar's website reveals general Superior Court preliminary injunctions issued for mishandling of client funds deposited into trust accounts. The injunctions granted or consented to were entered in various superior courts throughout the State of North Carolina. The North Carolina State Bar website lists the two injunctions referenced in the recent unauthorized practice of real estate law State Bar opinion. These were not preliminary injunctions, but permanent injunctions, both filed in Superior Court. The two cases are:

North Carolina State Bar v. Lighthouse Title Agency, Inc., FILE # 05 CVS 10637;

North Carolina State Bar v. The Closing Place, Inc., FILE # 06 CVS.

In addition to these two cases, the State Bar website lists three other cases dealing with the unauthorized practice of law. Each of these cases involved the North Carolina

State Bar seeking permanent injunctions against the Defendant, and each was heard in Superior Court. These cases are:

North Carolina State Bar v. Leapfrog Enters., Inc., FILE # 03 CVS 9813;

North Carolina State Bar v. Kolodner, FILE # 05 CVS 09856; and

North Carolina State Bar v. Lockett, FILE # 03 CVS 14526.

No injunctions or other judicial relief were found that entered against an attorney, other individual or other company regarding the unauthorized practice of law AND there was not a single case involving the unauthorized practice of law in the Business Court website.

The unprecedented step of accepting this public regulatory agency and constitutional case as a “complex business case” rather than a Rule 2.1 “exceptional case” is a dangerous step in opening the floodgates of litigation to the Business Court for regulatory agency matters. As an example, as recently as this month, The North Carolina State Bar sent out notice regarding the authorized practice advisory opinion:

Revised Authorized Practice Opinion on Real Estate Closings

As a result of a review of the activities of more than 50 nonlawyer service providers since the adoption of the authorized practice advisory opinion on nonlawyer real estate closings in 2003, including injunctions issued against two companies, proposed revisions to the advisory opinion have been published for comment. Access the revisions at the bottom of the page provided via the link below.

(See: <http://www.ncbar.com/ethics/propeth.asp>)

The N.C. State Bar, as a regulatory agency, has already identified as many as 50 cases involving the unauthorized practice of the single subspecialty of real estate law. This proposed revision coupled with a ruling in this case that the Business Court is the

appropriate venue for litigating the unauthorized practice of law opens the door to additional unauthorized practice cases being litigated in Business Court.

Further, as noted above, pursuant to N.C. Gen. Stat. Chapter 150B, all “final agency actions” of all state agencies (with the exception of tax disputes) are appealable to the Office of Administrative Hearings as “contested cases”. Until January 1, 2012, final decisions of OAH are appealable to the head of the agency involved in the decision. Only after the agency head acts is the matter appealable to general Superior Court (see NC Gen. Stat. § 150B-34; § 150B-43).

However, effective January 1, 2012, OAH will, for the first time in its history, have the statutory authority to render “final decisions” on contested state agency matters – which will then be directly appealable to general Superior Court (see Sections 18. and 22. of ratified Senate Bill 781, Session 2011; enacting NC Gen. Stat. § 150B-34; § 150B-43, effective January 1, 2012, applying to contested cases commenced on or after that date).

Thus, were this Court to designate this case as a “complex business case” it would be “opening the floodgates” for itself – not only to litigation from state agencies heretofore unknown to the Business Court, but beyond that, conceivably to a virtual flood of state agency appeals emanating from OAH’s newly bestowed “final decision authority.”

CONCLUSION

Plaintiffs respectfully submit that it was not the intent of the North Carolina General Assembly to expand the scope of the Business Court specifically to all cases with matters related to the unauthorized practice of law and the registration of prepaid legal

services plans or generally to state agencies and their regulation of business. To allow this case to proceed in Business Court would create precedent which may judicially expand the jurisdiction of the Business Court and unnecessarily add to the heavy caseload of our Business Courts. The appropriate remedy is to allow the case to proceed as originally designated and ordered – an exceptional case per Rule 2.1, in Wake County Superior Court with the Honorable Paul Gessner sitting by Rule 2.1 Designation.

This the 2nd day of December, 2011.

COUNSEL:

/s Alfred P. Carlton, Jr.

Alfred P. Carlton, Jr.
NC 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
NC 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
NC 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 **PLAINTIFF'S OPPOSITION TO NOTICE OF DESIGNATION** by depositing a copy of the same in the First-Class United States Mail, postage prepaid, addressed as follows:

I. Faison Hicks
Special Deputy Attorney General
North Carolina Department of Justice
114 West Edenton Street
Office Number 349
Raleigh, North Carolina 27603
Attorney for Defendant

This the 2nd of December, 2011.

CO-COUNSEL:

/s R. Daniel Boyce _____
R. Daniel Boyce
NC 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