STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 7847

NEW BREED, INC.,
Plaintiff

v.

GREGORY ALBERT GOLDEN, JR., BENJAMIN LANIER HOLDER, MICHAEL ERIC TURNER, KILEY CHET LANNING and RAHUL S. BIDE,
Defendants

ORDER ON NOTICE OF DESIGNATION

THIS MATTER is before the court upon Plaintiff's Opposition to Designation as a Complex Business Case and Motion to Remand, filed in this action on August 1, 2012 ("Opposition"); and

THE COURT, having reviewed the Opposition; Defendants' Brief in Support of Designation as a Complex Business Case, filed on August 8, 2012 ("Response"); Plaintiff's Motion for Leave to File Reply Brief in Support of Plaintiff's Opposition to Designation as a Complex Business Case and Motion to Remand ("Motion to Reply"), with proposed Reply Brief ("Reply") attached, filed on August 22, 2012; Notice of Designation of Action as Mandatory Complex Business Case Under N.C. Gen. Stat. § 7A-45.4 (further references in this Order to the North Carolina General Statutes will be to "G.S.") and the Complaint, FINDS and CONCLUDES that:

1. Plaintiff's Motion to Reply should be GRANTED. Accordingly, the court deems the Reply to be before it for purposes of determining the Opposition.

2. Plaintiff filed its Complaint in this matter on July 17, 2012, alleging that Defendants, each of whom is an important former information technology ("IT")

employee of Plaintiff, have violated various contractual non-competition and non-solicitation agreements ("Employment Agreement(s)") between the respective Defendants and Plaintiff. In substance, Plaintiff alleges that Defendants (a) formerly were employees of Plaintiff; (b) each signed a binding Employment Agreement with Plaintiff; (c) left the employ of Plaintiff and entered the employ of BE Aerospace, Inc. ("BE Aerospace"), a direct competitor of Plaintiff; (d) each is in violation of one or more terms and conditions of their respective Employment Agreement; (e) entered into a conspiracy to leave Plaintiff's employ and knowingly violate their respective Employment Agreements by wrongfully (i) becoming employed by BE Aerospace in violation of their non-competition agreements and (ii) soliciting and hiring away other important IT employees of Plaintiff, to the end that at least eleven former employees of Plaintiff have left or are leaving Plaintiff to go to work en masse for BE Aerospace and (f) effected a "raid" on important IT employees of Plaintiff aimed at harming Plaintiff's business, acquiring its trade secrets and/or confidential and proprietary information and depriving Plaintiff of the opportunity to retain its important employees.

3. The Complaint alleges four claims for relief ("Counts"): Count I – Breach of Contract; Count II – Tortious Interference with Contract; Count III – Civil Conspiracy and Count IV – Unfair and Deceptive Trade Practices. Plaintiff seeks injunctive relief, compensatory,[1] punitive[2] and treble damages and attorneys fees.[3]

4. Plaintiff objects to designation of this action as a mandatory complex business case ("Designation") pursuant to G.S. 7A-45.4, which provides for Designation by a party of a civil action if it involves a "material issue" related to one or more of the

[1] Under all Counts.
[2] Under Counts II and III.
[3] Under Count IV.

matters stated in G.S. 7A-45.4(a)(1) through (7). Plaintiff contends that there is no material issue raised by the Complaint that allows Designation.

Counts I, II and III

5. In support of its Opposition, Plaintiff argues that Counts I, II and III facially do not involve a material issue included in the statutory list of those issues supporting Designation. The court agrees that, standing alone and with nothing else appearing, none of the first three Counts support Designation.

Count IV

6. With regard to Count IV, Plaintiff points out that although under G.S. 7A-45.4(a)(4), the existence of a material issue involving state unfair competition law ordinarily will support Designation, the same provision specifically excludes claims "based *solely* on unfair competition under G.S. 75-1.1." (emphasis added). Plaintiff argues that Count IV does not support Designation because the unfair competition issue alleged in that Count, which is captioned as a claim for "unfair and deceptive trade practices" and includes narrative allegations of "unfair or deceptive acts and practices"[4] and "unfair competition,"[5] raises the unfair competition issue solely under G.S. 75-1.1 ("Chapter 75")[6] and therefore is excluded from eligibility for Designation.

7. Defendants argue to the contrary, contending that as the Complaint is drafted, it also raises material issues of state common law unfair competition that are not necessarily based on Chapter 75 – and which specifically are included, rather than excluded, by G.S. 7A-45.4(a)(4) as grounds for Designation. In support of their position,

[4] Compl. ¶ 43.
[5] *Id.*, ¶ 44.
[6] Count IV does not specifically mention Chapter 75, although the prayer for relief seeks remedies – treble damages and attorneys fees – consistent with a Chapter 75 claim.

Defendants point out that in addition to alleging "unfair competition,"[7] Count IV alleges that Defendants conspired together by:

> [H]iring New Breed's IT employees in large numbers designed to "raid" New Breed, all with the purpose and intent of harming a competitor, of acquiring trade secrets and/or confidential and proprietary information and of soliciting New Breed's employees secretly and in such a way as to deprive New Breed of the opportunity to retain the employees.[8]

8. Defendants argue that the above allegations, when considered with allegations in the Complaint that all the involved employees worked in Plaintiff's IT department on matters that were materially important to Plaintiff's business success,[9] raise material state common law issues of unfair competition separate and apart from any Count IV allegations intended by Plaintiff to fall under Chapter 75. Consequently, Defendants argue, Designation is appropriate under G.S. 7A-45.4(a)(4).

9. Defendants further posit that the allegations in paragraph 43 to the effect that Defendants' wrongful actions were done with the intent to acquire Plaintiff's trade secrets and/or confidential and proprietary information raise material issues of intellectual property law, the internet and electronic commerce, which they contend could constitute "additional bases for [D]esignation"[10] under G.S. 7A-45.4(a)(5) or (6), respectively. However, in the same paragraph of their brief, Defendants state that they "do not contend that these factors are sufficient"[11] in themselves to support Designation. Rather, they argue that the potential for Designation on such grounds supports their

[7] Compl. ¶ 43.
[8] *Id.*
[9] Compl. ¶¶ 16-19, 22, 24.
[10] Def. Br. Supp. Design. 4.
[11] *Id.*

argument that the Complaint raises material issues of unfair competition apart from a claim under Chapter 75.

10. The court recognizes that not every employer-employee case alleging breach of non-competition, non-solicitation or similar agreements will be appropriate for assignment to the Business Court, whether by Designation under G.S. 7A-45.4 or discretionary assignment by the Chief Justice under Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts ("Rule(s)"). *See* Order entered by Judge Ben F. Tennille in *Workplace Benefits, LLC v. Lifecare, Inc*. (N.C. Super Ct. July 14, 2008). Certainly, as argued by Plaintiff here, an unfair competition claim, if limited solely to Chapter 75, would not support Designation.[12]

11. In North Carolina, a claim for unfair competition does not necessarily fall only within the purview of Chapter 75, which is a creature of the General Assembly. Our courts also long have recognized the common law tort of unfair competition. *See, e.g., Henderson v. U.S. Fid. & Guar. Co*., 346 N.C. 741 (1997); *Charcoal Steak House of Charlotte, Inc. v. Staley*, 263 N.C. 199 (1964); *Carolina Aniline & Extract Co. v. Ray*, 221 N.C. 269 (1942); *D-E-W Foods Corp. v. Tuesday's of Wilmington, Inc*., 29 N.C. App. 519 (1976). In *Henderson*, the North Carolina Supreme Court observed that the common law tort of unfair competition contemplates a wrongful act done in the context of competition between business rivals. It stated that the "gravamen of unfair competition is the protection of a business from misappropriation of its commercial advantage earned through organization, skill, labor, and money." 346 N.C. at 748.[13]

[12] However, such a case may be eligible for discretionary assignment under Rule 2.1, depending on the particular facts alleged.

[13] In distinguishing between Chapter 75 claims and state common law unfair competition claims, the court notes that Chapter 75 was "not intended to apply to all wrongs in a business setting." *HAJMM Co. v.*

12. Here, BE Aerospace, the competing business entity complained of in the Complaint, has not been made a defendant to the action. Rather, Plaintiff's former employees, now allegedly employees of BE Aerospace, are the only Defendants. It is their actions that are complained of, and those actions clearly are alleged in the context of competition (a) by Plaintiff in the marketplace and (b) between Plaintiff and BE Aerospace. The court cannot find a requirement that a competing business be a party litigant as a condition precedent to alleging a common law claim for unfair competition.

13. Under North Carolina's current scheme of notice pleading, in examining a claim alleged in a complaint, neither the court nor party litigants are limited to the technical label given to the claim by the pleader. Rather, the reader appropriately should examine the actual facts alleged. *Bowlin v. Duke Univ.,* 108 N.C. App. 145, 147 (1992). Consequently, a fair reading of the Complaint in this matter reflects allegations in substance that Defendants were guilty of unfair competition in that they wrongfully intended to (a) raid Plaintiff of its IT employees, (b) harm Plaintiff's business and (c) acquire Plaintiff's trade secrets and confidential and proprietary information. These allegations support a contention by Plaintiff that Defendants engaged in common law unfair competition, to the harm of Plaintiff. Although the viability of any such claim is not before the court at this procedural stage, the court is forced to CONCLUDE that the

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House of Raeford Farms, Inc., 328 N.C. 578, 593 (1991). Rather, the statute was designed "to benefit consumers." *Durling v. King*, 146 N.C. App. 483, 488 (2001) (citing *HAJMM*, 328 N.C. at 592), and claims arising under Chapter 75 typically involve a buyer and a seller. *See, e.g.*, *Gray v. N.C. Underwriting Ass'n*, 352 N.C. 61, 68 (2000); *Prince v. Wright*, 141 N.C. App. 262, 268-69 (2000); *Holley v. Coggin Pontiac*, 43 N.C. App. 229 (1979). Although the statute has been extended to business relationships on a limited basis, *see Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 396 (1978) (rejecting assertion that Chapter 75 does not apply to disputes between competitors), it usually is not applicable to employment disputes. *Durling*, 146 N.C. App. at 488; *see also Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 21 (2007) ("[A] violation of a covenant-not-to-compete, essentially a breach of contract within the employer/employee relationship, lies outside the scope of [Chapter 75]."); *Buie v. Daniel Int'l*, 56 N.C. App. 445, 448 (1982) ("[W]e find that employer-employee relationships do not fall within the intended scope of [Chapter 75].").

Complaint fairly may be read to involve a "material issue related to"[14] common law unfair competition. Accordingly, the allegations of unfair competition are not necessarily limited "solely" to Plaintiff's Chapter 75 claim. Designation of this matter to the Business Court under G.S. 7A-45.4(a) therefore was proper and the Opposition should be OVERRULED.[15]

14. In view of the above conclusion, it is not necessary for the court to determine whether (a) Counts I, II or III, when read in the context of all factual allegations of the Complaint, raise one or more material issues that would support Designation or (b) the factual allegations of Count IV of the Complaint would support Designation under G.S. 7A-45.4(a)(5) or (6).

15. This Order should not be considered in any way to constitute a ruling by the court as to the legal sufficiency of any claims specifically alleged in the Complaint or any claims that otherwise may arise from or be supported by the facts alleged. Rather, those rulings, if any, are for later consideration by the court upon properly based motion practice.

NOW THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it is ORDERED that Plaintiff's Opposition to Designation as a Complex Business Case and Motion to Remand is OVERRULED and its motion for remand is DENIED. This civil action shall proceed in the Business Court as assigned.

[14] G.S. 7A-45.4 (a).
[15] The court also finds instructive, and supportive of this conclusion, *Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC*, 2003 NCBC 4 (N.C. Super. Ct. 2003) and *Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC*, 2002 NCBC 4 (N.C. Super. Ct. 2002).

SO ORDERED, this the 21st day of September, 2012.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Chief Special Superior Court Judge for
Complex Business Cases