

NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
10 CVS 8327

OUT OF THE BOX DEVELOPERS, LLC,  
d/b/a OTB CONSULTING,

Plaintiff,

v.

LOGICBIT CORP., FRANCISCO A.  
RIVERA, DOAN LAW, LLP, and THE  
DOAN LAW FIRM, LLP,

Defendants.

**ORDER ON MOTION TO STAY**

THIS MATTER is before the court on Defendants LogicBit Corp. (“LogicBit”), Francisco A. Rivera (“Rivera”), Doan Law, LLP and The Doan Law Firm, LLP’s Motion to Stay (“Motion”), to which Plaintiffs have responded. For the reasons stated, the Motion is DENIED.

It is important to place the Motion in the context of the Order that this court entered on October 4, 2013. The Motion is grounded on the assumption that the court’s October 4, 2013 Order is immediately appealable. Defendants’ brief in support of the Motion reflects an incorrect assumption that the court has determined that it will begin or that it has, in fact, begun irregular contempt proceedings, and that it proceeded to issue relief based on a contempt finding without having first issued a notice to show cause followed by an appropriate plenary hearing with due process safeguards. While Plaintiff may have requested the court to proceed in the nature of contempt, it also requested the imposition of sanctions because of Defendants’ asserted violations of the Court’s Protective Order. The court’s immediate purpose was to take narrow action necessary to assure compliance with its earlier Protective Order, including limiting the impact of any such violation. Contrary to Defendants’ unsupported statements that the court has sided with Plaintiffs, the court drew its Order for that stated limited purpose and

rejected Plaintiffs' request for immediate harsher sanctions or penalties. The court did not make any finding of contempt nor assume that it will or should make such a finding in the future. Contrary to the suggestion that it has ignored due process considerations attendant to contempt proceedings, the court reserved a determination of whether it should or would initiate any contempt proceedings. Should it do so, it would then be required to issue a notice to show cause followed by plenary proceedings, which may or may not be held before the undersigned. The court also reserved imposing sanctions, and what nature of sanctions it should consider if it chose to do so. That determination would appropriately take into consideration the intent and effect of actions that may or may not have been taken in violation of this court's Protective Order. For that reason, it allowed for limited discovery and directed that the Parties file briefs directed to the appropriate course the court should take for further proceedings related to Plaintiff's motion for sanctions and contempt.

Turning to the Motion to Stay, the court must first determine whether it has jurisdiction to rule on the Motion following Defendants' Notice of Appeal filed on October 4, 2013. While Defendants generally challenge this court's power to act after that Notice of Appeal, the Motion to Stay asserts that this court retains residual jurisdiction only until the record on appeal has been perfected.

Ordinarily, when "a party appeals an immediately appealable order" by filing a notice of appeal, the trial court loses jurisdiction to consider matters associated with the order. N.C. Gen. Stat. § 1-294; *RPR & Assocs. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002), *cert. dismissed*, 357 N.C. 166, 579 S.E.2d 882 (2003). However, if the order is *not* immediately appealable, the trial court retains jurisdiction over the entire case, including matters associated with the order from which appeal is taken. *RPR & Assocs.*, 153 N.C. App. at 347, 570 S.E.2d at 514. While the court has inherent authority to stay proceedings before it for various reasons, when the requested stay is grounded only on the trial court having been divested of jurisdiction by a pending appeal, the trial court should stay proceedings only if the order appealed from is immediately appealable.

See N.C. Gen. Stat. § 1-294; N.C. R. App. P. 8(a). The trial court has jurisdiction to make this determination. *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514 (citing *State of North Carolina ex rel. Utilities Comm'n. v. Edmisten*, 291 N.C. 361, 365, 230 S.E.2d 671, 674 (1976)).

The issue here is whether this court's October 4, 2013 Order affects a substantial right. N.C. Gen. Stat. §§ 1-277; 7A-27. A right is substantial right only if, without an immediate appeal, a party loses its ability to enforce that right. *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426–27; 444 S.E.2d 694, 696–97 (1994) (citing *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978)). Generally, discovery orders are not immediately appealable unless they contain enforcement sanctions. *E.g., Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988) (non-appealable unless enforced with sanctions); *B.B. Walker & HRUB Corp. v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554–55, 353 S.E.2d 425, 426 (1987) (non-appealable unless enforced with Rule 37(b) sanctions); *see also K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 718–19, 708 S.E.2d 106, 108–09 (2011) (noting that, even if trial court's order allegedly violates discovery rules, discovery orders are non-appealable). A discovery order may become appealable if the court combines sanctions or a contempt finding with its order. *Willis v. Duke Power Co.*, 291 N.C. 19, 27–28, 229 S.E.2d 191, 196 (1976) (contempt); *Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E.2d 190, 192 (1983) (striking answers, counterclaims, and defenses); *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 736, 294 S.E.2d 386, 387 (1982) (Rule 37(b) sanctions).

The court has not entered any order finding contempt or entering sanctions. It has imposed, after finding that Defendants violated its prior Protective Order, an immediate Order with limited relief directed solely to having Defendants comply with that Protective Order. It also allowed discovery and briefing to determine whether to order further relief. The court does not construe the October 4, 2013 Order as affecting a substantial right that divests this court of jurisdiction. It does not characterize that Order as the equivalent of entering discovery sanctions that would make its Order immediately appealable.

Defendants have not offered other reasons that would support the court's grant of a stay for other prudential reasons.

Accordingly, the court concludes that it has continuing jurisdiction, that its October 4, 2013 Order did not affect a substantial right and is not immediately appealable, that there is no adequate ground demonstrated to justify the issuance of a stay of further proceedings in this court, including but not limited to a stay of the court's October 4, 2013 Order, and that the Motion to Stay should be and hereby is DENIED.

IT IS SO ORDERED this the 1st day of November, 2013.

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