

NORTH CAROLINA
CUMBERLAND COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
06 CVS 6091

MITCHELL, BREWER,
RICHARDSON, ADAMS, BURGE,
& BOUGHMAN, PLLC; GLENN B.
ADAMS, HAROLD L. BOUGHMAN, JR.,
AND VICKIE L. BURGE,

Plaintiffs,

v.

COY E. BREWER, JR., RONNIE A.
MITCHELL, WILLIAM O. RICHARDSON
AND CHARLES BRITTAIN,

Defendants.

BRIEF IN SUPPORT
OF MOTION FOR
PRELIMINARY INJUNCTION

NOW COME the Plaintiffs herein, through counsel, pursuant to BCR 15.2 and file this their Brief in Support of Motion for Preliminary Injunction.

STATEMENT OF FACTS

Plaintiffs incorporate by this reference the affidavit of E.D. Gaskins, Jr., as its statement of facts.

ARGUMENT

N.C. Gen. Stat. § 1-485(2) authorizes this Court to enter an injunction “when, during the litigation, it appears by affidavit that a party thereto is doing or threatens . . . to do . . . some act . . . in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual.” Courts issue preliminary injunctions in order to prevent the commission of some act during the litigation which would render judgment in favor of the plaintiff ineffectual. Seaboard Air Line Railroad Company v. Atlantic Coast Line Railroad Company, 237 N.C. 88, 94, 74

S.E.2d 430, 434 (1953). In order to issue an injunction, the Court must find: (1) probable cause that plaintiff will be able to establish the rights which he asserts and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiff's rights during the litigation." (Emphasis supplied). Pruitt v. Williams, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975). Courts typically issue preliminary injunctions "in cases where the defendant has proceeded knowingly in breach of contract or in wilful disregard of an order of court." Anderson v. Town of Waynesville, 203 N.C. 37, 46, 164 S.E. 583, 588 (1932).

The decision to issue an injunction is in the sound discretion of the Court. Creel v. Piedmont Natural Gas Company, 254 N.C. 324, 118 S.E.2d 761 (1961). In determining whether to issue the injunction, the Court weights the relative conveniences and inconveniences which the parties will suffer by the granting or refusing of issue the injunction. Huskins v. Yancey Hospital, Inc., 238 N.C. 357, 361, 78 S.E.2d 116, 120 (1953). Courts generally issue injunctions "where the injury which the defendant would suffer from its issuance is slight as compared with the damage which the plaintiff would sustain from its refusal, if the plaintiff should finally prevail." Huskins v. Yancey Hospital, Inc., 238 N.C. 357, 361, 78 S.E.2d 116, 120 (1953). In short, *N.C Gen. Stat.* § 1-485(2), authorizes this Court to exercise its equitable powers "to prevent undue advantage being taken during litigation, and to maintain the status quo until all the essential facts can be properly determined and final judgment rendered." Seaboard Air Line Railroad Company v. Atlantic Coast Line Railroad Company, 237 N.C. 88, 93, 74 S.E.2d 430, 434 (1953).

In essence, this case is about the parties' entitlement to certain Firm assets, specifically the fees and expense reimbursements paid to the Firm from the Disputed Cases. In their Complaint, Plaintiffs seek an accounting of these fees and cost

reimbursements and further ask the Court to issue an order requiring Defendants to cause the Defendants and Firm to distribute to the individual Plaintiffs their share of fees and cost reimbursements.

The affidavit reveals that Defendants are about to disburse to themselves the very fees that are the subject of this litigation. As this Court noted in footnote 14 of its Order of May 8, 2007, Plaintiffs are entitled to receive some portion of the fees and expense reimbursement received in connection with the Disputed Cases, regardless of whether Plaintiffs withdrew from the Firm or the Firm dissolved.

Defendants have already taken for themselves a very substantial amount of fees and expense reimbursements from the Disputed Cases. Moreover, if Defendants continue to take all the funds for the Disputed Cases for themselves, they will render any judgment in favor of Plaintiffs ineffectual as Defendants will have already transferred to themselves the very assets that Plaintiffs seek to have this Court distribute. Finally, the burden imposed on Defendants by granting the injunction is light in comparison to the burden imposed on Plaintiffs. When the Court ultimately determines the allocation of fees, Plaintiffs and Defendants will share them. Otherwise, Defendants will have unfairly taken fees during the pendency of the matter.

N.C. Gen. Stat. § 1-1A, Rule 65(c) requires the Court to impose on Plaintiffs as movants a bond in an amount the Court deems proper for the payment of costs and damages as may be incurred by Defendants in the event it is later determined that they were wrongfully enjoined. The purpose of the bond requirement is to protect the restrained party from damages incurred as a result of the wrongful issuance of the injunctive relief. Keith v. Day, 60 N.C. App. 559, 299 S.E.2d 296 (1983).

In this case, there is little risk of damage to Defendants if the Court issues the injunction requested. At all times, the Court will remain in control of the funds at issue in this case, and it alone will control the disposition of the funds. Under these

circumstances Plaintiffs submit the bond should be a nominal amount. See Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984) (holding court not required to impose a bond in when the restraint will do the defendant no material harm).

Plaintiffs have identified two federal cases that recognize the diminished need for security in those cases where the court enjoins the defendant from transferring funds when, in the event the injunction is dissolved, the funds will be readily available to the defendant.¹ In Holborn Oil Trading Ltd. v. Interpetrol Bermuda Ltd., 658 F. Supp. 1205 (S.D.N.Y. 1987), petitioner sought to confirm and reduce a judgment arbitration award against it and in favor of the respondent. Respondent's creditors sought to intervene and further sought an injunction requiring the Petitioner to pay all funds into the Court. Respondent asked the Court to require the intervenors to post a bond equal to the amount to be paid by the petitioner into the Court. The Court refused respondent's request and ordered no bond. The Court held:

Where, as here, the preliminary injunction is phrased in terms of payment of an arbitration award into the registry of this Court such that the funds earn interest during the pendency of this action, the Court finds that the posting of a security is not necessary because there is no demonstration of harm to InterPetrol [the respondent] as a result of the imposition of the injunction. Accordingly, InterPetrol's request for the posting of an injunction security is denied.

Holborn Oil Trading Ltd. v. Interpetrol Bermuda Ltd. at 1211-12.

Similarly, in Fairview Mach. & Tool Co., Inc. v. Oakbrook Intern., Inc., 77 F.Supp.2d 199 (D. Mass 1999), plaintiff, a machinery manufacturer, sued defendant purchaser for breach of contract. After commencement of the litigation, plaintiff learned that defendant intended to sell all its' asset to a third party. Plaintiff moved for a preliminary injunction requiring defendant to escrow sufficient sale proceeds to pay any

¹ Rule 65(c) of the North Carolina Rules of Civil Procedure was adopted *verbatim* from the Federal Rules of Civil Procedure, and North Carolina courts look to federal decisions when interrupting Rule 65 of the North Carolina Rules of Civil Procedure. Keith v. Day, *supra* at 560-61.

judgment awarded plaintiff on its breach of contract claim. The Court granted plaintiff's motion and defendant moved for reconsideration. In its motion for reconsideration, defendant requested that the court order a \$100,000 bond in the event the Court denied defendant's motion to vacate the order granting plaintiff's injunction. The Court rejected this request but did approve a bond of \$10,000. In support of its decision to order a substantially reduced bond, the Court noted that "the only harm that Nuway [the defendant] may suffer would be interest lost on the \$693,000 placed in escrow, and even that may be palliated by placing the monies in an interest bearing account." Fairview Mach. & Tool Co., Inc. v. Oakbrook Intern., Inc. at 205.

Similarly, in this case, in the event the Court ultimately concludes that the fees are payable to Defendants, Defendants will already have immediate control of the funds, thus eliminating any chance of possible harm to Defendants in the event the Court ultimately dissolves its injunction.

CONCLUSION

For the reasons set forth herein, Plaintiffs ask that this Court enter an order enjoining Defendants from disbursing any future contingent fees and costs received by them or the Firm from any of the Disputed Cases and ordering either no bond or a bond in a nominal amount.

This the 4th day of March, 2008.

EVERETT, GASKINS, HANCOCK & STEVENS, LLP

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CERTIFICATE OF SERVICE

I, E.D. Gaskins, Jr., do hereby certify that a true copy of the foregoing Brief in Support of Motion for Preliminary Injunction was served on all counsel of record, via email and by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid, addressed to:

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This the 4th day of March, 2008.

/s/ E.D. Gaskins, Jr.
E.D. Gaskins, Jr.