

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV015924-910

SWIM CLUB MANAGEMENT
GROUP OF RALEIGH, LLC,

Plaintiff,

v.

PATRICK JAMES CALVIN, CORY
WILLIAM BALDWIN, JAROD
ANDREW DODD, EXPERT
AQUATICS, LLC, and COMMON
SENSE AQUATICS, LLC

Defendants.

v.

BRIAN SHEEHAN,

Counterclaim Defendant

**ORDER ON PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION
AGAINST DEFENDANTS PATRICK
JAMES CALVIN AND CORY WILLIAM
BALDWIN**

THIS MATTER is before the Court on Plaintiff's Motion for Preliminary Injunction Against Defendants Patrick James Calvin and Cory William Baldwin ("PI Motion," ECF No. 30).

THE COURT, having considered the PI Motion, the briefs, affidavits and other submissions of the parties, the arguments of counsel, and all other applicable matters of record, **CONCLUDES**, in its discretion, that the PI Motion should be **DENIED** for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Court's factual findings are made solely for purposes of deciding the present PI Motion and are not binding in any subsequent proceedings in this action. *See Daimlerchrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 578 (2002) (citing *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16 (1993)).

2. As a preliminary matter, the Court deems it appropriate to clarify the scope of the record currently before it with regard to the PI Motion. The Court notes that Plaintiff's Complaint is not verified and, therefore, the allegations contained therein do not consist of admissible evidence. *Hill v. Hill*, 11 N.C. App. 1, 10 (1971) ("An unverified complaint is not an affidavit or other evidence."). For this reason, the factual findings set forth below are taken from the affidavits submitted by the parties both in support of and in opposition to the PI Motion.

3. The affidavits submitted in support of the PI Motion are from Julia Herman, (ECF No. 31), Lenwood Boykin, (ECF No. 32), and Gary Marsland, (ECF No. 33). The affidavits offered in opposition to the PI Motion are from Patrick James Calvin, (ECF No. 51), Cory Baldwin, (ECF No. 53), Carrie Edwards, (ECF No. 54) and John G. Wilkening, (ECF No. 55).

4. Herman describes Plaintiff's business as follows:

[Plaintiff] provides professional aquatics services for country clubs, homeowners' associations, and municipalities in the Carolinas, including Wake County, North Carolina. It also provides aquatics services for homeowners. More specifically, [Plaintiff] provides pool maintenance and management services as well as residential and commercial pool construction, renovation, and repair services (including, but not limited to, pump room renovations and repairs, deck replacement renovations and pool resurfacing). In addition, [Plaintiff]

provides lifeguard and swim club management, swim lessons, and consulting services.

(Herman Aff. ¶ 4.)¹

5. Although there are other named Defendants in this case, Plaintiff's PI Motion is directed solely at Defendants Calvin and Baldwin—both of whom are former employees of Plaintiff.

6. Calvin began work for Plaintiff as a gate attendant, lifeguard, and pool manager in the summer of 2018. Calvin later worked for Plaintiff as a service technician and then as the Aquatics Facility Director at a year-round facility operated by one Plaintiff's customers. (Calvin Aff. ¶¶ 5, 11, 13.)

7. In late 2021, Plaintiff offered Calvin a new position as Director of Year-Round Maintenance. (Calvin Aff. ¶ 21.) In December 2021, Calvin executed an Employment Agreement. ("2021 Employment Agreement," Calvin Aff. ¶ 22, Ex. C.)²

8. Calvin's responsibilities as the Director of Year-Round Maintenance included maintaining, vacuuming, skimming, and checking chemical balances of pools operated by Plaintiff's clients. Calvin's work largely, if not exclusively, took place in Durham and Orange Counties. (Calvin Aff. ¶¶ 24–25.)

¹ The parties dispute the extent to which Plaintiff's business actually encompasses residential pools.

² In his brief in opposition to Plaintiff's PI Motion, Calvin asserts that Plaintiff lacks the ability to enforce the 2021 Employment Agreement because it was signed not by Plaintiff but rather by a different entity—apparently an affiliate of Plaintiff's—called Swim Club Management Group, LLC. However, the Court need not address this issue at the present time because it is denying the PI Motion based on Plaintiff's failure to show irreparable harm absent the entry of a preliminary injunction.

9. Calvin's 2021 Employment Agreement contained non-competition and non-solicitation provisions, which generally sought to prohibit Calvin from competing with Plaintiff or soliciting Plaintiff's existing or prospective customers within certain enumerated geographical areas for a period of twelve months following the termination of his employment with Plaintiff. (2021 Emp't Agrmt. ¶¶ 11–12.)

10. On 22 March 2024, citing a need to find less physically demanding work, Calvin resigned his position with Plaintiff. (Calvin Aff. ¶ 35, 40–45.)

11. In early 2024, Calvin contacted Defendant Jarod Dodd, also a former employee of Plaintiff, about the possibility of securing a management position with Dodd's new company, Defendant Expert Aquatics, LLC ("Expert Aquatics"). (Calvin Aff. ¶ 38.)

12. Calvin accepted a position with Expert Aquatics as the Director of Management Operations on 1 April 2024. (Calvin Aff. ¶¶ 48–49.)

13. Baldwin worked for one of Plaintiff's affiliates—Swim Club Management Group of Richmond, LLC—from 2014 to 2020, beginning as a lifeguard and ultimately serving as the Director of Operations. (Baldwin Aff. ¶ 2.)

14. In 2020, Baldwin accepted a position as Plaintiff's General Manager. (Baldwin Aff. ¶ 3.) Plaintiff promoted Baldwin twice in 2022—once to the position of Vice-President of Operations and later to the position of Managing Partner/Vice-President of Operations. (Baldwin Aff. ¶¶ 3–4, 6.)

15. In 2023, Baldwin was promoted to the role of President/Chief Executive Officer of Plaintiff. (Baldwin Aff. ¶ 10.) In conjunction with his 2023 promotion, Baldwin signed an Executive Agreement (“Executive Agreement,” Compl. Ex. A).

16. The Executive Agreement contained non-competition and non-solicitation provisions that were largely identical to those contained in Calvin’s Employment Agreement. (Exec. Agrmt., ¶¶ 11–12.)

17. On 11 December 2023, Plaintiff terminated Baldwin’s employment. (Baldwin Aff. ¶ 36.)

18. Baldwin’s wife, Billie Ann Radcliffe, is also a former employee of Plaintiff. Radcliffe founded Defendant Common Sense Aquatics (“CSA”) in February 2023 after she left her employment with Plaintiff. (Baldwin Aff. ¶ 44.) After Baldwin’s termination, he “decided that [he] needed to make some income in some way and moved forward to get CSA up and running.” (Baldwin Aff. ¶ 45.)

19. Baldwin testified that CSA markets itself as providing residential pool services. (Baldwin Aff. ¶ 46.) CSA currently has between five and six residential pool customers. (Baldwin Aff. ¶ 48.)

20. Plaintiff subsequently sent letters to both Calvin and Baldwin over the next several months warning them that they were acting in violation of the non-competition and non-solicitation provisions of their written employment agreements. (“Letter to Baldwin,” ECF No. 3, Ex. D; “Letter to Calvin,” ECF No. 3, Ex. E.)

21. Plaintiff initiated this action on 21 May 2024 by filing a Complaint in Wake County Superior Court against Calvin, Baldwin, Dodd, Expert Aquatics, and CSA. (ECF No. 3.)

22. Plaintiff asserted the following claims in its Complaint: (1) breach of contract claims against Calvin and Baldwin for breach of the non-competition and non-solicitation covenants in their respective employment agreements; and (2) tortious interference with contract claims against Dodd, Expert Aquatics, and CSA. (Compl. ¶¶ 81–113.)

23. This case was designated as a complex business case on 18 June 2024 and assigned to the undersigned two days later. (ECF Nos. 1–2.)

24. Plaintiff filed the PI Motion on 26 July 2024 seeking an order preliminarily enjoining Baldwin and Calvin from directly competing with Plaintiff or soliciting any of Plaintiff's customers or prospective customers in violation of their respective employment agreements. (PI Mot. ¶¶ 1–2, 9.)

25. A hearing on the PI Motion was held on 10 September 2024 at which all parties were represented by counsel. The PI Motion is now ripe for resolution.³

LEGAL STANDARD

26. A preliminary injunction “is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation.” *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701 (1977). The issuance of such injunctive relief “is a matter

³ On 9 July 2024, Defendant CSA filed a motion to dismiss as to the sole claim asserted against it in this action. (ECF No. 14.) That motion was also heard by the Court at the 10 September hearing and will be addressed by means of a separate order at a later date.

of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357 (1980). The plaintiff bears the burden of establishing the right to a preliminary injunction. *Pruitt v. Williams*, 288 N.C. 368, 372 (1975). The entry of a preliminary injunction is proper only where the plaintiff is (1) able to show a “likelihood of success on the merits of his case,” and (2) “likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [the] plaintiff’s rights during the course of litigation.” *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983) (quoting *Ridge Cmty. Inv’rs*, 293 N.C. 688, 701 (1977)).

27. The Court must also weigh the potential harm a plaintiff will suffer if no injunction is entered against the potential harm to a defendant if the injunction is issued. *See Williams v. Greene*, 36 N.C. App. 80, 86 (1978).

28. Ultimately, “[t]he issuance of a preliminary injunction is a decision committed to a trial court’s discretion.” *State ex rel. Stein v. MV Realty PBC, LLC*, 2023 NCBC LEXIS 102, at **37–38 (N.C. Super. Ct. Aug. 30, 2023) (citing *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357 (1980)).

ANALYSIS

29. Plaintiff contends that it is likely to prevail on the merits of its breach of contract claims against Calvin and Baldwin based on its argument that the non-competition and non-solicitation provisions of their employment agreements contain

reasonable restrictions under North Carolina law that are fully enforceable and that both Baldwin and Calvin have breached these provisions.

30. However, the Court need not decide whether Plaintiff has demonstrated a likelihood of success on the merits because the Court concludes that Plaintiff has failed to show the existence of irreparable harm that would exist but for the entry of a preliminary injunction.

31. As an initial matter, the Court notes that Plaintiff's principal brief in support of its PI Motion is devoid of any actual substantive argument as to the irreparable harm prong of the preliminary injunction standard. It was not until it filed its reply brief on 23 August 2024, ("Reply Brief," ECF No. 67), that Plaintiff overtly addressed the issue of irreparable harm. A party's failure to address an argument in its principal brief would normally result in the court's refusal to consider it. *See State v. Triplett*, 258 N.C. App. 144, 147 (2018) ("[A] reply brief is not an avenue to correct the deficiencies contained in the original brief.") (cleaned up); *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 78–79 (2015) (same). The Court has nevertheless fully considered the arguments made on this issue in Plaintiff's reply brief and at the 10 September hearing but finds them to be legally insufficient.

32. Plaintiff contends that the breaches of their employment agreements by Baldwin and Calvin have caused Plaintiff to lose key customers to Expert Aquatics. (Reply Br., at 15). *See Kennedy v. Kennedy*, 160 N.C. App. 1, 15 (2003) finding irreparable harm "through a showing that a substantial portion of [the plaintiff's]

patients have followed [the defendant former employee] to the new practice.”) (cleaned up); *Philips Elecs. N. Am. Corp. v. Hope*, 631 F. Supp. 2d 705, 711 (M.D.N.C. June 30, 2009) (holding that a “loss of permanent relationships with customers and loss of proprietary information may constitute irreparable harm”).

33. In her affidavit, Herman (Plaintiff’s General Manager) states “upon information and belief” that three of Plaintiff’s former clients—N.C. State University Club, The Club at Sunset (“Sunset Club”), and Hope Valley Country Club—are now clients of Expert Aquatics and/or Baldwin. (Herman Aff. ¶¶ 28, 31, 35.) However, it is the burden of a plaintiff seeking a preliminary injunction to demonstrate its entitlement to such extraordinary relief. “[C]onclusory assertions made ‘upon information and belief’ are not sufficient.” *See Vanguard Grp., Inc.*, 2022 NCBC LEXIS 55, at *14. In cases where a party’s request for such emergency injunctive relief is grounded in speculation, “[t]he Court will require further evidence before it can reach the conclusions that [the party] seeks.” *Id.* at *15.

34. In addition, portions of her affidavit are based on hearsay and references to unauthenticated private websites. The Court cannot consider those provisions as admissible evidence. *See Strickland v. Doe*, 156 N.C. App. 292, 295 (2003) (“If an affidavit contains hearsay matters or statements not based on an affiant’s personal knowledge, the court should not consider those portions of the affidavit.”); *Rankin v. Food Lion*, 210 N.C. App. 213, 217–18 (2016) (holding that website content was properly excluded from summary judgment record where plaintiff made no effort to authenticate non-governmental website).

35. The Court further finds that several of Plaintiff's key allegations are directly rebutted by affidavits submitted by Defendants, which—at the present stage of this litigation—the Court finds to be credible.

36. Notably, in his affidavit, Calvin testified that he has not communicated with or contacted any of Plaintiff's existing clients to encourage them to discontinue their relationship with Plaintiff or to transfer their business to Expert Aquatics. (Calvin Aff. ¶¶ 47, 70.) Similarly, Baldwin has offered testimony that since leaving Plaintiff's employment, he has not initiated contact with Plaintiff's customers for the purpose of soliciting them as clients for Expert Aquatics. (Baldwin Aff., ECF No. 52 ¶ 62.)

37. Defendants have also submitted affidavits from two of Plaintiff's former customers, which state that their decisions to end their contractual relationship with Plaintiff had nothing to do with Baldwin or Calvin.

38. Carrie Edwards, the Director of Membership for Sunset Club, testified that in October 2023, Sunset Club and Plaintiff terminated their contractual relationship based on rising costs and other concerns Sunset Club had with Plaintiff's services. (Edwards Aff. ¶¶ 7–13.)

39. John G. Wilkening, the General Manager of another former client of Plaintiff's (North Hills Club), testified as to his dissatisfaction with Plaintiff's services when he worked in a prior job for another facility and explained the circumstances under which North Hills Club ended its relationship with Plaintiff at the end of 2023. (Wilkening Aff. ¶¶ 5–12.)

40. The Court finds that Plaintiff has failed to make a persuasive showing that it has lost clients due to any acts by Baldwin or Calvin in breach of their employment agreements.

41. The evidence in the record regarding the seasonal nature of the aquatics industry also works against Plaintiff with regard to its ability to show irreparable harm.

42. In his various roles with Plaintiff, Baldwin handled customer contracts and oversaw contract renewals. In his affidavit, he testified that Plaintiff's general practice was to offer its customers one-year contracts that ran from January through December of a given year. The contracts contained an auto-renewal provision that operated as a renewal of the contract for the upcoming year unless the customer gave notice of cancellation by 1 September of the current year. This auto-renewal provision generally aligns with the seasonal pool management business, which runs from May to September. (Baldwin Aff. ¶¶ 25–26, 28.)

43. Baldwin further testified that by virtue of this auto-renewal provision, Plaintiff would know by September of a given year which of its current customers were renewing or cancelling their contracts for the upcoming year. (Baldwin Aff. ¶ 27.) The Court finds Baldwin's testimony to be credible on this issue.

44. Given that 1 September has come and gone, it appears that Plaintiff's roster of customers for the spring and summer of 2025 season is set. Therefore, because (1) Plaintiff's slate of customers has already been determined for 2025; and (2) the non-competition and non-solicitation provisions for both Calvin and Baldwin

will expire before the 2025 aquatics season begins, the Court finds that Plaintiff will suffer no irreparable harm by the denial of its PI Motion.

45. In addition, the Court cannot ignore the lack of urgency Plaintiff has shown with regard to its PI Motion. It is helpful to consider the timeline of relevant dates with regard to this issue.

46. As noted above, Baldwin was terminated by Plaintiff on 11 December 2023, and Plaintiff sent him a letter on 25 January 2024 stating its concerns that he was acting in violation of the non-competition and non-solicitation provisions of his employment agreement. (“Letter to Baldwin,” ECF No. 3, Ex. D) Calvin resigned his employment with Plaintiff on 22 March 2024 and began work at Expert Aquatics on 1 April 2024. Plaintiff warned Calvin by letter dated 30 April 2024 that he was in violation of the noncompetition provision of his employment agreement. (“Letter to Calvin,” ECF No. 3, Ex. E.)

47. Despite all of this, this lawsuit was not filed until 21 May 2024. Although the Complaint contained a request for a temporary restraining order and preliminary injunction, the record does not show any indication that Plaintiff actually sought to pursue its request for such immediate injunctive relief in Wake County Superior Court between the date the Complaint was filed and the date the case was designated to this Court on 18 June 2024.

48. Moreover, it was this Court—not Plaintiff—who initiated a discussion of this issue by scheduling a status conference on 27 June 2024 in which the Court expressly inquired whether Plaintiff intended to pursue its stated requests in the

Complaint for preliminary injunctive relief. At the 27 June conference, Plaintiff's counsel stated that he was no longer seeking a temporary restraining order but that he intended to pursue a preliminary injunction. The Court informed Plaintiff's counsel at that time that, pursuant to the Business Court Rules, he would need to file a "standalone" PI Motion along with a supporting brief.

49. The parties jointly submitted a proposed briefing schedule with respect to Plaintiff's anticipated PI Motion on 3 July 2024 by email to the Court. On 5 July 2024, the Court entered an Order Setting Briefing Schedule, ("Briefing Schedule Order," ECF No. 13), that was in accordance with the schedule jointly proposed by the parties. The Briefing Schedule Order provided that the PI Motion and accompanying brief would be due no later than 22 July 2024, and that briefing on the PI Motion would close by 19 August 2024.

50. At no time did Plaintiff seek an expedited briefing schedule or hearing date in connection with the PI Motion.

51. Indeed, to the contrary, on 22 July 2024, the Court entered an Order granting a Motion for Extension of Briefing Order and Other Deadlines, ("Order on Consent Motion," ECF No. 29), that was filed earlier that day *by Plaintiff*, ("Consent Motion," ECF No. 28). The Order on Consent Motion extended—as requested by Plaintiff—the deadline for Plaintiff to file the PI Motion and accompanying brief until 26 July 2024.

52. Plaintiff's delay in actually moving forward on its professed desire to obtain immediate injunctive relief is at odds with its assertion that the extraordinary

remedy of a preliminary injunction is warranted on these facts. Courts have recognized that such delay by the moving party is a factor that can properly be considered when assessing whether irreparable harm has been shown. *See N. Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 79 (2009) (affirming trial court's finding of no irreparable harm where plaintiff waited over two months to allege irreparable harm); *W&W v. Ferrell Land Co.*, 2018 NCBC LEXIS 210, at *10 (N.C. Super. Ct. March 8, 2018) ("One significant measure of the need for immediate and irreparable harm is the haste with which the moving party seeks injunctive relief."); *Am. Air Filter Co., Inc. v. Price*, 2017 NCBC LEXIS 9, at *13–14 (N.C. Super. Ct. Feb. 3, 2017) (denying a preliminary injunction motion after a delay of four months); *see also Southtech Orthopedics, Inc. v. Dingus*, 428 F. Supp. 2d 410, 420 (E.D.N.C. Mar. 27, 2006) ("[T]he six to nine week delay between plaintiff's discovery of defendant's competitive activities and its filing suit weighs against injunctive relief.").

53. Moreover, a consequence of Plaintiff's half-hearted approach to seeking a preliminary injunction in this case is that a significant portion of the twelve-month restricted periods applicable to the non-competition and non-solicitation provisions at issue have expired. Indeed, close to half of the time period contained in Calvin's Employment Agreement has passed, and less than three months remain of the period applicable to Baldwin. For this reason as well, any potential benefit accruing to Plaintiff from the entry of immediate injunctive relief has been significantly lessened by its failure to act promptly in pursuing its PI Motion. *See Gen. Parts Distrib. LLC*

v. Perry, 907 F. Supp. 2d 690, 693 (E.D.N.C. Oct. 10, 2012) (“Given that there is so little time remaining in the covenant not to compete’s twelve-month restrictive period, this Court sees little benefit that would be created by requiring the defendant to cease or limit his employment[.]”).

54. Finally, the Court has carefully engaged in a balancing of the respective equities in this case and finds that this factor likewise supports the denial of Plaintiff’s PI Motion.

55. For all of these reasons, the Court, in the exercise of its discretion, concludes that Plaintiff has failed to meet its burden of showing irreparable harm absent the entry of a preliminary injunction.

CONCLUSION

THEREFORE, IT IS ORDERED that Plaintiff’s Motion for Preliminary Injunction is **DENIED**.

SO ORDERED, this the 17th day of September 2024.

/s/ Mark A. Davis

Mark A. Davis

Special Superior Court Judge
for Complex Business Cases