

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 7360

NORTH CAROLINA CITIZENS FOR)
PROGRESS,)
Plaintiff)

v.)

PATRICK L. McCRORY and)
THE PAT McCRORY COMMITTEE,)
Defendants)

ORDER

THIS MATTER comes before the undersigned upon the Defendants' Motion to Dismiss the Plaintiff's complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. All parties appeared by and through counsel on August 29, 2012 at a hearing on this matter, and the Court has considered the arguments and all matters of record.¹

The Plaintiff, in its pleadings, asserts that it is a non-profit organization that has commissioned two television advertisements questioning the ethics of Patrick McCrory, the Republican candidate in the 2012 election for the office of North Carolina Governor. Plaintiff asserts that the Defendants have demanded that the Plaintiff and television broadcasters cease and desist from disseminating the ads because, in the Defendants' view, the ads are false and defamatory. In furtherance of their demand, the Defendants have threatened to sue various individuals, organizations and broadcasters for defamation if Plaintiff persists in airing the ads. On May 24, 2012, Defendants filed an Application

¹ The Court noted at the hearing on this matter that it was striking the first nine (9) pages of the Defendants' brief inasmuch as those pages reference numerous facts not contained in the pleadings or otherwise proper for the Court to consider in connection with these motions. The Court has not considered matters outside of the pleadings in this matter with the sole exception of the affidavit of Terri Silverman filed on August 28, 2012 by the Plaintiff in opposition to the Defendants' arguments of lack of subject matter jurisdiction under Rule 12(b)(1).

and Order Extending Time to File Complaint in Wake County Superior Court against a number of individual and entities, including the Plaintiff, signifying Defendants' intent to file a complaint for damages for defamation with the court within 20 days. That action abated without the Defendants ever filing the complaint.

The Plaintiff has commenced this litigation seeking to have this Court declare, among other things, that the advertisements are political speech, constitutionally privileged, true and/or substantially true, and not defamatory. Declaratory relief under North Carolina's Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.*, ["NC DJA"] is the sole remedy sought by the Plaintiff.

A motion to dismiss a declaratory judgment claim tests whether the complaint presents a concrete present controversy on which the court can and should issue its declaration; the motion does not test whether the plaintiff in a declaratory judgment action is ultimately entitled to the declaration it seeks. *Legalzoom.com, Inc. v. The North Carolina State Bar*, 2010 N.C. Business Court 47 (August, 2012), *citing* N.C. *Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974); *see also Walker v. Charlotte*, 268 N.C. 345, 347-48, 150 S.E.2d 493, 495 (1966) (emphasis added). Thus, this Motion requires the Court to determine whether this action, as presented by the Plaintiff in its pleadings, is one in which the Court can and should issue declaratory relief, irrespective of the merits of the parties' claims and defenses.

There is little, if any, case law in North Carolina on the precise issue before the Court – namely whether Court's subject matter jurisdiction under the NC DJA extends to determining whether a publication's content is true or false, and if false, whether it is defamatory. However, the Court is guided by several North Carolina appellate decisions

that have considered the scope of the trial court's jurisdiction under the NC DJA in other contexts. In *Prudential Ins. Co. of America v. Powell*, 217 N.C. 495, 8 S.E.2d 619 (1940), the North Carolina Supreme Court considered a question of whether certain individuals were "employees" under the Unemployment Compensation Law. The Court held that:

This is essentially a question of fact. The purpose of the Declaratory Judgment Act is to provide a ready means of determining rights, status and other legal relations. These are questions of law. While, in some instances, it may be necessary to hear evidence in order to determine the legal questions presented in a proceeding under this Act, proceedings may not be maintained under the Act to present issues of fact only. 8 S.E.2d at 622.

Later, applying this same reasoning, our Court of Appeals held that "a negligence action, with unresolved issues of fact, cannot be properly decided under the North Carolina's Declaratory Judgment Act. . . . Therein, on the face of the plaintiff's complaint, it revealed a factual issue to be determined by a jury and not by a trial judge in a declaratory judgment action. Accordingly, the trial court correctly determined that this action was not proper under the Declaratory Judgment Act." *Strickland v. Town of Aberdeen*, 124 N.C. App. 430 (1996). Although the *Strickland* case involved the tort of negligence, rather than the tort of defamation, the holding is persuasive because, like the case at bar, it involved the application of the NC DJA to tort claims that necessarily require determination of significant unresolved facts:

Several federal courts have been confronted with defamation actions brought under the federal Declaratory Judgment Act ["federal DJA"] (which, the Court notes, confers broader subject matter jurisdiction than the North Carolina counterpart under which the instant case arises). In one such defamation case, *Dow Jones & Co. v.*

Harrods, Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002), the plaintiff, Dow Jones, commenced an action seeking, under the federal DJA, to have the trial court declare that its published statements about the defendant, Harrods, were non-actionable expressions of opinion and not defamatory. The federal court, with a detailed analysis of its reasoning, concluded that “where the purported use of the DJA seeks a declaration of non-liability to preemptively defeat actions grounded on tort claims involving rights already accrued by reason of alleged wrongful conduct, various courts have held that that application is not a warranted purpose of the DJA.” *Id* at 426-27, citing *BASF Corp. v. Symington*, 50 F.3d 555, 559 (8th Cir. 1995) (holding that “where a declaratory plaintiff raises chiefly an affirmative defense, and it appears that granting relief could effectively deny an allegedly injured party its otherwise legitimate choice of the forum and time for suit, no declaratory judgment should issue.”); *Morrison v. Parker*, 90 F. Supp. 2d 876, 880-81 (W.D. Mich. 2000); *Sun Oil Co. v. Transcontinental Gas Pipeline Corp.*, 108 F. Supp. 280, 282 (E.D. Pa. 1952), *aff’d*, 203 F.2d 957 (3d Cir. 1953); and 10B *Wright, Miller & Kane*, § 2765 at 638-39. The *Dow Jones* court dismissed the plaintiff’s claim pursuant to Rule 12(b)(1) and (2) of the Federal Rules of Civil Procedure. While the *Dow Jones* case is factually distinguishable because it involved a completed tort (the offending publication had already occurred and was not likely to be repeated) and a battle over competing forums (the United States court and the courts of the United Kingdom), the *Dow Jones* court relied upon principles that are in accord with the principles set out in the aforementioned North Carolina appellate cases. This Court finds the federal court’s reasoning persuasive.

Thus, because (1) the Plaintiff's pleadings in this case assert claims for relief invoking solely the subject matter jurisdiction of the Court conferred through the NC DJA, (2) the relief sought by the Plaintiff is to have the Court declare that ads at issue are not a breach of the tort of defamation, and (3) the determination of whether the ads are defamatory would necessarily involve the resolution of a number of prevalent and predominant issues of fact, such as whether the ads are true or false, the Court therefore concludes that, as a matter of law, the Plaintiff's amended complaint seeks relief that is not properly the subject of the NC DJA. Accordingly, the Plaintiff's claims must be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief might be granted.²

It is therefore ORDERED that the Defendants' Motion under Rule 12(b)(1) and 12(b)(6) is ALLOWED and the Plaintiff's claims be DISMISSED with prejudice. Each party is to bear its own costs.

This the 10th day of September, 2012.

/s/ Paul C. Ridgeway

Paul C. Ridgeway, Superior Court Judge

² The Court does not intend in this Order to address the merits of the parties' respective claims, and this Order should not be construed to have a preclusive effect on a later determination of the merits of the claims in an appropriate forum.