

COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

DONALD F. PARSONS, JR.  
VICE CHANCELLOR

New Castle County CourtHouse  
500 N. King Street, Suite 11400  
Wilmington, Delaware 19801-3734

December 31, 2003

Paul E. Weber  
14 Winnwood Road  
Newark, DE 19711

Richard H. Cross, Jr., Esquire  
Mark D. Oliveri, Esquire  
Cross & Associates, LLC  
913 N. Market Street, Suite 1001  
P.O. Box 1380  
Wilmington, DE 19899-1380

Re: *Paul E. Weber, et. al. v. Audrey L. Kirchner*  
Civil Action No. 19956-NC

Dear Mr. Weber and Counsel:

Paul E. Weber (“Weber”) and six entities<sup>1</sup> brought this action seeking declaratory, injunctive, and compensatory relief. Ms. Kirchner (hereinafter “Riley”)<sup>2</sup> has two outstanding motions before the Court. The first is Riley’s motion to dismiss the entity Plaintiffs. The second is Riley’s motion for summary judgment on the basis of a release signed by Weber on October 23, 2000.

---

<sup>1</sup> According to Weber’s Verified Complaint, these entities are: White Clay Holdings, Inc., a Delaware corporation; White Clay Group, a Delaware company and subsidiary of White Clay Holdings, Inc.; Splash!, a subsidiary of White Clay Holdings; Comfort Spas, a subsidiary of White Clay Holdings; QCA Spas (Delaware), a subsidiary of White Clay Holdings; and Rent-a-Tub, a subsidiary of White Clay Holdings.

<sup>2</sup> Ms. Kirchner recently married and is now known as “Mrs. Audrey Riley.”

The Complaint was filed on October 3, 2002. After answering, Riley filed a motion to dismiss on July 1, 2003 along with a motion to disqualify Plaintiffs' counsel. Former Vice Chancellor Jacobs granted the motion to disqualify in an order dated May 6, 2003 that directed Plaintiffs to obtain new counsel and enter their appearance within sixty (60) days. Plaintiffs have failed to retain new counsel. Riley also filed a motion for summary judgment on November 7, 2003. Plaintiffs did not respond to that motion or the earlier motion to dismiss.

After this action was reassigned, this Court scheduled oral argument on both motions for December 1, 2003. Weber, however, did not respond to a proposed scheduling order reflecting that date circulated by Riley's counsel. The Court therefore postponed argument until December 17, 2003 to ensure that Weber had an opportunity to participate. *See* Nov. 21, 2003 Ltr. from Court to Weber and counsel. On December 17, 2003, the Court heard argument on Riley's motions to dismiss and for summary judgment. Weber did not attend. This is the Court's ruling on those motions.

I. MOTION TO DISMISS.

Riley moved to dismiss all of the entity plaintiffs, White Clay Holdings, Inc., White Clay Group, Splash!, Comfort Spas, QCA Spas (Delaware), and Rent-A-Tub. The Complaint identifies these Plaintiffs as distinct entities. *See* Compl.

¶¶ 4-9. When he granted Riley's motion to disqualify Plaintiffs' counsel in May 2003, former Vice Chancellor Jacobs gave Plaintiffs sixty (60) days to find new counsel and have them enter an appearance. To date, more than six months later, no new attorney has appeared on behalf of any of the Plaintiffs. Corporations and artificial entities cannot appear *pro se*. *Transpolymer Indus., Inc. v. Chapel Mail Corp.*, 582 A.2d 936 (Del. Supr. 1990); *Mateson v. Mateson*, C.A. No. 14730 (Del. Ch. Apr. 29, 1997)(Allen, C.); *Marriott Corp. v. Host Marriott Corp.*, 1993 WL 271442, at \*2 (Del. Ch. July 14, 1993). Because the plaintiff entities cannot appear *pro se* and have failed to procure new counsel, despite having had ample opportunity, the Court will grant Riley's motion to dismiss the entity plaintiffs. Only Weber will remain as a plaintiff in this action.

The caption will now read:

PAUL E. WEBER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	C.A. No. 19956-NC
AUDREY L. KIRCHNER,	)	
	)	
Defendant.	)	

II. MOTION FOR SUMMARY JUDGMENT.

Riley seeks summary judgment against Weber and the entity plaintiffs. Because the Court has already determined to dismiss the entity plaintiffs, the following will address the motion for summary judgment only as it applies to Weber.

The parties previously were involved in other litigation. *See Kirchner v. Weber*, C.A. No. 18428-NC (Del. Ch. 2000). The Verified Complaint references a Mutual Release and Settlement Agreement dated October 23, 2000 in the prior action (the “Settlement Agreement”) and alleges that it was procured by duress. *E.g.*, Compl. ¶¶ 25, 31, 32. Riley contends the Settlement Agreement precludes the current action. Riley correctly notes that Weber will have the burden to prove that the Settlement Agreement is invalid at trial. The Complaint alleges that the Settlement Agreement was executed under duress, which, if proven, would provide

a basis to set aside the agreement. *E.g., Edge of the Woods v. Wilmington Savings Fund Society, FSB*, 2001 WL 946521, at \*4 (Del. Super. Aug. 16, 2001).

To prove duress at trial, Weber would have to demonstrate that there was a wrongful act that overcame his free will and that he had no adequate legal remedy to protect his interests. *Id.*; *Way Road Development Co. v. Snavely*, C.A. No. 89C-DE-48, mem. op. at 8 (Del. Super. Jan. 31, 1992). Summary judgment may be granted only if Riley is entitled to judgment as a matter of law when the facts and reasonable inferences from those facts are viewed in the light most favorable to Weber. Court of Chancery Rule 56(c). Riley argues that, as a matter of law, the Complaint fails to plead facts that if true could establish that the Settlement Agreement was executed under duress. The Complaint alleges that the threat of litigation, both civil and criminal, physical threats and emotional gamesmanship coerced Weber to enter into the Settlement Agreement. Compl. ¶¶ 16-37.

A. Threatened Litigation.

Riley argues that the prior lawsuit does not constitute economic duress as a matter of law because the lawsuit was filed under a good faith belief that a viable cause of action existed. Whether the lawsuit was filed in good faith raises factual issues that may not be resolved on the present record. The Complaint alleges that the prior action was frivolous and an abuse of process designed to interfere with

Weber's ability to conduct the affairs of White Clay Holdings, Inc. Among other things, Weber asserts the following: that Kirchner changed the locks and security codes on the business premises and then claimed Weber had abandoned the business; that drug screenings rebut Kirchner's claim that Weber was engaged in drug use; and that records and receipts rebut Kirchner's claim of misappropriation of corporate funds. Compl. ¶¶ 26-29. These allegations, when assumed to be true with all inferences viewed in the light most favorable to Weber, are sufficient to support a reasonable inference that the litigation was not filed in good faith.

The case relied on by Riley for the proposition that it is "impossible to sustain a claim [for duress] where litigation is already pending" is distinguishable. In *E.I. duPont de Nemours and Co. v. Custom Blending Int'l, Inc.*, 1998 WL 842289 (Del. Ch. Nov. 24, 1998), Vice Chancellor Strine held that a sophisticated commercial party could not sustain a claim that the economic duress of continued litigation in a pending action would invalidate a settlement of that action. In contrast, Weber is an individual of limited means and has averred facts beyond the economic duress of the prior litigation that, if proven, could support an inference that the Settlement Agreement was procured under economic duress.

B. Physical Threats.

Riley argues that, although Weber alleges that she induced her employees to threaten him physically, his Verified Complaint fails to allege that the threats were related to Weber's decision to execute the Settlement Agreement. The Verified Complaint specifically alleges that on one occasion Kirchner (now Riley) threatened Weber with bodily injury "via a third party if he did not relinquish control of the corporation to her." Compl. ¶ 19. Paragraph 22 of the Complaint alleges another such incident. The alleged threats were on October 8<sup>th</sup> and 12<sup>th</sup> of 2000, just days before Weber signed the Settlement Agreement, which provided that he would relinquish control of his equitable interests in the corporation. *Id.*

Riley conceded at oral argument that the Verified Complaint must be treated as an affidavit for purposes of this motion. In a follow-up letter to the Court on December 19, 2003, Riley clarified her position to be that Weber must have set forth specific facts based on his own personal knowledge in the Verified Complaint to create a genuine issue of disputed fact for trial. For purposes of the allegations recited above, however, Weber's Verified Complaint appears to satisfy the requirements of Court of Chancery Rule 3(aa). Riley's affidavit denying the alleged threats simply creates a genuine issue of material fact for trial.

C. Whether Weber's Free Will was Overcome.

Defendants argue that Weber failed to allege facts that support a conclusion that his will was overcome by the alleged duress. Weber signed the Settlement Agreement while he was with Leo J. Ramunno, an attorney. However, both the Verified Complaint and Riley's affidavit raise factual issues as to whether Ramunno was in fact representing Weber in connection with the Settlement Agreement, when Weber executed it. Furthermore, assuming Weber's verified assertions are true, as we must for purposes of this motion for summary judgment, and giving him the benefit of all reasonable inferences, the Court cannot rule out the possibility that the pleadings may support a finding that his will was in fact overcome by economic, physical, emotional or other duress.

D. Reasonable Alternatives.

Riley also argues that Weber had reasonable alternatives to succumbing to the alleged duress. Specifically, he could have sought civil or criminal relief against the alleged physical threats and could have defended himself against the lawsuit, sought sanctions, filed counterclaims or filed suit for abuse of process. Whether these alternatives were reasonably available to Weber and would have provided adequate relief under the circumstances are facts to be determined at trial.



In summary, the evidence adduced to date is not sufficient to show the absence of any genuine issue of material fact and that Riley is entitled to judgment as a matter of law based on the Settlement Agreement and related release obtained in the prior litigation. Accordingly, the Court will deny Riley's motion for summary judgment.

### III. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss the entity plaintiffs is GRANTED. Defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor