

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SALADWORKS, INC. :
 :
 v. : 05-CV-1928
 :
 MI HO NO :

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 5, 2005

Plaintiff Saladworks, Inc. ("Saladworks") in this action against its franchisee, Mi Ho No ("Mr. No"), alleges fraud, breach of the franchise agreement, and violations of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a). Saladworks filed a complaint and moved for a preliminary injunction requesting the court to order expedited discovery and effectively terminate Mr. No's franchise. The court granted expedited discovery and held a hearing on the remainder of the preliminary injunction on May 19, 2005.

On May 23, 2005, Saladworks filed an amended complaint and second motion for a preliminary injunction, titled "Emergency Motion for Entry Pursuant to Paragraph XVI.E of the Franchise Agreement", ordering Mr. No to allow Saladworks to enter and exercise complete authority over the business to correct breaches of the franchise agreement regarding health and safety standards. Because of concerns for public safety and the potential for irreparable injury to Saladworks' trademarks and reputation, the

court granted this injunction, allowing Saladworks to enter and take control of the business for 45 days while Mr. No retained ownership. See *Saladworks, Inc. v. Ho No*, No. 05-CV-1928, 2005 WL 1417096 (E.D. Pa. June 15, 2005).

On June 2, 2005, Mr. No filed an answer and counterclaims against Saladworks for tortious interference with a prospective contract, breach of the duty of good faith and fair dealing, and negligence. Mr. No also sought a preliminary injunction to enjoin Saladworks from interfering with his efforts to sell his business or obtain a direct lease of the restaurant premises. This preliminary injunction is now before the court.

After a hearing on June 8, 2005, the court makes the following findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a).

Findings of Fact

1. Saladworks is a corporation organized under the laws of the State of New Jersey, with its principal place of business at Eight Tower Bridge, Suite 225, 161 Washington Street, Conshohocken, Pennsylvania.

2. Saladworks, franchising more than 65 Saladworks restaurants in the Delaware Valley, allows franchisees to use its exclusive trademarks, service marks, trade name, and trade dress.

3. Saladworks employs and advertises throughout the Delaware Valley certain trademarks and service marks ("Saladworks

Marks") identifying the source, origin, and sponsorship of its facilities, products and services. All right, title, and interest to the Saladworks Marks and the design, decor, and image of the Saladworks restaurants are vested solely in Saladworks.

4. Mr. No, an individual residing in Pennsylvania, is a franchisee of a Saladworks restaurant at 3728 Spruce Street in Philadelphia ("the Restaurant"). Mr. No also subleases the premises from Saladworks.

5. There is subject matter jurisdiction under 28 U.S.C. § 1331, based on 15 U.S.C. § 1121, for the claims arising under the Lanham Act, 15 U.S.C. § 1114, and § 1125(a). The court exercises supplemental jurisdiction over all state law claims under 28 U.S.C. § 1367.

6. The court has personal jurisdiction over the parties, and venue is proper under 28 U.S.C. § 1391(b).

7. On February 27, 2004, Saladworks entered into a franchise agreement ("the Franchise Agreement") with Mr. No for the operation of the Restaurant. The Franchise Agreement granted Mr. No a license to use the Saladworks Marks in the operation of the restaurant. Plaintiff's Exhibit P-1.

8. The term of the Franchise Agreement and the sublease extend from February 27, 2004 to December 31, 2006. The Franchise Agreement and sublease are valid and binding on the parties; Mr. No currently has the right to use the Saladworks

name and Saladworks Marks. Plaintiff's Exhibit P-1.

9. Mr. No purchased the franchise from the prior franchisee, Hashad Vyas, for \$200,000 through a Transfer of Franchise Agreement. Saladworks approved the transfer and received a transfer fee of \$17,500. Plaintiff's Exhibit P-3.

10. Contemporaneously with the Franchise Agreement, Mr. No entered into an agreement to sublease the Restaurant premises from Saladworks, the sublandlord and lessee of the owner, the University of Pennsylvania. Plaintiff's Exhibit P-2.

11. Saladworks first filed a complaint together with a motion for a preliminary injunction and expedited discovery on April 26, 2005 (Doc. No. 2).

12. Saladworks also filed an amended complaint for injunction and damages (Doc. No. 11) on May 23, 2005.

13. After a hearing on the first motion for a preliminary injunction, while a decision was pending, Saladworks filed a second motion for preliminary injunction, titled "Emergency Motion for Entry Pursuant to Paragraph XVI.E of the Franchise Agreement" (Doc. No. 10), on May 23, 2005.

14. Defendant and counsel were served with a copy of the summons and complaint, both motions for preliminary injunctions, and supporting affidavits.

15. The second motion for preliminary injunction sought to allow Saladworks to enter and exercise complete authority over

the business on an interim basis under a provision in the Franchise Agreement; Mr. No would retain ownership of the business. The court granted the second motion for preliminary injunction on June 15, 2005.

16. On June 2, 2005, Mr. No filed an answer, counterclaims, and a motion for a preliminary injunction. He counterclaimed for tortious interference with a prospective contract, negligence, and breach of the duty of good faith and fair dealing. The proposed preliminary injunction would enjoin Saladworks from interfering with Mr. No's efforts to sell his business or obtain a direct lease of the restaurant premises.

17. Mr. No alleges Saladworks attempted to prevent Mr. No from obtaining a direct lease of the Restaurant premises from the University of Pennsylvania.

18. At the June 8, 2005 hearing, Mr. No presented the testimony of John Dugan ("Dugan"), a broker who frequently deals with Saladworks in arranging sales and purchases of franchises.

19. Dugan testified that when Mr. No first purchased the franchise, Dugan advised him to seek a release from his sublease with Saladworks and arrange a direct lease with the University of Pennsylvania. H.T. at 98.

20. Dugan testified that a representative from the University of Pennsylvania offered to move Mr. No's restaurant into a new location with a direct lease. H.T. at 99.

21. Dugan testified that a representative of Saladworks told him Dugan should not negotiate the lease, and that Saladworks would take over the negotiation. H.T. at 103.

22. On cross-examination, Dugan admitted that the negotiations consisted only of two phone calls, that he had no written offers from the University of Pennsylvania, and that he had not spoken with any agent of the University who had the apparent authority to negotiate leases. H.T. at 118-119.

23. Dugan testified that he had prepared to assist Mr. No with the sale of his franchise by listing it for sale, but a representative of Saladworks told Dugan that Mr. No no longer had a valid franchise agreement that could be sold or transferred, so Dugan removed the sale listing. H.T. at 108-109.

24. The Franchise Agreement allows Mr. No to transfer the franchise or assign his rights under the Franchise Agreement, subject to Saladworks' approval of the transferee or assignee. Plaintiff's Exhibit P-1.

25. Saladworks does not object to a preliminary injunction enjoining it from preventing Mr. No from obtaining a new direct lease, provided he obtains a release from or satisfies the obligations of his current lease with Saladworks. H.T. at 166-167.

Discussion

To support a preliminary injunction, the moving party must

prove a reasonable probability of success on the merits and irreparable injury if the preliminary relief is not granted pending final adjudication on the merits. See *American Greetings Corporation v. Dan-Dee Imports, Inc.*, 807 F.2d 1136, 1140 (3d Cir. 1986). The district court must also consider the potential harm to the party opposing the preliminary injunction as well as the public interest. *Id.*

Under Pennsylvania law, the elements of a claim for tortious interference with prospective contractual relations are: (1) a prospective contractual relationship; (2) the purpose or intent to harm the plaintiff by preventing the relationship from occurring; (3) the absence of a privilege or justification on the part of defendant; and (4) actual harm to plaintiff as a result of defendant's conduct. *Glenn v. Point Park College*, 441 Pa. 474 (Pa. 1971). To meet the first element, the plaintiff must prove with reasonable probability that he had a prospective contractual relationship. The alleged prospective relationship must be something more than a mere hope or the innate optimism of the plaintiff. *Id.* at 480.

Mr. No did not provide evidence that he was likely to succeed on his claim of tortious interference regarding his efforts to obtain a direct lease. The testimony showed only brief discussions between Mr. No and certain persons from the University of Pennsylvania had occurred. This may not be

adequate to show a sufficiently definite contractual opportunity. However, Saladworks concedes that Mr. No has the right to seek a direct lease for his business, providing he satisfies the obligations of his present lease with Saladworks or obtains a valid release. Saladworks would suffer no legally cognizable harm from such an injunction. For this reason, we will grant Mr. No's motion for a preliminary injunction protecting his efforts to obtain a direct lease.

Regarding an injunction to enjoin Saladworks from interfering with Mr. No's attempt to sell or transfer his business, Mr. No presented no evidence to show he had a prospective buyer or transferee. Dugan merely testified that he had briefly listed the franchise for sale. This is insufficient to show a prospective contractual relationship. Also, Saladworks retains the right under the Franchise Agreement to approve or reject a potential buyer or transferee.

Provided he complies with the Franchise Agreement and informs potential buyers of its limitations, Mr. No retains the right to seek a buyer for his business. No injunction to this effect is necessary.

Regarding Mr. No's claims for negligence and breach of the duty of good faith and fair dealing, the injunctive relief he requested does not pertain to those claims; the court need not analyze his probability of success on the merits of those claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SALADWORKS, INC. :
 :
 v. : 05-CV-1928
 :
 MI HO NO :

ORDER OF PRELIMINARY INJUNCTION

AND NOW, this 5th day of July, 2005, upon consideration of defendant's counterclaims, motion for preliminary injunction and all responses thereto, and after a hearing the motion for preliminary injunction, it is hereby **ORDERED** that:

1. Mr. No's motion for preliminary injunction (Doc. No. 16) is **GRANTED IN PART** and **DENIED IN PART**.
2. Counterclaim defendant Saladworks, its agents, and assigns shall not prevent Mr. No from seeking a new lease, at the present location or a new location, provided Mr. No complies with or obtains a release from his current lease and Franchise Agreement with Saladworks.

/s/ Norma Shapiro
Norma L. Shapiro, S.J.