

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.

June 15, 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 enjoin Mr. No from holding himself out as the operator of an authorized Saladworks restaurant. 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". This second motion is presently before the court. It seeks an injunction 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. This motion would only grant Saladworks *interim*

authority to control the business, and would allow Mr. No to retain ownership of the franchise. After a hearing on the second motion on June 2, 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. 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.

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

5. After a hearing on the motion for a preliminary injunction, while a decision was pending, Saladworks filed the instant 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.

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

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

8. 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.

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

10. 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.

11. The Saladworks Marks have been advertised and promoted by Saladworks in the Delaware Valley over the last eighteen years. Franchisees must use the Saladworks Marks on products such as signs, logos, menu boards, posters, and other such items.

12. Plaintiff's products bearing the Saladworks Marks are

offered and sold in interstate commerce.

13. Saladworks has developed good will for the Saladworks Marks, and restaurants, products, and services bearing the Saladworks Marks.

14. The public is familiar with the Saladworks Marks, and the products and services associated with the Saladworks Marks are understood by the public to be produced, marketed, sponsored, supplied by, or affiliated with Saladworks.

15. 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.

16. 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.

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

18. 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.

19. Saladworks has established a uniform system of operational standards to regulate and control all aspects of Saladworks restaurant operations by requiring adherence to detailed specifications set forth in a Confidential Operations Manual ("the Manual"). The Franchise Agreement requires Mr. No to adhere to all Saladworks operational standards, including procedures and specifications set forth in the Manual. Franchise Agreement, Paragraph VI.A.

20. The Manual prescribes rules governing the method of preparation of menu items and other food products, product formulae, standards, operating procedures of a Saladworks restaurant, and other specifications. Franchise Agreement, Paragraph VII.A.

21. Saladworks employs personnel to conduct periodic inspections of Saladworks restaurants to ensure compliance with Saladworks operating procedures. After inspections, Operations Performance Review ("OPR") reports, evaluating the restaurant's compliance with Saladworks standards, are issued to the franchisee. Franchise Agreement, Paragraph XIII.D; Plaintiff's Exhibits P-7, P-10.

22. An OPR evaluates food safety procedures based on an examination of equipment, operating temperatures, sanitation,

handling of in-process products, protection of products from contamination, pest infestation, product shelf life and rotation, food safety training, and personal hygiene. Plaintiff's Exhibits P-7, P-10.

23. The Franchise Agreement requires Mr. No to use Plaintiff's restaurant design, color schemes, signage, interior decor, equipment systems, menu, and service format. Franchise Agreement, Section XII.

24. The Franchise Agreement requires Mr. No to maintain insurance of a prescribed coverage with Saladworks. Franchise Agreement, Paragraph XIV.B.

25. The Transfer of Franchise Agreement requires Mr. No to employ a trained general manager approved by Saladworks. Franchise Agreement, Section IV.

26. The Franchise Agreement defines certain acts as events of default. For certain acts of default, the Franchise Agreement requires Saladworks to give the franchisee notice of the default and thirty days to cure the default before termination of the Franchise Agreement based on the default. Franchise Agreement, Paragraph XVI.A.

27. The franchisee's violation of any health, safety, or sanitation law, ordinance, or regulation, or the operation of the franchised restaurant in a manner that presents a health or safety hazard to the public is an act of default. Franchise

Agreement, Paragraph XVI.B.13.

28. The franchisee's commission of any act that can be reasonably expected to materially impair the good will associated with the Saladworks Marks is an act of default. Franchise Agreement, Paragraph XVI.B.10.

29. The franchisee's failure or refusal to comply with any provision of the Franchise Agreement, or any mandatory specification, standard, or operating procedure prescribed in the Manual or otherwise in writing, followed by the failure to correct such failure within thirty days (or failure to provide proof acceptable to Saladworks that the franchisee has made all reasonable efforts to correct such failure and will continue to do so until a cure is effected, if such failure cannot reasonably be corrected within thirty days) after written notice of such failure to comply is delivered to the franchisee is an act of default. Franchise Agreement, Paragraph XVI.C.2.

30. In the event that a franchisee has not cured a default under the Franchise Agreement within twenty business days after receipt of a written notice to cure from Saladworks, Saladworks may enter the premises of the franchised restaurant and exercise complete authority with respect to the operation of the restaurant until such time as Saladworks determines that the default has been cured and there is compliance with the Franchise Agreement. Franchise Agreement, Paragraph XVI.E.

31. In the event Saladworks takes control of the restaurant under Paragraph XVI.E, the franchisee pays Saladworks a service fee of not less than \$300.00 per day, plus all travel expenses, room and board, and other expenses reasonably incurred. Franchise Agreement, Paragraph XVI.E.

32. Saladworks presented the testimony of Saladworks Chief Executive Officer and President John Scardapane ("Scardapane"), and Vice President of Operations Paul Steck ("Steck").

33. Plaintiff's personnel conducted OPR reviews of the Restaurant on December 21, 2004, April 29, 2005, and May 18, 2005. Steck, conducting the April 29 and May 18 OPR reviews, found numerous and serious deficiencies in the Restaurant's operations. Plaintiff's Exhibits P-7 and P-10.

34. The OPR scores from the April 29 and May 18 OPR reviews were 49.8% and 41.8% respectively, out of a possible score of 100%. Plaintiff's Exhibits P-7 and P-10.

35. The OPR reviews revealed: rodent contamination including rodent feces; improper food handling, storage, and preparation increasing the risk of bacterial growth and contamination; unsanitary and dirty equipment (such as cutting boards and lettuce spinners); unsafe food temperatures; storage of insecticide near paper products; the absence of sanitization test strips; improper rotation and dating of food products; fermentation of salad dressings; and general disarray and

uncleanliness. Saladworks submitted numerous photographs documenting the unsanitary conditions at the Restaurant. Plaintiff's Exhibit P-7, P-10. Saladworks is likely to succeed in showing these failures are defaults of the operational standards under the Franchise Agreement.

36. Employees wore non-uniform items of clothing such as bandanas and "do-rags," and failed to practice basic food-handling safety. Plaintiff's Exhibits P-7, P-10. Saladworks is likely to succeed in showing that the employees at the Restaurant lacked adequate training in food safety and sanitary practices in default of the operational standards under the Franchise Agreement.

37. Saladworks is likely to succeed in showing that Mr. No failed to hire a properly trained, Saladworks-approved manager. Plaintiff's Exhibit P-4.

38. Saladworks is likely to succeed in showing that the Restaurant offered for sale non-standard products unapproved under the Franchise Agreement. Plaintiff's Exhibits P-7, P-10.

39. Saladworks is likely to succeed in showing that Mr. No had no insurance coverage during much of the period covered by the Franchise Agreement, that Mr. No did not obtain insurance coverage until May 31, 2005, and that the policy he obtained failed to meet the requirements of the Franchise Agreement. Defendant's Exhibit N-12. Saladworks is likely to succeed in

showing that this was a default of the operational standards under the Franchise Agreement.

40. Saladworks sent several notices to cure various defaults under the Franchise Agreement, including notice to cure violations of quality, service, and cleanliness standards. Plaintiff's Exhibit P-6.

41. On the morning of June 1, 2005, Steck attempted to conduct an OPR at the Restaurant. He testified that when he entered the Restaurant to perform the inspection, Mr. No became angry and agitated, and started yelling loudly. One of Mr. No's employees moved between Steck and Mr. No, and asked Steck to leave. Steck left, and was unable to complete the OPR. June 2 H.T. at 7.

42. Mr. No testified through an interpreter. While perhaps well-intentioned, Mr. No displayed an inadequate understanding of proper restaurant operations and business practices.

43. Mr. No presented the testimony of Hyun Yoo ("Yoo"), a volunteer for the Korean American Grocery Association.

44. Yoo trains Korean food establishment employees on food safety. He inspected the restaurant on the afternoon of June 1, 2005. June 2 H.T. at 41.

45. Yoo testified that the Restaurant was not dangerous, and was in good condition. June 2 H.T. at 41-43.

46. Yoo, completing an inspection checklist, noted numerous

problems with food handling at the Restaurant, including the absence of time and temperature logs, improper storage, and absence of dates on foods. Defendant's Exhibit Exhibit N-13.

47. On cross-examination, Yoo testified that he observed numerous violations of the City of Philadelphia Health Code. June 2 H.T. at 47; 48; 50; 51.

48. Yoo was not familiar with Plaintiff's standards for safety and cleanliness. June 2 H.T. at 53.

49. Yoo's inspection of the restaurant was incomplete, and his statement that the Restaurant was safe was not credible.

50. Mr. No presented the testimony of James Moody ("Moody"), an employee of the Restaurant who was recently promoted to interim manager.

51. Mr. No presented a videotape made at the Restaurant on June 1, 2005, narrated by Moody. The videotape showed that some, but not all, of the previously identified unsanitary conditions at the Restaurant had been cured. Defendant's Exhibit N-14.

52. Moody never received the training required by Saladworks, had no certification in food handling, and was unfamiliar with some basic food handling rules. June 2 H.T. at 69; 73-74.

53. Moody's testimony and the videotape does not convince the court that Saladworks would not prevail as to proof of unsanitary and unsafe conditions at the Restaurant.

### **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.*

#### **A. Probability of Success on the Merits**

The Franchise Agreement provides that Saladworks may enter the Restaurant and take control of business operations in the event Mr. No fails to cure a default within twenty business days after receipt of written notice to cure.

Plaintiff presented credible evidence of numerous violations of Saladworks operational standards at the Restaurant. The OPR scores and deviations from operational standards, not yet corrected to a minimum level of acceptability, suggest by clear and convincing evidence that Saladworks would most likely prevail on the merits until verified corrective action has been taken to the satisfaction of the franchisor. The conditions at the Restaurant were more than mere violations of unrealistic standards; in some cases, they were a likely threat to public health. The conditions were attested to by Saladworks Vice

President of Operations, Paul Steck, and Chief Executive Officer and President John Scardapane. The substandard conditions were corroborated by photographs. In addition, Mr. No refused to allow Steck to inspect the Restaurant on June 1, 2005. This refusal suggests Mr. No had not yet improved the Restaurant to an acceptable level of safety and sanitation.

Defendant's witness, Yoo, testified that the Restaurant was not dangerous. This testimony was not persuasive. His inspection was cursory and incomplete. He did not check the temperature of many of the foods, dressings and sauces about which Saladworks had complained. He was unable to testify whether many of the foods were stored past the expiration date. He also admitted on cross-examination to observing several health code violations. Finally, he was not familiar with Saladworks standards, and could not judge whether the Restaurant met those standards. His testimony lacked credibility.

The record supports Plaintiff's likelihood of success on its claim of violations of its quality and safety standards. Failure to adhere to Saladworks operation standards, if shown, would constitute a violation of the Franchise Agreement. Saladworks also presented sufficient evidence that Mr. No failed to cure the identified defaults in a timely fashion; Mr. No failed to present evidence of cure.

**B. Irreparable Harm**

Mr. No's position as a Saladworks franchisee and concomitant license to use the Saladworks Marks virtually guarantees that consumers will identify products sold at the Restaurant with Saladworks approved products. The Restaurant offers a selection of food in the same manner and at the same price as other Saladworks restaurants.

The cornerstone of the franchise system is the trademark or trade name of a product. Uniformity of product and control of its quality cause the public to turn to franchise restaurants. *Susser v. Carvel Corp.*, 206 F.Supp. 636, 640-641 (S.D.N.Y.1962); N.T. II at 126. The franchisee/franchisor relationship allows the franchisee to sell Saladworks products from a store of uniform and distinctive design that has as an integral structural feature the Saladworks trademarks. The public's knowledge of the uniformity of operation and quality of product draws business to Saladworks restaurants. The name "Saladworks" constitutes a trademark of value to Saladworks and to the franchisees. Plaintiff's inability to protect and insure the maintenance of the high quality of service that the Saladworks Marks represent would cause irreparable injury to Plaintiff's business reputation and good will.

To the extent Saladworks is likely to prevail on the merits, it has demonstrated irreparable harm. If Saladworks is unable to control the nature and quality of the goods and services

defendant provides at a Saladworks franchised restaurant, activities not meeting Saladworks standards at those restaurants could irreparably harm the goodwill associated with its Marks and reputation. Failure to meet some of the safety and sanitary standards here involved might also subject Saladworks to substantial civil liability if members of the public were personally injured.

**C. Harm to Defendant**

Allowing Saladworks to assume temporary control of the Restaurant will cause some financial harm to Mr. No. Under the Franchise Agreement, Saladworks will charge Mr. No \$300.00 per day taken from gross sales to assume control of the Restaurant; Mr. No will have reduced expenses, will receive the excess sales and receipts, and will retain ownership of the franchise. To what extent Mr. No's total income will be affected by the takeover is difficult to determine. Evidence of sales figures was limited and imprecise. There were totals taken from Plaintiff's audit of the cash registers, but the computation may have been inaccurate because of voided sales and possible off-register sales.

The financial harm to defendant has been considered in limiting the equitable relief to a temporary takeover of the Restaurant. Conditions necessitate temporary closure to ensure substantial compliance with Saladworks operational standards and

City health codes. Present conditions at the restaurant present a threat to public health and safety that weighs heavier than the detriment to the franchisee.

**D. Public Interest**

Failure to maintain required quality standards constitutes an imminent threat to public health and safety. Food products maintained at improper temperatures may cause food poisoning. The evidence of rodent infestation cannot be credibly controverted. The likelihood Saladworks will prevail on the merits and the possibility of irreparable harm to Saladworks outweigh the financial harm to defendant, especially in view of the threat to public health and safety; a preliminary injunction will issue granting in part the relief requested.

Any facts stated in this section are incorporated in the preceding findings of fact as if stated therein.

**Conclusions of Law**

1. The court has jurisdiction over the parties and the subject matter.
2. Saladworks has a reasonable probability of success on the merits.
3. Saladworks will be irreparably harmed by the persistence of substandard conditions at defendant's restaurant and Plaintiff's inability to control the quality of the goods and services provided by defendant.

4. The financial harm to the defendant from Plaintiff's temporary takeover of the Restaurant is moderate in comparison to the harm to Plaintiff.

5. The public interest in maintaining clean and sanitary restaurants as well as avoiding illness from contaminated food outweighs financial harm to defendant from preliminary injunctive relief.

6. An injunction will issue as follows:

- a) The injunction will be limited in time to 45 days, followed by a status hearing to determine whether continuation is necessary.
- b) Saladworks will be reimbursed \$300.00 per day from gross receipts, for six days per week, with no additional expenses.
- c) Mr. No and his manager shall have the right to enter the premises and observe Plaintiff's operation of the Restaurant.
- d) Saladworks shall provide weekly status and sales reports to the court to assure proper operation of the Restaurant and preservation of the value of the franchise.
- e) The injunction will be effective upon Saladworks filing a bond under Federal Rule of Civil Procedure 65(c) in the amount of \$25,000 to protect Mr. No's interests.

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

SALADWORKS, INC. :  
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 v. : 05-CV-1928  
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ORDER OF PRELIMINARY INJUNCTION

AND NOW, this 15<sup>th</sup> day of June, 2005, upon consideration of the verified amended complaint, the second motion for preliminary injunction (Doc. No. 10) and supporting memoranda of law of plaintiff, Saladworks, Inc. ("Saladworks") and all responses thereto, and after hearings on May 19, 2005 and June 2, 2005, in accordance with the attached memorandum, it is hereby **ORDERED** that:

1. Saladworks' motion for preliminary injunction is **GRANTED**.
2. Defendant Mi Ho No ("Mr. No"), his agents and assigns, shall allow Saladworks to enter the Saladworks restaurant at 3728 Spruce Street in Philadelphia and exercise complete authority over the operation of the restaurant.
3. This injunction shall remain in effect until **July 30, 2005**. A status hearing will be scheduled to determine whether continuation is necessary.
4. Saladworks will be reimbursed \$300.00 per day from gross receipts, for six days per week, with no additional expenses.
5. Mr. No and his manager shall have the right to enter the premises and observe Saladworks' operation of the Restaurant.
6. Saladworks shall provide weekly status and sales reports to the court to assure proper operation of the Restaurant and preservation of the value of the franchise.
7. This injunction will be effective upon Saladworks filing a bond under Federal Rule of Civil Procedure 65(c) in the amount of \$25,000.00.

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