

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DICK ROAD-BLEND ALL HOTEL
DEVELOPMENT, INC. and WILL-RIDGE
ASSOCIATES, LLC

Plaintiffs

**MEMORANDUM
DECISION**

vs.

Index No. 4236/08

JOSEPH A. CIPOLLA, URBANDALE DEVELOPMENT
COMPANY, PASTA GRILL, INC., DAVID J.
BUFFAMONTI, T.D.K. NATIONAL CORPORATION,
and KEITH W. SCHILLO

Defendants.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Connors & Vilardo, LLP**
Attorneys for Plaintiffs
Lawrence J. Vilardo, Esq., of Counsel

Jaekle Fleischmann & Mugel, LLP
Attorneys for Defendants Joseph A. Cipolla
and Urbandale Development Company
Charles C. Swanekamp, Esq., of Counsel

Hodgson, Russ, LLP
Attorneys for Defendants Pasta Grill, Inc.
and David J. Buffamonti
Jill Yonkers, Esq., of Counsel

Mark Montour, Esq.
Attorney for Defendants T.D.K. National Corporation
and Keith W. Schillo

CURRAN, J.

Plaintiffs have moved for declaratory and injunctive relief to enforce the Easement Modification Agreement dated February 28, 2006 (“Agreement”). Specifically, plaintiffs seek a declaration that the defendants are in violation of the Agreement and that any leases which violate the Agreement are null and void. Plaintiffs also seek an injunction prohibiting any of the defendants from using the parcel which is the subject of the Agreement, located at 2094 George Urban Boulevard, in any way which would violate the Agreement. Defendants, Joseph Cipolla (“Cipolla”) and Urbandale Development Company (“UDC”), have cross-moved to dismiss the Complaint pursuant to CPLR § 3211(a) (1), (7) and (10). Defendant, David J. Buffamonti, also has sought dismissal.

Procedural History

This action was commenced on April 11, 2008. Plaintiffs have moved by way of an Order to Show Cause granted and entered on April 24, 2008. Defendants Cipolla and UDC have cross-moved pursuant to a notice dated April 30, 2008. Oral argument on the competing applications was initially conducted on May 8, 2008. At that time, the Court directed that T.D.K. National Corporation (“TDK”) and Keith W. Schillo (“Schillo”), be joined as party defendants and be notified of the pending application for an injunction. The Court further directed that an evidentiary hearing be held in conjunction with the competing motions. The evidentiary hearing was conducted on May 19 and May 21, 2008. Further submissions on the law were received on the afternoon of May 29, 2008, and further oral argument conducted on May 30, 2008, at which time decision was reserved.

Plaintiffs' Contentions

Plaintiffs contend that they are entitled to a preliminary injunction because documentary evidence confirms defendants' continuing violations of the Agreement. Plaintiffs rely primarily on Section 5(a) of the Agreement which precludes UDC from using any portion of the Urbandale Plaza located at 2094 George Urban Boulevard for a: (1) "bar serving alcoholic beverages except in connection with a restaurant;" and (2) "night club, discotheque or dance hall." Plaintiffs contend that some or all of the defendants are operating establishments in violation of these portions of the Agreement, the purported "Adult Bars."

Plaintiffs also point to Section 5(b) of the Agreement which contains an exception to the prohibitions of Section 5(a) for: "[t]he existing teen nightclub located on the [parcel] operated by T.D.K. Corporation. . . ." Section 5(b) of the Agreement provides that if TDK "ceases operations" or if TDK "transfers its interest in said nightclub," "then [UDC] shall not allow said space to be used for a nightclub or any other use set forth above" in Section 5(a). Plaintiffs assert that the "teen nightclub" has ceased operations and that any interest in that "teen nightclub" has been transferred by TDK to defendants Pasta Grill, Inc. ("Pasta Grill") and/or David J. Buffamonti ("Buffamonti"), and that therefore the right to use the premises in violation of Section 5(a) has been extinguished.

Plaintiffs contend that there is great urgency to this application because plaintiffs have procured a tenant for the premises next door to the purported "Adult Bars" and that this tenant, Hobby Lobby, requires as a pre-condition of leasing the space that the operation of the purported "Adult Bars" be terminated on or before June 1, 2008. Plaintiffs claim that they have

established a clear right to relief demonstrating meritorious claims, irreparable injury and a balancing of the equities in their favor.

Defendants' Contentions

Defendants UDC and Cipolla assert that it was always their intent to retain the rights of their tenant, TDK, to use the premises “for a teen dance club and/or an occasional music showcase venue” as described in the lease between UDC and TDK. On this basis, UDC and Cipolla assert that the reference to the “teen nightclub” in Section 5(b) of the Agreement is purely descriptive of the tenant and is not any sort of restriction on the use of the premises. Rather, according to UDC and Cipolla, the only limitations on the exception contained in Section 5(b) is that TDK not cease all of its operations and not transfer all of its interests in the nightclub to another. UDC and Cipolla assert that TDK has not ceased all of its operations and has not transferred all of its interests in the nightclub to another.

Defendants Pasta Grill and Buffamonti, who are presently operating the alleged “Adult Bars” within the premises, assert that they opened the establishments in April of 2007 and have invested substantially in their reconstruction. Pasta Grill and Buffamonti point to the substantial prejudice they will suffer if they are ordered to close by virtue of the language in the Agreement. These defendants argue that plaintiffs should be denied equitable relief under the doctrine of laches because plaintiffs must have been aware of the use these defendants were making of the premises for at least most of the past year.

Defendants TDK and Schillo assert that they have not ceased all of their operations and still maintain some interest in the premises by virtue of an agreement with defendants Pasta Grill and Buffamonti permitting TDK and Schillo to conduct promotional events for Wednesday evenings.

Factual Background

UDC and TDK entered into a lease in approximately September of 2005. UDC agreed to lease the former Eckerd Store at the Urbandale Plaza to TDK for use as a “teen dance club and/or an occasional music showcase venue.” The initial lease term is from July of 2005 through December of 2008. TDK has an option to extend the initial lease term for a period of three (3) years.

Also in the Fall of 2005, plaintiffs and UDC entered into negotiations which ultimately lead to the execution of the Agreement. Four to five years before, plaintiffs had acquired the former Ames Store within the Urbandale Plaza, along with parking lot space and an out-parcel. As part of the process of selling the out-parcel to a local bank, Benderson found it necessary to address UDC’s concerns as to the maintenance of the parking lot which is in front of the former Ames Store and the premises leased by TDK. The primary impetus behind the Agreement was to provide a means for plaintiffs to share in the cost of maintaining the parking lot, with such maintenance being performed by UDC. The parties also mutually consented to a so-called “noxious use clause” prohibiting both plaintiffs and UDC from leasing any portion of the Urbandale Plaza for certain types of uses.

During the negotiations concerning that clause, UDC pointed out that it had an existing teen nightclub operating next to the former Ames Store and wanted to ensure that this use was permitted for the current tenant (TDK) despite the prohibitive language in Section 5(a) of the Agreement. The parties mutually negotiated Section 5(b) of the Agreement. The record reflects various drafts and comments between the parties as to the preparation of that particular section of the Agreement.

The parties ultimately agreed upon the following language in Section 5(b):

The parties agree that the existing teen nightclub located on the Bella Vista Parcel operated by T.D.K. Corporation may continue its operations, which may include serving alcohol at live events, however, in the event that T.D.K. Corporation ceases operations or if T.D.K. Corporation transfers its interest in said nightclub, then Bella Vista shall not allow said space to be used for a nightclub or any other use set forth above, to the extent Bella Vista shall have the lawful right to prevent it.

The Agreement was executed by UDC in February of 2006. It was not recorded by plaintiffs until approximately December of 2006.

TDK began operating what is referred to in the papers as “Club Inferno” in approximately September of 2005. This was a “teen nightclub” which functioned primarily on weekend evenings and for special occasions such as on nights before school holidays. Schillo testified that he never applied for a liquor license and at no time did Club Inferno or the “teen nightclub” serve alcohol. Schillo testified that he was unable to establish the financial wherewithal to procure a liquor license for the premises.

The “teen nightclub” continued to operate on weekends and on special occasions throughout 2006. According to Schillo’s testimony, it was at all times operated by him and TDK. This is consistent with Cipolla’s intent as of the time the Agreement was entered into that only the Schillo family would have the right to operate at the premises. While there were some issues with the operation of the “teen nightclub” during 2006, the record reflects that at most it closed for only one day in 2006 by virtue of not having a “dance hall” license from the Village of Depew.

In October of 2006, UDC, TDK and Pasta Grill entered into a “sub-lease” of TDK’s lease with UDC. According to the terms of the sub-lease, “the parties hereby mutually agree and consent to a new lease dated October 1, 2006” that would “replace the original lease dated September 16, 2005.” The “new lease” contained changes in terms with respect to rental charges and use of the premises.

According to Buffamonti, pursuant to this “sub-lease,” he began reconstruction work within the premises during the Fall of 2006 and continued that work through the Spring of 2007. At the same time, Pasta Grill applied to the State Liquor Authority to revive a liquor license which it had for a different premises and to have that license apply to the premises within the Urbandale Plaza. The record establishes that TDK and Pasta Grill could not both have a liquor license for the same premises.

Schillo testified that the “final transition” from the “teen nightclub” to the present use occurred in January of 2007. Between then and when Pasta Grill began operating at the premises in April of 2007, Schillo testified that there was one event he conducted in

February of 2007. He also testified that at some point he needed to have the water turned off and to modify the bathrooms in order to effectuate this “final transition.”

Pasta Grill’s liquor license for the subject premises was issued just a few days before a major concert event which was held within the premises on April 13, 2007. The record reflects that this is the date upon which Pasta Grill undertook operations at the premises under the names of “Coyotes” and “Rock-N-Roll Heaven.”

While the “sub-lease” contemplated that there would be further agreements pertaining to the operations of the premises, the only agreement introduced into evidence which seems to confirm such an understanding is the contract between Pasta Grill and TDK dated June 1, 2007. Pursuant to that contract, TDK was given the opportunity to promote Wednesday night as a dance night and to receive all door proceeds minus the cost of advertising. Schillo testified that he could not receive any share of the bar proceeds because that would be in violation of the liquor license issued to Pasta Grill.

In late 2007, Hobby Lobby contacted plaintiffs to inquire about leasing space in the Buffalo area. It was at this point that plaintiffs began their investigation of appropriate space for Hobby Lobby which in turn led plaintiffs to investigate the operations at the subject premises. As a result of that investigation, and plaintiffs’ desire to lease to Hobby Lobby, plaintiffs notified UDC by letter dated January 17, 2008, that the operations of the so-called “Adult Bars” within the premises were in violation of the Agreement. Plaintiffs demanded that all such violations be cured on or before January 31, 2008. When the perceived violations were not cured by that date, and following procurement of a letter of intent from Hobby Lobby dated March 29, 2008, plaintiffs commenced this litigation.

Conclusions

Defendants do not dispute that the operations conducted by “Coyotes” and “Rock-N-Roll Heaven” violate Section 5(a) of the Agreement. An evidentiary hearing was necessary, however, to address defendants’ claims that the intent of Section 5(b) of the Agreement was to protect all current uses and rights of current tenants of UDC and to address claims by defendants that TDK had not ceased all of its operations and had not transferred all of its interests in the nightclub to another. Thus, the sole issue tried before the Court was the application of Section 5(b) to the facts before it.

While the intent underlying Section 5(b) may not be relevant given the clear language of that clause, the Court has nevertheless considered it because of the initial competing interpretations given by the parties to that clause. Both parties agree that it is a “grandfather clause” seeking to continue the use by TDK of the premises for a “teen nightclub” which may include serving alcohol at live events. There is no evidence that the negotiations leading up to Section 5(b) involved any discussion of authorizing a bar or adult nightclub to be operated by TDK. Rather, both of the individuals who negotiated the language in that clause, Dennis Duggan on behalf of the plaintiffs and Cipolla on behalf of UDC, wanted to ensure that the current tenant could continue to use the premises for its then-current operation. At that time, the current operation was a “teen nightclub.”

Cipolla also secured as part of the negotiations the opportunity for TDK to serve alcohol at live events (for persons twenty-one years of age or older) because, as Cipolla testified, it was his understanding that TDK was in the process of procuring a liquor license. Cipolla also made clear during his testimony that his intent at the time the Agreement was

entered into was to ensure that only the Schillo family, represented by TDK, would be the tenant contemplated under Section 5(b).

According to the clear understanding of the parties as reflected in the language of Section 5(b), TDK was entitled to continue operating a “teen nightclub” within the premises, which may include TDK serving alcohol at live events. The only limitations upon this right were if TDK “ceases operations” and/or if it “transfers its interest in said nightclub.”

It is undisputed that TDK and Pasta Grill cannot operate with a liquor license at the same premises and at the same time. As there can be only one “father” of the operations within the premises, that “father” is now Pasta Grill to the exclusion of TDK. Moreover, UDC, TDK and Pasta Grill entered into the “new lease” to enable Pasta Grill to assume operations at the nightclub with its liquor license. The “new lease” with new terms, coupled with the indisputable fact that Pasta Grill is the sole authorized operator of the existing nightclubs, leads the Court to conclude that plaintiffs have established by clear and convincing evidence that TDK has transferred its interest in “said nightclub” to Pasta Grill. Therefore, any rights UDC or TDK have under Section 5(b) have been extinguished, and “then [UDC] shall not allow said space to be used for a nightclub or any other use set forth [in Section 5(a)], to the extent [UDC] shall have the lawful right to prevent it.”

As it is sufficient for plaintiffs to have established that TDK transferred its interest in the nightclub to Pasta Grill, the Court need not to address the issue of whether TDK has ceased its operations within the subject premises.

Defendants set forth a number of additional arguments in favor of continuing the current uses. UDC and Cipolla rely on the language in Section 5(b) that UDC should not allow prohibited uses after TDK ceases operations or transfers its interest in the nightclub: “to the extent [UDC] shall have the lawful right to prevent it.” According to UDC and Cipolla, UDC has no lawful right to prevent Pasta Grill from operating the adult nightclubs because of the “sub-lease.” This argument ignores the fact that UDC entered into the “new lease” with TDK and Pasta Grill, replacing the old one with TDK only, at a time after UDC had entered into the Agreement with plaintiffs. UDC was under no legal compulsion to enter into the “new lease.” Rather, the record reflects that UDC entered into the “sub-lease” to salvage its own and TDK’s economic interests in the premises because TDK would not be applying for a liquor license. UDC cannot now be heard to complain it has no legal right to prevent its own voluntary act.

Defendants Pasta Grill and Buffamonti argue that the prohibitions in the Agreement cannot be applied to them because the prohibitions are preempted by the Alcohol Beverage and Control Law. While the preemption argument might pertain to a contest between state and local governments, there is no authority supporting the view that preemption pertains to a purely private contract such as the Agreement here.

Defendants also argue that plaintiffs should be precluded from receiving equitable relief under the doctrine of laches or based on waiver. There are no facts in the record supporting any claim that plaintiffs waived their rights under the Agreement through a voluntary relinquishment of a known right. Moreover, there is no evidence of bad faith underlying plaintiff’s alleged delay in seeking enforcement of its rights under the Agreement, because plaintiffs did so promptly upon investigating the facts as a result of the inquiry from

Hobby Lobby. Moreover, there is no prejudice to Pasta Grill and Buffamonti because they were in a position to learn from UDC the restrictions contained in the Agreement and failed to do so. To the extent that Pasta Grill, Buffamonti, TDK or Schillo may claim that they were deceived or not provided the full facts by UDC, that is an issue which is not before the Court.

Lastly, with respect to the applications of Cipolla and Buffamonti to be dismissed from this case, those motions are in all respects granted as there is no personal liability or involvement by these individuals as they both appear to have acted exclusively through corporations. The motions to dismiss are otherwise denied.

Based on the foregoing, the Court concludes that defendants UDC, Pasta Grill and TDK are enjoined pursuant to the Agreement from any use of the premises which would violate Section 5(a) of the Agreement. This prohibition shall become effective as of September 2, 2008, with "Coyotes" and "Rock-N-Roll Heaven" being closed no later than that date but with the right to move out no later than September 16, 2008. As a condition of the injunction, plaintiffs must immediately post an undertaking in the sum of: (a) \$150,000.00 for UDC; (b) \$150,000.00 for TDK; and (c) \$100,000.00 for Pasta Grill. Any other relief sought by plaintiffs is denied. The applications to dismiss Cipolla and Buffamonti are in all respects granted but the cross-motions of defendants are otherwise denied.

DATED: May 30, 2008

HON. JOHN M. CURRAN, J.S.C.