SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

S.J.J.K. TENNIS, INC.,

Plaintiff,

INDEX No. 002533/10

MOTION DATE: March 15, 2010
Motion Sequence # 001

-against-

CONFER BETHPAGE, LLC and
GLOBAL GOLF, INC.,

Defendants.

The following papers read on this motion:

Order to Show Cause..... X
Affidavit in Opposition..... X
Affirmation in Further Support..... X
Reply Affirmation X
Memorandum of Law..... XX

This motion, by the attorney for the plaintiff, for an order granting a preliminary injunction preventing defendants from terminating the agreement between plaintiff and defendants permitting plaintiff to occupy, operate and manage the tennis facility located at 99 Quaker Meeting House Road, Bethpage, New York (herein "the Tennis Facility") until such time as the issues raised in the verified complaint are determined on the merits, is **granted**.

On or about March 3, 1998, defendant Global Gold, Inc. ("Global") entered into an

agreement with the New York State Department of Parks ("State") for the operation and management of the golf and tennis facility located at 99 Quaker Meeting House Road, Bethpage, New York ("Bethpage State Park").

Plaintiff alleges that on or about June 16, 1999 plaintiff entered into a written contract with defendant Global for a license ("the Tennis Agreement") appointing plaintiff as the sale entity to operate, manage and occupy the Tennis Facility. The Tennis Agreement provided that plaintiff would manage the Tennis Facility until December 31, 2017, unless terminated earlier by the written consent of the plaintiff and defendant Global. Plaintiff asserts that in October 1999 it procured a $1 million dollar loan from the Small Business Administration ("SBA") through the Business Loan Center ("BLC")to obtain funds for improvements at the Tennis Facility including the planning, construction and operation of an enclosure for 8 of the 12 existing tennis courts. In order to induce SBA to facilitate the loan, plaintiff alleges it provided a "Collateral Assignment of Lease" to the SLA and BLC executed by the plaintiff and defendant Global. Plaintiff asserts the assignment of the license served as additional collateral for the SBA loan. Plaintiff also alleges that the State of New York Office of Parks, Recreation and Historic Preservation ("State") signed the Collateral Assignment of Lease indicating its knowledge and approval of plaintiff's role as manager and operator of the Tennis Facility until December 31, 2017.

In December 2006, defendant Confer Bethpage LLC ("Confer") purchased the assets of Global and received an assignment of the Concession Agreement that was originally between the State and Global. State consented to the assignment from Global to Confer. Plaintiff asserts that at the time defendant Confer succeeded to defendant Global's interests, Global no longer had the right to operate or manage the Tennis Facility, having previously granted that right to the plaintiff in 1999. In short, it is plaintiff's contention that when defendant Confer acquired defendant Global's interest in the entire facility, based on the January 16, 1999 Tennis Agreement between plaintiff and Global, defendant Confer did not obtain the right to occupy, manage, control or operate the Tennis Facility which rights belong to plaintiff until December 31, 2017.

On or about January 26, 2010 defendant Confer served plaintiff with a 10 day notice that its possession, operation, and use of the tennis facility was being revoked.

Plaintiff seeks a preliminary injunction preventing the defendants from terminating the agreement between the plaintiff and the defendants and permitting the plaintiff to occupy,

operate and manage the tennis facility until the final resolution of this action on the merits.

In opposition to the application for a preliminary injunction, the principals of both defendants Confer and Global have submitted affidavits asserting that plaintiff was hired solely as a "tennis manager." The Concession Agreement does not allow assignments, transfers, subcontracts, sales or vesting rights in the concession without approval by the State. Defendants contend the State never gave approval to the alleged transfer to plaintiff. Global acknowledges that in October of 1999, plaintiff arranged for a $1 million dollar loan to finance the improvement at the Tennis Facility. The loan was to be funded from tennis concession revenues. Global asserts that when Confer was awarded the concession in December 2006, it was not subject to any rights of S.J.J.K. and the management agreement between Global and S.J.J.K. ended. Nevertheless, the plaintiff continued to operate and manage the Tennis Facility for over three years after Confer succeeded to Global's interest. Global asserts "S.J.J.K. reaped the benefit of the improvement during is tenure as tennis manager." Neither defendants explain to the satisfaction of the court the benefits the plaintiff allegedly "reaped" from the construction of the tennis enclosure and the procurement of a $1 million dollar SBA loan collateralizing plaintiff's and its principals' property if the agreement with a termination date of December 31, 2017 could be unilaterally voided without cause after the third year.

In order to be entitled to a preliminary injunction, a movant must clearly demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (***Aetna Ins. Co. v Capasso***, 75 NY2d 860; ***Doe v Axelrod***, 73 NY2d 748; ***Ruiz v Meloney***, 26 AD3d 485; ***Stockley v Gorelik***, 24 AD3d 535; ***Matos v City of New York***, 21 AD3d 936).

The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (***Ruiz v Meloney***, ***supra***; ***Coinmach Corp. v Alley Pond Owners Corp.***, 25 AD3d 642; ***Weinreb Management, LLC v KBD Management, Inc.***, 22 AD3d 571). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (***Doe v Axelrod***, ***supra***, at 750; ***Ruiz v Meloney***, ***supra***; ***Weinreb Management, LLC v KBD Management, Inc.***, ***supra***). "It is well settled that absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (***SHS Baisley, LLC v Res Land, Inc.***, 18 AD3d 727; ***St. Paul Fire and Mar. Ins. Co. v York Claims Serv.***, 308 AD2d 347, 348-349; ***MacIntyre v***

Metropolitan Life Ins. Co., 221 AD2d 602).

A preliminary injunction is available where the termination of a license is imminent although it has not yet occurred. In ***U.S. Ice Cream Corp., et al, v Carvel Corporation, et al***, 136 AD2d 626, the Second Department reversed the denial of a preliminary injunction by the trial court, where plaintiff sought to enjoin the defendant from terminating its exclusive license to sell licensed products in Israel. The court looked at the three well-established criteria for injunctive relief, to wit: the likelihood of success on the merits; the specter of irreparable damage; and the balancing of equities. (*see,* ***Aetna Ins. Co. Capasso, supra***; ***Doe v Axelrod***, ***supra***; ***Ruiz v Meloney***, ***supra***). The plaintiff has met the first criteria of likelihood to succeed on the merits based on the documentary evidence presented, to wit, Concession License Agreement dated February 20, 1998 between Global and State; Agreement dated June 1, 1999 between Global and plaintiff; Global's letter dated June 16, 1999, wherein Globe purportedly acknowledged completion of a 20-year concession partnership agreement with the plaintiff; SBA loan documents; Collateral Assignment of Lease; and Assignment, Assumption and Consent Agreement dated December 12, 2006 between Confer and State.

Irreparable injury may be defined as "that which cannot be repaired, restored or compensated in money or where the compensation cannot be measured" (12 Weinstein-Korn Miller NY Civ. Prac. Sec. 6301.15). Defendants have not demonstrated any prejudice or hardship by the granting of a preliminary injunction. Absent a preliminary injunction, the plaintiff would be out of business. Such interference with an ongoing business (since 1999), particularly one that relies exclusively on the right to remain in possession at the tennis facility, risks injury for which monetary damage will be inadequate. On the other hand, defendants have not shown that they will be inconvenienced by a preliminary injunction.

There are numerous questions of fact including but not limited to whether the State gave approval to the agreement between Global and Plaintiff; the State's consent to the SBA putting a $1 million dollar lien on the Tennis Facility in connection with the loan; and the nature of the liens given to the SBA, both by the plaintiff and plaintiff's principals in order to obtain the necessary funds for the improvements at the Tennis Facility. The existence of a factual dispute will not bar the granting of a preliminary injunction if one is necessary to preserve the *status quo* and the party to be enjoined will suffer no great hardship as a result of its issuance. (***Mr. Natural, Inc. v Unadulterated Foods Products, Inc.***, 152 AD2d 729). Defendant Confer acknowledges that the plaintiff continues to deposit revenues in Confer's bank accounts. Confer does not indicate any prejudice or harm to it by allowing plaintiff to

continue to manage the Tennis Facility, something that plaintiff has been doing since 1999. Nor did Confer indicate that plaintiff is in any way in default of the agreement. Balancing of the equities favors the granting of the preliminary injunction. By granting a preliminary injunction, the court will be preserving the tangible asset of the purported license of plaintiff to occupy, manage, control and operate the Tennis Facility.

The plaintiff's motion for a preliminary injunction is **granted**.

The parties are admonished that an injunction is not a determination on the merits or the law of the case (***Bonded Concrete Inc. v Town of Saugerties***, 42 AD3d 852; ***Icy Splash Food & Beverage, Inc. v Henckel***, 19 AD3d 595).

Upon granting a preliminary injunction, the Court is required to direct that plaintiffs post an undertaking to assure that the plaintiff will pay all damages incurred by the defendants if it is ultimately determined that the preliminary injunction was improvidently issued. (CPLR 6312(b); *see also* ***Margolies v Encounter, Inc.***, 42 NY2d 475).

Plaintiffs shall post an undertaking as required by CPLR 6312(b) in the sum of $100,000 within fifteen (15) days of service of a copy of this Order of Entry, or the preliminary injunction shall be deemed vacated.

Counsel for plaintiff shall serve a copy of this Order on defendants pursuant to CPLR 308(1) or (2) or 311(a), on or before April 19, 2010.

A Preliminary Conference has been scheduled for April 26, 2010 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

This decision is the Order of the Court.

Dated 6 April 2010

J.S.C.

ENTERED

APR 13 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE