

**R2D2B2, L.L.C., D/B/A  
VENETIAN ISLES MARINA &  
SEAFOOD DOCK**

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**NO. 2002-CA-0016**

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**COURT OF APPEAL**

**VERSUS**

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**FOURTH CIRCUIT**

**CITY OF NEW ORLEANS**

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**STATE OF LOUISIANA**

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**APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2001-8505, DIVISION "M"  
HONORABLE C. HUNTER KING, JUDGE**

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**JAMES F. MCKAY III  
JUDGE**

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(Court composed of Judge Joan Bernard Armstrong, Judge Miriam G. Waltzer, Judge James F. McKay III, Judge Dennis R. Bagneris, Sr., Judge Terri F. Love)

**ARMSTRONG, J., DISSENTS.**

**WALTZER, J. DISSENTS WITH REASONS**

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Improvement Association and Kenneth Cowie, individually and as  
President of Venetian Isles Civic Association

**REVERSED AND**

**REMANDED**

The plaintiff, R2D2B2, L.L.C., owns and operates Venetian Isles Marina and Seafood Dock located at 4571 Burton Road in the Venetian Isles section of New Orleans. The plaintiff has owned and operated the marina and seafood dock since acquiring the property in February of 1994. The property is zoned RS-2 (single family residence), with the plaintiff operating as a non-conforming commercial seafood business from 1994 through 2002. The plaintiff was informed by the defendant, City of New Orleans, that the defendant intended to close down the marina and arrest its employees because of its non-conformity with the current zoning restrictions.

On May 21, 2001, the plaintiff filed a petition for temporary restraining order (TRO), preliminary injunction, permanent injunction and declaratory judgment. On May 22, 2001, the trial court issued a TRO prohibiting the City from closing down the marina as a commercial seafood operation. The trial court also ordered the City to show cause on May 30, 2001 why a preliminary injunction should not be issued. On May 25, 2001, the Venetian Isles Civic Association and Kenneth Cowie, both individually and as president of the Venetian Isles Civic Association, filed an intervention citing *inter alia* an interest in the outcome of the plaintiff's suit to the extent that the TRO should be dissolved and the injunctions and declaratory relief denied.

On May 30, 2001, the trial court revoked the TRO. The trial court found that with regard to the undisputed use of the marina, it could continue to operate while the administrative process is ongoing. Further, the trial court ordered that the preliminary and permanent injunctions and the declaratory judgment be denied. On June 6, 2001, the plaintiff filed a motion for a new trial. A hearing on this motion was held on September 7, 2001, and the new trial was denied. On September 10, 2001, the plaintiff

filed a motion and order for a devolutive appeal.

In this appeal, the plaintiff raises the following assignments of error:

1) the trial court erred in not issuing a preliminary injunction where the plaintiff clearly demonstrated the extent of irreparable harm not subject to remedy by compensation in money damages; 2) the trial court erred in dismissing the petition for permanent injunction and declaratory judgment where request for said relief was not properly before the court on the summary rule for preliminary injunction; and 3) the trial court abused its discretion by executing a judgment that extended impermissibly beyond the relief prayed for on the rule for preliminary injunction by making a specific award of relief in granting an un-prayed for injunction.

In order to prevail at a hearing for preliminary injunction, the moving party must show: (1) that the injury, loss or damage he will suffer if the injunction is not issued may be irreparable; (2) that he is entitled to the relief sought; and (3) that he will be likely to prevail on the merits of the case.

General Motors Acceptance Corp. v. Daniels, 377 So.2d 346 (La. 1979);

Burnham Broadcasting Co. v. Williams, 629 So.2d 1335 (La.App. 4 Cir.

1993). Only a *prima facie* showing is required; therefore, the petitioner is

required to offer less proof than is necessary in an ordinary proceeding for permanent injunction. Id. Irreparable harm means the party seeking the preliminary injunction cannot be adequately compensated in money damages for its injury or suffers injuries which cannot be measured by pecuniary standards. HCNO Services, Inc. v. Secure Computing Systems, Inc., 96-1693, 96-1753 (La.App. 4 Cir. 4/23/97), 693 So.2d 835.

In the instant case, the plaintiff contends that the essential element of irreparable harm would be sustained by the plaintiff's losing of its "grandfather" status in the operation of the marina. During the taking of testimony on May 30, 2001, the plaintiff as well as the director of the Department of Safety and Permits for the City of New Orleans agreed that if in fact for at least ten-plus years, the marina had been buying and selling seafood as a non-conforming, commercial seafood marina it would be permitted to continue to do so irrespective of its non-conforming status. Accordingly, it appears the plaintiff is entitled to the relief sought and there is a good chance the plaintiff will prevail on the merits of the case. Therefore, the trial court erred in not issuing a preliminary injunction.

A preliminary injunction is essentially an interlocutory order issued in

summary proceedings incidental to the main demand for permanent injunctive relief. Freeman v. Treen, 442 So.2d 757 (La.App. 1 Cir. 1983). The principal demand, as opposed to the preliminary injunction, is determined on its merits only after a full trial under ordinary process, even though the hearing on the summary proceedings to obtain the preliminary injunction may touch upon or tentatively decide merit-issues. Smith v. West Virginia Oil & Gas Co., 373 So.2d 488 (La. 1979). Only where the parties have expressly agreed to submit the case for final decision as the hearing on the rule for a preliminary injunction, may the ruling on the preliminary injunction definitively dispose of the merit-issues. State ex rel. Guste v. City of New Orleans, 363 So.2d 678 (La. 1978). There is nothing in the record to indicate such an express agreement in the instant case.

Although the plaintiff's request for permanent injunction and declaratory relief were combined in its original petition for the restraining order, they were not properly before the trial court at the summary proceeding held on May 30, 2001. However, when the trial court denied the preliminary injunction and dismissed the plaintiff's suit, it effectively dismissed the actions for permanent injunction and declaratory judgment as

well. A petition for permanent injunction and suit for declaratory judgment are ordinary not summary proceedings. *See* C.O.S.T. v. St. Landry Parish School Board, 528 So.2d 1048 (La.App. 3 Cir. 1988). Accordingly, the trial court erred in dismissing the suit. Therefore, the matter must be remanded for a hearing on the merits of the permanent injunction and ultimately a hearing on the declaratory judgment.

For the foregoing reasons, the judgment of the trial court is reversed and the matter is remanded as set forth above.

**REVERSED AND REMANDED**