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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TOLLE FURNITURE GROUP, LLC,

Plaintiff,

v.

LA-Z-BOY INCORPORATED,

Defendant.

Case No. C09-0889RSL

ORDER DENYING MOTION FOR
A TEMPORARY RESTRAINING
ORDER

I. INTRODUCTION

This matter comes before the Court on a motion for a temporary restraining order filed by plaintiff Tolle Furniture Group, LLC (“Tolle”) to prevent defendant from terminating its Galleries Retailer Agreements on July 21, 2009. The parties entered into the agreements to permit Tolle to sell defendant’s products, which it does through five showrooms throughout the Puget Sound region.

For the reasons set forth below, the Court denies the motion.

II. DISCUSSION

A. Background Facts.

Defendant La-Z-Boy (“LZB”) is the world’s largest manufacturer of recliners.

ORDER DENYING MOTION FOR A
TEMPORARY RESTRAINING ORDER - 1

1 Tolle has operated a LZB gallery store since 2000.

2 In 2004, LZB and Tolle discussed the possibility of Tolle taking over and
3 consolidating underperforming LZB stores in the Seattle area. Based on LZB's alleged
4 representations, Tolle sold its LZB store in Wichita, Kansas, and Tolle's owners, Andrew
5 and Barbara Spotts, moved their family to the Seattle area. Tolle acquired existing stores
6 in Tacoma, Tukwila, and Issaquah. In 2006, Tolle opened new stores in Lynnwood and
7 Silverdale. Tolle relocated the Tukwila store to a new and much larger showroom.

8 Pursuant to the Retailer Agreements, Tolle orders products from LZB at wholesale
9 prices, LZB ships the product, then Tolle pays the invoiced amount by the stated due date.
10 Declaration of Paulette Roberts, (Dkt. #17) ("Roberts Decl.") at ¶ 5. Tolle contends that
11 its start-up costs and costs associated with building out the new stores caused its account
12 with LZB to grow to nearly \$6 million after all of the stores were completed. Declaration
13 of Andrew Spotts, (Dkt. #11) ("A. Spotts Decl.") at ¶ 15. LZB notes that Tolle's
14 accounts receivables balance as of June 28, 2009 is just over \$6 million, and the past-due
15 balance is approximately \$5.1 million. All of the past due amounts "are for product that
16 Tolle ordered and received, but never paid for." Roberts Decl. at ¶ 6.

17 On June 11, 2009, LZB notified Tolle that over \$4 million on its account was past
18 due and that Tolle was in default under its Retailer Agreements. A. Spotts Decl., Ex. C.
19 The notice requested payment of over \$4 million. Despite informal efforts to resolve the
20 dispute, the parties have been unable to reach an agreement.

21 Plaintiff argues that it is entitled to an injunction because (1) LZB previously
22 agreed to allow Tolle to defer payment of its debt, and (2) the relationship between the
23 parties is a franchise under Washington law. If the relationship is a franchise, then any
24 attempt to terminate it must be done in compliance with Washington's Franchise

1 Investment Protection Act (“FIPA”), RCW 19.100 *et seq.* Plaintiff contends that LZB has
2 not complied with FIPA’s provisions.

3 **B. Analysis.**

4 The Supreme Court recently explained, “A plaintiff seeking a preliminary
5 injunction must establish that he is likely to succeed on the merits, that he is likely to
6 suffer irreparable harm in the absence of preliminary relief, that the balance of equities
7 tips in his favor, and that an injunction is in the public interest.” Winter v. Natural Res.
8 Def. Council, Inc., ___ U.S. ___, 129 S. Ct. 365, 374 (2008). Following *Winter*, the Ninth
9 Circuit has explained, “To the extent that our cases have suggested a lesser standard, they
10 are no longer controlling, or even viable.” American Trucking Associations, Inc. v. City
11 of Los Angeles, 559 F.3d 1046 at *14-15 (9th Cir. 2009).

12 **1. Likelihood of Success on the Merits.**

13 Plaintiff contends that it is likely to succeed on the merits of its claim because
14 defendant has not complied with the FIPA. Even assuming that the FIPA applies,
15 plaintiff has not shown a likelihood of success. First, the FIPA permits a franchisor to
16 terminate a franchise for “good cause:”

17 Good cause shall include, without limitation, the failure of the franchisee to
18 comply with lawful material provisions of the franchise or other agreement
19 between the franchisor and the franchisee and to cure such default after being
20 given written notice thereof and a reasonable opportunity, which in no event need
21 be more than thirty days, to cure such default, or if such default cannot reasonably
22 be cured within thirty days, the failure of the franchisee to initiate within thirty
23 days substantial and continuing action to cure such default: PROVIDED, That
24 after three willful and material breaches of the same term of the franchise
25 agreement occurring within a twelve-month period, for which the franchisee has
26 been given notice and an opportunity to cure as provided in this subsection, the
franchisor may terminate the agreement upon any subsequent willful and material
breach of the same term within the twelve-month period without providing notice
or opportunity to cure:

24 RCW 19.100.180(2)(j). Plaintiff does not dispute that it has over \$5 million in past-due

1 invoices owed to LZB. Therefore, it has failed to comply with Section 10.2(a) of the
2 Retailer Agreement, which addresses the failure to pay monies due. Despite that
3 provision and the size of its debt, plaintiff contends that good cause is lacking because it
4 had an agreement with LZB to defer payment of its debt. Specifically, plaintiff contends
5 that LZB promised to “financially support a build-out of the Seattle Market to all New
6 Generation Gallery Stores.” Declaration of Barbara Spotts, (Dkt. #10) at ¶ 4. Plaintiff
7 apparently believed that it could repay its debt to LZB from store profits once they were
8 generated. Motion at p. 6 (citing A. Spotts Decl. at ¶ 10, Ex. E); see also A. Spotts Decl.
9 at ¶ 20 (“At the time that Tolle entered the [Seattle] market, LZB and Tolle agreed that
10 the parties would work together to build out the Seattle market and invest capital to gain
11 market share and voice, as well as open new stores LZB would then have a
12 preferred right to all profits generated by the stores until the capital expenses were
13 paid.”). However, that understanding was not based on any written agreement. Nor has
14 plaintiff shown that any oral agreement is enforceable. Plaintiff does not state how long
15 LZB was expected to shoulder the debt. Plaintiff’s description of the conduct and
16 conversations that underlie plaintiff’s assumption is vague. Furthermore, the alleged
17 conversations occurred before plaintiff executed the Retailer Agreements. None of the
18 Retailer Agreements includes a term that supports plaintiff’s assertion. To the contrary,
19 they all contain merger clauses. A. Spotts Decl., Ex. A at § 11.11 (“There are no
20 representations, undertakings, agreements, terms or conditions not contained or referred
21 to herein.”). Moreover, when Tolle planned to enter the Seattle market, Andrew Spotts
22 sent LZB a letter detailing Tolle’s “funding sources for both capital and building funds.”
23 Declaration of Greg White, (Dkt. #16). Neither the letter nor its attachments referenced
24 LZB as a funding source, nor did they reference any agreement to defer payments. In
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1 2008, LZB twice wrote to Tolle referencing the millions of dollars past due; plaintiff did
2 not contest the amounts past due.¹ All of this evidence shows that plaintiff is not likely to
3 prevail on its claim that the parties agreed to defer payment of the debt.

4 Second, plaintiff’s argument that LZB violated the FIPA is premised on the faulty
5 assertion that defendant was required to give plaintiff three notices of its breach before
6 terminating the relationship. The statute, however, states that the franchisor may
7 terminate the relationship without notice after “three willful and material breaches of the
8 same term of the franchise agreement occurring within a twelve month period.” RCW
9 19.100.180(2)(j). However, in this case, LZB is not attempting to terminate without
10 notice. In fact, it gave the required notice. The statute requires that the franchisor
11 provide “written notice [of default] and a reasonable opportunity, which in no event need
12 be more than thirty days, to cure such default.” *Id.* Plaintiff has had more than thirty
13 days to attempt to cure its debt, but it has not taken any steps to do so after receiving the
14 notice. Nor has it described any steps it plans to take or could take to cure the debt.
15 Instead, plaintiff described cure measures it attempted around October 2008, and its
16 owners have explained that they unsuccessfully sought additional funding from LZB.
17 None of those efforts reflects a current and viable plan to mitigate plaintiff’s significant
18 debt. Accordingly, plaintiff has not shown a likelihood of success on the merits.
19 Nevertheless, the Court will evaluate the remainder of the factors.

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22 ¹ Tolle also contends that LZB is “making an opportunistic attempt to take the
23 Seattle Market from Tolle.” Motion at p. 3. However, plaintiff has not cited any
24 evidence in support of that assertion. Plaintiff also contends that some of the debt reflects
25 “a substantial increase in illegal and impermissible costs due to Tolle losing its ability to
utilize independent freight haulers.” Motion at p. 22. Even if plaintiff’s allegations were
true, the excess costs comprise only a portion of the debt.

1 **2. Likelihood of Irreparable Injury.**

2 Plaintiff must also show a likelihood of “irreparable injury” in the absence of
3 injunctive relief, which includes injuries that cannot be fairly compensated by monetary
4 damages or other forms of relief available at law. See, e.g., Winter, 129 S. Ct. at 374;
5 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (explaining that plaintiff
6 “must demonstrate . . . that remedies available at law, such as monetary damages, are
7 inadequate to compensate for that [irreparable] injury”); Rent-a-Center v. Canyon
8 Television & Appliance, 944 F.2d 597, 603 (9th Cir. 1991). Plaintiff contends that absent
9 an injunction, “its individual owners, its 43 employees, and its creditors” will be
10 irreparably harmed “by forcing Tolle’s five stores out of business by the end of the
11 month. Deprived by LZB of a means to generate revenue, Tolle will default on its leases,
12 be forced to terminate all employees, and its individual owners, who have contributed in
13 excess of \$10,000,000 of capital and who personally guarantee over \$25,000,000 on the
14 leases, [will be forced] to file for personal bankruptcy.” Motion at p. 1. The Court is
15 very sympathetic to the potential loss of a family business and of jobs, particularly in
16 these difficult economic times. However, plaintiff has not explained why it could not
17 contract to sell other furniture out of its existing showrooms, thereby preserving jobs and
18 plaintiff’s investment. Accordingly, plaintiff has not shown a likelihood of irreparable
19 harm.

20 **3. The Public’s Interest and the Balance of Equities.**


21 Finally, plaintiff must show that the balance of equities tips in its favor, and that an
22 injunction is in the public interest. See, e.g., Winter, 129 S. Ct. at 374. In making this
23 determination, the Court must determine whether the public interest favors the moving or
24 nonmoving party. See Sammartano v. First Judicial Dist. Court in & for the County of

1 Carson City, 303 F.3d 959, 974 (9th Cir. 2002). In this case, the public has an interest in
2 the continued employment of Tolle's employees, but as set forth above, it is not clear that
3 they will be discharged absent an injunction. Furthermore, the Court is loathe to require
4 parties to continue a business relationship that is not working. LZB has had to carry a
5 significant amount of debt for months, and there is no clear prospect for improvement.
6 LZB is also understandably concerned about the damage to its brand name that could
7 occur if Tolle continues to operate LZB stores that have an insufficient amount of product
8 for display and sale, and inordinately lengthy wait times to fulfill orders. Declaration of
9 Kurt Darrow, (Dkt. #18) at ¶ 16. Accordingly, plaintiff has not shown that the balance of
10 equities tips in its favor or that an injunction is in the public interest.

11 **III. CONCLUSION**

12 For all of the foregoing reasons, the Court DENIES the motion for a TRO (Dkt.
13 #8).

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15 DATED this 17th day of July, 2009.

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18 Robert S. Lasnik
19 United States District Judge
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