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**IN THE
COURT OF APPEALS OF INDIANA**

BOROVILLOS RESTAURANT CORPORATION II,)
)
Appellant-Plaintiff,)
)
vs.)
)
LUTHERAN UNIVERSITY ASSOCIATION, INC.,)
)
Appellee-Defendant.)

No. 64A03-0704-CV-170

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0612-CT-11403

December 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Borovilos Restaurant Corporation II (“Broadway Café”) appeals the trial court’s partial grant of its requested preliminary injunction against Lutheran University Association, Inc. (“Valpo. Univ.”). We affirm.

Issue

Broadway Café raises the issue of whether the trial court abused its discretion in granting a preliminary injunction that did not enforce the entire scope of its easements for ingress, egress, and parking.

Facts and Procedural History¹

During the 1980s, Andrew and Doris Barboul (“Barbouls”) leased a parcel of land in Valparaiso, Indiana to Elmer and Shirley Wiesjahn (“Wiesjahns”). On December 1, 1989,

¹ Valpo. Univ. filed a Motion to Strike after Broadway Café filed its Reply Brief. Valpo. University requests this Court to strike references by Broadway Café in its Reply Brief to Exhibit H as evidence of the easements and to its business needs requiring the utilization of the parking area and ingress/egress easement on Kelsey’s parcel. Valpo. Univ. asserts that these arguments were not raised in the Appellant’s Brief and are waived. We hereby deny in part and grant in part the Motion to Strike. First, we note that it is Exhibit D that is mentioned rather than Exhibit H as one of the sources creating the easements. As to references to Plaintiff’s Exhibit D as a source of the claimed easement rights, this is not a new issue because this document is in evidence as part of the succession of documents from which the easement rights flowed to Broadway Café. This document and section referenced were included in the Statement of the Case and incorporated into the Statement of the Facts of the Appellant’s Brief. We therefore deny the request to strike references in the Reply Brief to this document.

The second part of the Motion to Strike involves Broadway Café’s argument in its Reply Brief regarding its business needs requiring the use of the access to U.S. 30 on the Kelsey’s parcel. In his closing argument, Broadway Café’s counsel emphasized the restaurant’s legal entitlement based on the easements created by the leases as the justification for requiring the east U.S. 30 entrance to be open. However on appeal, Broadway Café’s contention for this relief is that the restaurant’s business needs require this third entrance to be open. Broadway Café did not present evidence at trial supporting this new argument. Because the Appellant is raising this argument of business needs for the first time in its Reply Brief, the issue is waived. See *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005). Accordingly, we grant Valpo. Univ.’s Motion to Strike as to this argument.

the Wiesjahns² entered into an agreement with Kenneth Blaney (“Blaney”) to sublease the eastern half of the parcel (“Kelsey’s parcel”) for the purposes of operating Kelsey’s Steak House. At that time, a Big Boy restaurant was located on the western half of the parcel. The sublease agreement included a non-exclusive parking and maintenance section providing that each subleasing restaurant granted to the other the right to freely use the entire parcel for ingress and egress and agreed to permit the customers of the other party to park on any portion of the parcel.

On October 28, 1994, Broadway Café On 30, Inc. (“Broadway On 30”), entered into an agreement (“Sublease Agreement”) to sublease the western half of the parcel (“Broadway Café parcel”) from the Wiesjahns. Section 1.2 provided for the common use by the two restaurants of the common and parking areas, service roads, sewer and water lines, sidewalks, and egress and ingress to and from Sturdy Road³ and U.S. 30. A survey of the entire parcel, west and east, illustrated the parking areas, sidewalks and entrances from Sturdy Road and U.S. 30. According to this survey, the Broadway parcel had access to U.S. 30, and the Kelsey’s parcel had access to Sturdy Road and a separate access to U.S. 30.

On October 31, 1994, Broadway On 30 and Blaney entered into an agreement entitled Memorandum of Reciprocal Rights (“Reciprocal Memo”), which was recorded. This document acknowledged the reciprocal parking and other rights, providing further details of the mutual covenants. Specifically, the Kelsey sublessee, Blaney, granted Broadway On 30 a

² The lease agreement lists the sublessor as Wieker, Inc., which was created and owned by the Wiesjahns. Wieker, Inc. was later dissolved, so we refer to the Wiesjahns for simplicity.

³ Sturdy Road was previously known as Route 2 and State Road 49. Although some of the lease documents

non-exclusive parking lot easement⁴ as well as ingress/egress easements to Kelsey's entrances/exits to Sturdy Road and U.S. 30.

In January of 1999, Broadway On 30 entered into a sub-sublease agreement ("Sub-Sublease") with Borovilos Restaurant Corporation II, herein referred to as Broadway Café. George Borovilos signed the Sub-Sublease in his capacity as president of the corporation. The Sub-Sublease provided that Broadway Café would have common use of the common and parking areas, service roads, sewer and water lines, sidewalks, and ingress/egress access from Sturdy Road and U.S. 30. Section 6 provided that Blaney, operator of Kelsey's Steak House, and Broadway Café would have unrestricted use of the entire parking area as set out in the Reciprocal Memo, except that Broadway Café agreed that its employees would not utilize the northern most parking spaces on the Kelsey's parcel. A Memorandum of the Sub-Sublease Agreement was recorded.

By February of 2006, Valpo. Univ. had acquired title to both the Kelsey's and Broadway Café parcel. Prior to that time, Kelsey's ceased operation and removed all the fixtures in the building, which resulted in holes in the roof. In addition to the damage to the roof, some of the gas shut-off valves were leaking and stripped live electrical wires were left

refer to the road by its prior names, we refer to its current name.

⁴ The Reciprocal Memo. reads: "Kelsey does hereby grant . . . a non-exclusive parking lot easement for the purpose of parking automobiles and other such vehicles in, over and across the Broadway real estate shown on the Schedule of Real Estate . . ." Plaintiff's Exhibit I at 13 (emphasis added). Based on this language, Valpo. Univ. argues that Broadway Café never had easement rights on the Kelsey parcel, because the plain language of this section grants Broadway Café parking and parking rights on the Broadway Café parcel, not the Kelsey parcel. The trial court concluded that the use of "Broadway real estate" was a scrivener's error. We agree. First, a person cannot grant a property interest to another if the grantor does not have an interest in the property. This is what the above language purports to do: Kelsey granting Broadway Café an easement on the Broadway Café parcel. Second, the title of the document identifies its purpose for the parcel lessees to

on the floor. These safety hazards prompted Valpo. Univ. to demolish the Kelsey's building. Fences were installed around the building to be demolished and the parking area due east of the building as well as a substantial northern portion of the Kelsey's parking area. Access to Sturdy Road from the northeast corner of Kelsey's parcel was open with a row of parking spaces along the fence, but access to U.S. 30 on the south side of the parcel was fenced off. Eventually, Valpo. Univ. planned to remove the asphalt in the fenced areas and grade it with topsoil for seeding with grass.

On December 15, 2006, Broadway Café filed a complaint seeking a preliminary injunction to maintain the status quo and a declaratory judgment defining Valpo. Univ.'s obligations under the Sub-Sublease. Evidence was presented on the issue of a preliminary injunction on February 27, 2007. The trial court viewed the property on March 7, 2007. The trial court partially granted the requested preliminary injunction, ordering that "customers and employees of the Broadway Café may use any parking spaces on the Kelsey's parcel, except those that are currently fenced in as shown outlined in blue on Defendant's Exhibit 6." Appellant's Appendix at 11.

This appeal ensued.

Discussion and Decision

I. Standard of Review

The issue is whether the trial court erred by imposing a preliminary injunction with a smaller scope than requested by Broadway Café. The grant or denial of a request for a

grant mutually corresponding rights to each other. The use of "Broadway real estate" in the above excerpt is clearly a scrivener's error and should read "Kelsey real estate."

preliminary injunction rests within the sound discretion of the trial court, and our review is limited to whether there was a clear abuse of that discretion. Ind. Fam. and Soc. Serv. Admin. v. Walgreen Co., 769 N.E.2d 158, 161 (Ind. 2002). When determining whether or not to grant a preliminary injunction, the trial court is required to make special findings of fact and state its conclusions thereon. Ind. Trial Rule 52(A). When findings and conclusions are made, the reviewing court must determine if the trial court's findings support the judgment. Barlow v. Sipes, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001), trans. denied. The trial court's judgment will be reversed only when clearly erroneous. Id. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. Id. We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment. Id.

To obtain a preliminary injunction, the moving party has the burden of demonstrating by a preponderance of the evidence that:

- (1) the movant's remedies at law were inadequate, causing irreparable harm pending resolution of the substantive action;
- (2) the movant had at least a reasonable likelihood of success at trial by establishing a *prima facie* case;
- (3) the threatened injury to the movant outweighed the potential harm to the defendant; and
- (4) the public interest would not be disserved.

Ind. Fam. and Soc. Serv. Admin., 769 N.E.2d at 161. If the movant fails to prove any of these requirements, the trial court's grant of a preliminary injunction is an abuse of discretion. Id. The power to issue a preliminary injunction should be used sparingly, and such power should not be used except in rare instances in which the law and facts are clearly within the moving party's favor. Planned Parenthood of Ind. v. Carter, 854 N.E.2d 853, 863 (Ind. Ct. App. 2006).

II. Analysis

The procedural posture of the parties on appeal is distinctive compared to most appeals from the grant of a preliminary injunction. Here, the trial court granted Broadway Café's request, but with a lesser breadth than solicited. Dissatisfied, Broadway Café appeals the partial grant of the preliminary injunction that it sought, asking this Court to revise the scope of the preliminary injunction to include the amount of parking originally granted in the recorded documents. On appeal, Valpo. Univ. argues that the trial court's entry of the preliminary injunction against the university should be affirmed.

Broadway Café only challenges the trial court's conclusion of law that Broadway Café did not fully meet the requirement that the preliminary injunction does not disserve public interests.⁵ The pertinent portion of the trial court's conclusions is as follows:

Part of the public interest in the granting or denying of this particular preliminary injunction is public safety. If the parking east of the site of the former Kelsey's building extended to Sturdy Road was opened for parking, people who parked there would have to walk past the fenced area of the previous Kelsey's building either on the Highway 30 side of that location, which the Court observed is barely wide enough for two cars to pass each other, or those customers would have to walk along the entryway to Sturdy Road, which the Court also observed is barely wide enough for two cars to meet and pass each other. Therefore, any customers walking from parking east of the former Kelsey's building to the Broadway Café would be placed in considerable danger by the vehicles entering and exiting the property.

Therefore, the Court concludes that element (4) [public interest] for the granting of a preliminary injunction, has not been met in total. It has been met as to parking on the Kelsey's parcel that is not between the former site of the Kelsey's building and Sturdy Road.

⁵ Valpo. Univ. also argues that it may modify improvements to the Kelsey parcel without Broadway Café's approval. This argument goes to the merits that will be addressed in the subsequent trial. Accordingly, we do not address this topic.

Therefore, the Court does grant Plaintiff's Motion for Preliminary Injunction and orders that customers and employees of the Broadway Café may use any parking spaces on the Kelsey's parcel, except those that are currently fenced in as shown outlined in blue on Defendant's Exhibit 6.

App. at 10-11. Broadway Café asserts that the trial court essentially rewrote the terms of the parties' contracts for the easements and that the trial court was without the authority to do so.

This argument misinterprets the purpose of a preliminary injunction.

Preliminary injunctions are designed to protect the property and rights of the parties from any injury, usually by maintaining the status quo, until the issues and equities in a case can be determined after a full examination and hearing. Barlow, 744 N.E.2d at 6. Such relief prevents harm to the moving party that could not be corrected by a final judgment. Crossmann Cmty., Inc. v. Dean, 767 N.E.2d 1035, 1042 (Ind. Ct. App. 2002). Injunctions must be narrowly tailored and never more extensive in scope than is reasonably necessary to protect the interests of the aggrieved parties. Felsher v. Univ. of Evansville, 755 N.E.2d 589, 600 (Ind. 2001). "An injunction is to be denied if the public interest would be substantially adversely affected, even if the plaintiff has a claim." State ex. rel. Atty. Gen. v. Lake Superior Court, 820 N.E.2d 1240, 1256 (Ind. 2005).

The arguments and cases proffered by Broadway Café relate to a permanent injunction. That is not the situation before us. Here, a preliminary injunction was ordered to temporarily freeze all actions regarding the Kelsey parcel in order to protect both parties' interests while the merits of the case were tried. The trial court concluded that removal of the fencing that enclosed the parking spaces east of the demolition area would adversely affect the public safety. Thus, the scope of the preliminary injunction was narrowly tailored to

protect the interests of all parties involved. Broadway Café has not demonstrated that the trial court abused its discretion by narrowing the scope of the preliminary injunction in order to protect the public interest.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.