HORIZON RIVER RESTAURANTS, LLC	*	**NO. 2018-CA-0412**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
WEST CENTRO, LLC AND JOSHUA BRUNO	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2018-02081, DIVISION "L-6"
Honorable Kern A. Reese, Judge
* * * * * *
Judge Regina Bartholomew-Woods
* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Regina Bartholomew-Woods, Judge Tiffany Chase, Judge Dale Atkins)

BELSOME, J., DISSENTS WITH REASONS
LOBRANO, J., CONCURS IN THE RESULT

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REVERSED
JANUARY 23, 2019

Appellants, Defendants West Centro, L.L.C. ("West Centro"), and Joshua Bruno, appeal the district court's March 14, 2018 judgment granting a preliminary injunction in favor of Appellee, Plaintiff Horizon River Restaurants, L.L.C ("Horizon"). For the reasons that follow, we reverse the judgment of the district court.

BACKGROUND

According to the petition, filed March 2, 2018, Appellee operates a Pizza Hut franchise ("the business") in Gretna, Louisiana, in a building leased from Appellant.[1] Joshua Bruno is a member and the manager of West Centro. Appellee entered into the lease in October, 2013, and began operating the business in December, 2013, after making improvements to the building. Appellee operated the business without incident until February, 2017, when West Centro sent a notice of violation of the lease, indicating fines would be imposed for overflowing trash in the building's dumpster. In September, 2017, West Centro began sending Appellee demands for past due rent and fines, despite a prior court order directing

[1] The lease agreement provided that enforcement actions shall be brought in Orleans Parish, Louisiana.

Appellee to pay rent to the Jefferson Parish Sheriff's Office ("Sheriff's Office") pursuant to a garnishment judgment in an unrelated matter.

On October 17, 2017, West Centro filed a petition to evict Appellee based on failure to pay rent for the period during which Appellee sent payments to the Sheriff's Office, which was dismissed at a rule to show cause one week later. West Centro continued to send notices of violations of the lease terms with accompanying fines, eventually culminating in a notice of default on December 1, 2017. Appellee's petition also alleged West Centro and Mr. Bruno had defaulted on certain of their obligations under the lease.

In addition to other relief sought, Appellee sought injunctive relief from West Centro's interference with its right to peaceful possession of the premises. Specifically, Appellee sought to end any "further wrongful eviction efforts" and the imposition of additional fines or fees not contemplated by the lease. Among other things, Appellee submitted it would suffer irreparable harm in the form of damage to its business relationship with Pizza Hut without such relief.[2]

On March 8, 2018, the district court conducted a hearing on Appellee's request for a preliminary injunction. Prior to the examination of any witnesses, the court entertained West Centro's exception of no cause of action. West Centro urged the court to grant the exception, arguing that injunctive relief would be inappropriate to enjoin a legal proceeding such as an eviction. The court denied the exception, citing West Centro's demand for rent payments paid during the period in which Appellee was under court order to forward such payments to the Sheriff's Office.

[2] Appellees' petition alternatively suggested they need not show irreparable injury pursuant to La. C.C. art. 1987. However, they have not advanced that theory in opposition to Appellant's claims on appeal.

Scott Davidson, President of Horizon, was the only witness to testify. He explained that the company invested over three-hundred thousand dollars in building improvements. He stated that he negotiated the lease with Mr. Bruno, and that no provision existed permitting the imposition of fines for violating the lease. He also explained the company's payments of rent to the Sheriff's Office for September, October, November, and a portion of December 2017, pursuant to the aforementioned court order. According to Mr. Davidson, on September 6, 2017, Horizon received a notice assessing numerous fines and fees for supposed violations and late payments. Mr. Bruno also told him the failure to pay rent – despite the court order – put Horizon in default. As a result, in October 2017, West Centro sent a notice of eviction to Horizon, based on non-payment of rent. Horizon incurred fees as a result of employing counsel, but was ultimately successful in having the suit dismissed. Nonetheless, Mr. Davidson asserted that the notices persisted, not only with respect to non-payment of rent, but for additional fees and fines. A December 1, 2017 letter was also sent to Horizon, tallying the total amount of unpaid monies, including rent payments that had been garnished by the Sheriff's Office.

Mr. Davidson further discussed his concerns regarding Horizon's business reputation with Pizza Hut. He explained that Horizon has numerous locations in the New Orleans area, and that it is seeking to open more. He added that an eviction would cause Horizon to be in breach of numerous contracts with its vendors, and thus impair its ability to contract in the future. Eviction would further result in a breach of its contract with Pizza Hut, which would prevent them from opening any new franchises. Mr. Davidson also noted that the damage to Horizon's relationship with Pizza Hut, along with the long term nature of the numerous

contracts at risk, made it impossible to put a dollar amount on the harm caused by West Centro and Mr. Bruno's actions. Mr. Davidson confirmed that the instant suit had been filed on March 2, 2018, and a temporary restraining order entered enjoining Appellants from interfering with Appellees' peaceful possession, including pursuing "wrongful eviction efforts" and attempting to impose fines and fees not contemplated by the lease. On March 5, 2018, after entry of the temporary restraining order, Horizon received a notice from "Metrowide Apartments," a company with which Horizon had no business relationship, and which was owned by Joshua Bruno.

On cross-examination, Mr. Davidson confirmed that no eviction proceedings were pending against Horizon, nor had West Centro or Mr. Bruno resorted to any self-help remedies. Mr. Davidson also conceded that the receipt of notices did not, in fact, hurt Horizon's reputation, but that an eviction "would have a similar effect." He also acknowledged that Horizon reimbursed West Centro for a city fine of $487.50 in relation to its "grease bin," which was apparently paid by Horizon because there was "some question" as to who may have been responsible for paying the fine. Mr. Davidson also acknowledged an email indicating that some grease had been placed in a dumpster at the building which had spilled into the parking lot. Regarding the dumpster, however, Mr. Davidson testified he had told Mr. Bruno and West Centro that the pick-ups were not frequent enough, resulting in excess garbage piling up. Another notice, from September 12, 2017, was discussed, which addressed a "grease violation." However, Mr. Davidson noted that no fine was assessed as a result.

On redirect, Mr. Davidson denied ever placing grease in the dumpster; in fact, when Horizon made its improvements, it had installed a grease bin that a third

party would occasionally empty. He did acknowledge some grease spills; however, he explained that as a result of landscaping by Mr. Bruno, it became difficult for employees to access the grease bin.

The court denied Appellant's exception and granted the preliminary injunction, observing that Mr. Bruno had engaged in "unsavory" practices in asserting Horizon was in default as to its rental payments, which had been paid to the Sheriff's Office pursuant to a court order. The court explicitly stated the injunction would not prohibit an eviction action. In relevant part, the written judgment enjoined West Centro and Mr. Bruno "from taking any actions to interfere with [Appellee's] peaceful possession of its Leased Premises . . . ."

West Centro briefs four assignments of error. In its first and third assignments, West Centro argues the preliminary injunction should not have been granted, as Appellee failed to show the existence of irreparable harm. In its second assignment of error, West Centro argues the district court committed legal error in denying its exception of no cause of action and in issuing an injunction to "enjoin an eviction." In its fourth assignment, West Centro argues the district court's injunction fails to specify in reasonable detail the actions enjoined.

STANDARD OF REVIEW

The district court's grant of Appellee's preliminary injunction and the denial of Appellant's exception of no cause of action are interlocutory judgments. However, "[a]n appeal may be taken as a matter of right from an order or judgment relating to a preliminary or final injunction." La. C.C.P. art. 3612. Furthermore, "when a non-appealable issue is raised in conjunction with appealable issues, the non-appealable issues may be reviewed to achieve judicial economy and justice." *Riley v. Riley*, 1994-2226, p. 2 (La. App. 4 Cir. 9/4/96), 680 So.2d 169,

171 (citing *Martin v. Martin*, 1995-0466 (La. App. 4 Cir. 10/26/95), 663 So.2d 519).

A plaintiff seeking a preliminary injunction must make a prima facie showing that it will suffer irreparable injury if the motion for preliminary injunction is not granted and that it will likely prevail on the merits of the case. *Easterling v. Estate of Miller*, 2014-1354, p. 10 (La. App. 4 Cir. 12/23/15), 184 So.3d 222, 228. It is a "harsh, drastic and extraordinary remedy and should only be issued if the applicant is threatened with irreparable loss without adequate remedy at law." *Id.*, 2014-1354, p. 11, 184 So.3d at 229. "Irreparable injury is an injury or loss that cannot be adequately compensated in money damages, or is not susceptible to measurement by pecuniary standards." *Id.* A showing of inconvenience alone is not sufficient to establish irreparable harm. *Id.*

In reviewing the district court judgment as to injunctive relief, we are guided by this Court's decision in *Mid-S. Plumbing, LLC v. Dev. Consortium-Shelly Arms, LLC*, 2012-1731, p. 10 (La. App. 4 Cir. 10/23/13), 126 So.3d 732, 739:

> "The standard of review for a preliminary injunction is whether the trial court abused its discretion in ruling." *Kern* [*v. Kern*], [20]11-0915, p. 6 [(La. App. 4. Cir. 2/29/12),] 85 So.3d [778,] 781. "That broad standard is, of course, based upon a conclusion that the trial court committed no error of law and was not manifestly erroneous or clearly wrong in making a factual finding that was necessary to the proper exercise of its discretion." *Yokum* [*v. Pat O'Brien's Bar, Inc.*], [20]12-0217, p. 7 [(La. App. 4. Cir. 8/15/12),] 99 So.3d [74,] 80. The trial judge has great discretion to grant or deny the relief requested at a hearing on a preliminary injunction. *Desire Narcotics Rehab. Ctr., Inc. v. State Dep't of Health and Hospitals*, [20]07-0390, p. 4 (La. App. 4 Cir. 10/17/07), 970 So.2d 17, 20. An abuse of discretion results from a conclusion reached in an arbitrary or capricious manner. *Wise v. Bossier Parish Sch. Bd.*, [20]02-1525, p. 6 (La.6/27/03), 851 So.2d 1090, 1094. An arbitrary conclusion is one resulting from a disregard of the evidence or its proper weight; a capricious conclusion is one [that] is not supported by substantial evidence or that is contrary to substantiated competent evidence. *Id.*

As to the denial of Appellant's exception of no cause of action, we are guided by this Court's opinion in *Koch v. Covenant House New Orleans*, 2012-0965, p. 2 (La. App. 4 Cir. 2/6/13), 109 So.3d 971, 972-73:

> The exception of no cause of action "tests the legal sufficiency of a petition by examining whether, based upon the facts alleged in the pleading, the law affords the plaintiff a remedy." *Meckstroth v. Louisiana Dept. of Transp. & Dev.*, [20]07-0236, p. 2 (La. App. 4 Cir. 6/27/07), 962 So.2d 490, 492. "A peremptory exception of no cause of action is a question of law that requires the appellate court to conduct a *de novo* review." *R–Plex Enterprises, L.L.C. v. Desvignes*, [20]10-1337, p. 5 (La. App. 4 Cir. 2/9/11), 61 So.3d 37, 40 (citations omitted). "The court reviews the petition and accepts all well pleaded allegations of fact as true, and the issue at the trial of the exception is whether, on the face of the petition, the plaintiff is entitled to the relief sought." *Meckstroth, supra*, p. 2, 962 So.2d at 492 *(citing Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234–36 (La.1993) (citation omitted)). No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action. La. Code Civ. Proc. art. 931.

ANALYSIS

We first observe that, as the judgment relates to injunctive relief, it does not state anything more than what the law already provides. "The lessor warrants the lessee's peaceful possession of the leased thing against any disturbance caused by a person who asserts ownership, or right to possession of, or any other right in the thing." La. C.C. art. 2700. A lessor is bound "[t]o protect the lessee's peaceful possession for the duration of the lease." La. C.C. art. 2682. "[P]eaceable possession of the thing during continuation of the lease . . . . [is] implied in every contract of lease." *Elmwood MRI, Ltd. v. Paracelsus Pioneer Valley Hosp., Inc.*, 2001-764, p. 9 (La. App. 5 Cir. 12/26/01), 806 So.2d 743, 748. However, in the context of the proceedings which the district court held, Appellants may rightfully now wonder whether the specific acts sought to be enjoined—"wrongful" eviction

efforts and the sending of notices for fees—constitute actions that violate Appellees' peaceful possession.

Peaceful, or "peaceable," possession is not specifically defined by statute, but it has been given meaning through our jurisprudence. A review of the jurisprudence indicates that the right to "peaceful possession" is a right to be free from a type of harm that is not presented by the facts of this case.

In *McCurdy v. Bloom's Inc.*, 39,854, pp. 7-8 (La. App. 2 Cir. 6/29/05), 907 So.2d 896, 901, the Second Circuit reasoned and held as follows:

> If a disturbance is such that the lessee can no longer use the premises for the intended use, the lessor has breached its obligation to maintain the lessee in peaceable possession. *Plater v. Ironwood Land Co., L.L.C.*, 39,085 (La.App. 2d Cir.12/08/04), 889 So.2d 475. Additionally, according to the Revision Comments of La. C.C. art. 2700, "... the term 'disturbance' of possession is intended to have the same meaning as in Article 3659 of the Code of Civil Procedure...." That article states, in pertinent part:
>
> > A disturbance in fact is an eviction, or any other physical act which prevents the possessor of immovable property or of a real right therein from enjoying his possession quietly, or which throws any obstacle in the way of that enjoyment.
> >
> > . . .
>
> Here, the trial court correctly determined as premature [plaintiff's] request for a preliminary injunction against [defendants] to maintain his peaceable possession, because it is evident that [plaintiff's] right of possession has not been disturbed in fact. Primarily, he has not been evicted physically from the property. Nor has [defendant] carried out any other type of physical act that has prevented [plaintiff] from enjoying the property according to its intended use under the Lease. For example, a fence has not been erected along the lines drawn on the survey prepared for the contemplated partition—such action may have constituted a disturbance in fact; however, that has not occurred.

In addition to disturbances "in fact," a disturbance may be "in law," which refers to:

> [T]he execution, recordation, registry, or continuing existence of record of any instrument which asserts or implies a right of ownership or to the possession of immovable property or of a real right therein, or any claim or pretension of ownership or right to the possession thereof except in an action or proceeding, adversely to the possessor of such property or right.

La. C.C.P. art. 3659.

A number of other cases employ reasoning similar to *McCurdy*. In *Nash v. La Fontaine*, 407 So.2d 783, 785 (La. App. 4 Cir. 1981)[3], this Court stated:

> The burden which rests upon the plaintiff to prove such claims [i.e., those alleging disturbance of peaceful possession] is that the problem or defect complained of was of a nature serious enough to warrant cancellation of the lease or that the lessor's actions seriously disturbed the lessee in his possession and full use and enjoyment of his premises. *Berry v. Thompson*, 297 So.2d 484 (La.App.2nd Cir. 1974); *Robinson v. McKean, Inc.*, 389 So.2d 451 (La.App.2nd Cir. 1980); and *Broussard v. O'Bryan*, 270 So.2d 127 (La.App.3rd Cir. 1972) *writ denied* 272 So.2d 374 (La.1972).

In *Creole Corp. v. McMillan*, 379 So.2d 805, 807 (La. App. 4 Cir. 1980), this Court held that "[t]he record amply supports the trial court's finding that the defendants did illegally disturb the plaintiff's peaceful possession of the premises by depriving him of its use" based on defendants' padlocking the premises in question.

In *Constantin Land Tr. v. Pitre Indus., L.L.C.*, 2016-0993, p. 5 (La. App. 1 Cir. 7/10/17), 225 So.3d 1089, 1093, the First Circuit Court of Appeal stated:

> One of the principal obligations a lessor has to his lessee is to protect the lessee's peaceful possession for the duration of the lease. . . . If a disturbance is such that the lessee can no longer use the premises for the intended use, the lessor has breached its obligation to maintain the lessee in peaceful possession. *McCurdy*, 39,854 at p. 7, 907 So.2d at 901.

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[3] The *Nash* opinion considered the statute in its previous form, under La. C.C. art. 2692. The 2004 Revision Comments make clear that the article in its current form "restates the substance of Article 2692 of the Civil Code of 1870 with some cosmetic changes in language. These changes are not intended to change the law."

Despite Appellant's repeated assertions otherwise, the district court's judgment does not—and cannot—enjoin the bringing of an eviction action. *Easterling*, 2014-1354, p. 6, 184 So.3d at 226; *See also Constantin Land Tr. v. Pitre Indus., L.L.C.*, 2016-0993, p. 5 (La. App. 1 Cir. 7/10/17), 225 So.3d 1089, 1093 (stating "an action or proceeding filed adversely to a possessor . . . is *not* a disturbance."). Accordingly, Appellant's assignment of error in this regard is without merit.

The evidence at trial demonstrated that West Centro has yet to commence eviction proceedings since its unsuccessful first attempt. Horizon did assert that such an action, if successful, would irreparably harm its business relationship with Pizza Hut. However, if West Centro were to take such action, both West Centro and Horizon would have an opportunity to present their positions to the district court. If West Centro were to prevail on the merits of an eviction action, it would indeed irreparably harm Horizon's relationship with Pizza Hut, but not because of any wrongful action by West Centro. Conversely, if Horizon successfully defended an eviction action, no harm to its relationship with Pizza Hut would follow. Accordingly, this Court sees no basis for injunctive relief as a result of any arguments related to a possible eviction.

We distinguish the facts of this case with those of *Easterling*, *supra*, and the case on which it relied, *Historic Restoration, Inc. v. RSUI Indem. Co.*, 2006-1178 (La.App. 4 Cir. 3/21/07), 955 So.2d 200. While *Easterling* and *Historic Restoration* granted injunctive relief based on harm to one's "business reputation," as alleged here, we find those cases were limited to "the facts and circumstances"

of those cases. *Easterling*, 2014-1354, p. 13, 184 So.3d at 230; *Historic Restoration*, 2006-1178, p. 13, 955 So.2d at 209.

In *Easterling*, the parties had come to an impasse as to which was responsible for certain repairs to the premises, and defendants attempted to terminate the lease and demanded that plaintiffs vacate. *Easterling*, 2014-1354, p. 3, 184 So.3d at 225. Defendants also sought to enjoin Plaintiffs' continued business operations on the premises. *Id.*, 2014-1354, p. 4, 184 So.3d at 225. Plaintiffs argued that, if evicted, they would "suffer irreparable injury due to nonfulfillment of their numerous contractual commitments, [and due to] the effect of the contractual breaches on their reputation and on third parties." *Id.*, 2014-1354, p. 12, 184 So.3d at 229. Plaintiffs accordingly sought an injunction to prevent the institution of eviction proceedings. *Id.*, 2014-1354, p. 4, 184 So.3d at 225. The district court granted plaintiff's request for preliminary injunctive relief, effective "until a subsequent order or Judgment" by the court on defendants' reconventional eviction suit, finding plaintiffs demonstrated irreparable harm in the form of harm to their business reputation. *Id.*, 2014-1354, pp. 8, 12, 184 So.3d at 227, 229. This Court affirmed the injunction on appeal, finding the language of the judgment did not preclude the *institution* of eviction proceedings, which had, in fact, already commenced at the time preliminary injunctive relief was granted. *Id.*, 2014-1354, pp. 7-8, 184 So.3d at 227. This Court also noted that had the district court granted defendants' request for injunctive relief, defendants' "would have obtained the relief sought in their reconventional demand for eviction . . . before a determination that there are grounds for eviction . . . ." *Id.*, 2014-1354, p. 10, 184 So.3d at 228. This Court read the judgment as "crafted to preserve the status quo

between Plaintiffs and Defendants until trial on the merits of Defendants' reconventional eviction suit." *Id.*, 2014-1354, p. 7, 184 So.3d at 227.

In *Historic Renovation*, plaintiff sought to enjoin its insurance company from quadrupling its policy premiums, which it could not pay.[4] *Historic Renovation*, 2006-1178, pp. 1, 13, 955 So.2d at 202, 209. In granting preliminary injunctive relief, the district court stated:

> If [plaintiff] is unable to obtain property insurance, it faces irreparable injury in that it will be in default of mortgage agreements, partnership agreements, management agreements and ground lease agreements requiring the maintenance of property insurance, threatening the loss of goodwill, loss of reputation, and loss of its competitive edge in the marketplace. This Court also finds that failure to maintain insurance will also jeopardize several of [plaintiff's] pending financial transactions on assets covered by the . . . policy [provided by defendant], negatively impacting [plaintiff] in excess of several million dollars in 2006.

Id., 2006-1178, p. 12, 955 So.2d at 208-09. This Court affirmed. *Id.*, 2006-1178, p. 13 955 So.2d at 209.

Unlike *Easterling* and *Historic Restoration*, Appellee has not shown how Appellant's actions would impair its business reputation. There is not a pending eviction action upon which Appellees may rely to prove irreparable harm. Even were Appellants to pursue such action again and succeed, the ensuing irreparable harm would not be attributable to Appellants because the district court would be required to consider the eviction action on the merits.

The only other basis for injunctive relief as suggested by Appellees alleged harm in the form of West Centro's sending of notices and accompanying

[4] The district court primarily granted injunctive relief because "Louisiana law does not require a showing of irreparable harm for a violation of a prohibitory law." *Historic Restoration*, 2006-1178, p. 12, 955 So.2d at 208. Thus, this Court's reasoning as it related to injunctive relief was secondary to affirming the district court on that basis.

fines/fees. Assuming the annoying and inconvenient nature of the notices—even unsavory as the district court observed—injunctive relief is nonetheless not appropriate, as the notices do not prevent Appellant from using the premises for the intended use, i.e., operating a Pizza Hut franchise. The jurisprudence on this issue mandates more than inconvenience, and the testimony of Horizon's own witness demonstrated that Appellee would suffer no irreparable injury as a result of the notices and purported fees.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court granting preliminary injunctive relief. Our decision in this regard renders Appellant's appeal of the district court's denial of its exception moot.

REVERSED