STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: December 15, 2016]

COLBEA ENTERPRISES, L.L.C.,	:	
Plaintiff,	:	
	:	
	:	
v.	:	**C.A. No. PC-2016-3413**
	:	
W.A.C. & FAMILY, LLC, PAULA	:	
SARDELLI; ROBERT RECCHIA,	:	
Trustee of the Evelyn Recchia Irrevocable	:	
Trust dated October 24, 2014; STANLEY	:	
PIKUL, in his capacity as the Director of	:	
Building Inspection for the	:	
City of Cranston,	:	
Defendants.	:	

DECISION

LANPHEAR, J. Before this Court is Plaintiff Colbea Enterprises, L.L.C.'s (Colbea) motion for a preliminary injunction, to require the Defendants—W.A.C. & Family, LLC (W.A.C.); Paula Sardelli, and Robert Recchia, as Trustee of the Estate of Evelyn Recchia Irrevocable Trust—to allow Colbea to remove a canopy over a property that was formerly a gasoline service station. Colbea further seeks a writ of mandamus from this Court to compel the City of Cranston—another named Defendant—through its Director of Building Inspection Stanley Pikul (Pikul), to issue a demolition permit for the canopy. W.A.C., Sardelli, and Recchia (Lessors) filed a counterclaim seeking a declaration that Defendants own the canopy. Defendants also filed a cross-claim asking this Court to make a declaration that Pikul does not have the authority to

permit the demolition of the canopy without the permission of the property's ownership and a preliminary and permanent injunction to prevent Pikul from issuing said permit.

The parties entered into an agreed Stipulation of Undisputed Facts, which the Court has recorded as Joint Exhibit I. The Court received testimony and other evidence on August 15, 2016. This Court has also provided an opportunity for both parties to file post-hearing briefs. The equitable matters are now before this Court for decision. The Court has jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

On July 2, 1970, Antonio P. and Victoria O. Capuano leased property at 1036 Reservoir Avenue in Cranston, Rhode Island to Shell Oil Company. Joint Ex. 1 ¶¶ 6, 16. Lessors all gained ownership of the land at various times and are the successors-in-interest of the Capuanos. See Joint Ex. 1 ¶¶ 9, 23. Colbea is the successor-in-interest to Shell's interest in the lease agreement, and operated the facility as a Shell gasoline station until the expiration of the lease in July 31, 2016. Joint Ex. 1 ¶¶ 11, 14, 17, 22.

The lease states, in pertinent part:

> "All improvements, equipment and other property constructed, installed or placed on the premises by Shell or acquired by Shell, at any time during the continuance of this or any previous Lease, or any tenancy thereafter; shall be and remain Shell's property, and Shell shall have the right to remove any or all of the same from the premises at any time during, and within sixty (60) days after any termination of this Lease or any tenancy thereafter." Joint Ex. 1 ¶ 18 (quoting Lease dated July 2, 1970 ¶ 14).

Although the original lease specifically excludes "buildings" from Paragraph 14, an attachment to the lease states:

> "At any termination of this Lease, hereof, any and all buildings constructed by Shell on the premises shall become the property of the Lessor. Shell shall retain the right to remove their equipment and other improvements, but shall restore Lessor's premises to proper grade after any such removal." Joint Ex. 1 ¶ 20 (quoting Attachment to Lease of 1970 at ¶ 5A).

In an additional agreement, dated March 12, 1997, the Lessors and Colbea agreed that "upon termination or expiration of the Lease and subject to ordinary wear and tear, Shell shall surrender the premises to Lessor, including all buildings and yard asphalt paving, in good repair and condition." Joint Ex. 1 ¶ 21.

In 2008, Colbea constructed a large canopy to cover the gasoline pumps. V. Compl. ¶ 27. The canopy is a 100 foot by 30 foot roof-like structure, without walls and supported by columns. JX 1 ¶¶ 24, 25. Colbea erected the canopy pursuant to Shell's specifications which governed height, color, displays and Shell Oil brandings. V. Compl. ¶ 28.

Between December 2013 and August 2015, the parties worked toward an extension of the lease terms. Joint Ex. 1 ¶ 27. However, negotiations fell through and on September 11, 2015, Colbea notified Defendants that it would not renew its lease. Id. In April 2016, as the lease was nearing completion, Colbea informed Marc Hays (Hays), a representative of the Lessors, that it required demolition permits to remove the canopy, underground storage tanks and other improvements. Joint Ex. 1 ¶ 28. Between May 3 and May 30, 2016, the parties' respective representatives communicated about who would have the rights to the canopy, but, ultimately, could not come to an agreeable decision. Joint Ex. 1 ¶ 32. During that time, Colbea gave the necessary demolition permits and other paperwork to Hays on May 17, 2016. Joint Ex. 1 ¶ 29.

Colbea wrote to the Lessors on or about June 23, 2016 requesting that they sign the Demolition Permit Application. Joint Ex. 1 ¶ 33. In return for their signature, Lessors required that Colbea determine whether the canopy was up to code and whether it could be replaced in the

same location. Id. Lessors also informed Colbea that their position was that the canopy was a building and thus, as required by the contract, would stay on the property. See id.

On July 7, 2016, Colbea submitted three documents to the City of Cranston Department of Building Inspections (Department), two of which were signed by Sardelli and Theresa Capuano. Joint Ex. 1 ¶ 30. The Department notified Colbea that the forms were not filled out adequately as a signature was missing. Joint Ex. 1 ¶ 31. Two days later, Lessors permitted and Colbea began to remove the vehicle lifts inside the building, the underground gasoline storage tanks, equipment and other items. Joint Ex. 1 ¶ 34. While the Lessors had cooperated with other items being removed—including removal of the storage tanks and lifts—the demolition permits were never returned by all three Lessors.[1] Joint Ex. 1 ¶¶ 34, 35. Colbea itself completed and submitted a demolition permit application, a bond, and an insurance certificate, but the City refused to issue the demolition permit without the owner's signature. Joint Ex. 1 ¶¶ 40-42. The Building Inspector would have issued a permit if the owner had signed for it.

On July 20, 2016, prior to the expiration of the lease, Colbea filed a complaint against the Lessors for breach of contract and requested that the Court issue an injunction requiring Lessors cooperate in executing the demolition permit application and allowing for removal of the canopy. V. Compl. ¶¶ 61-65. Colbea has also requested of this Court a writ of mandamus requiring Pikul to issue a demolition permit from the building. V. Compl. ¶¶ 66-69. On July 9, 2016, the Lessors stated that they would not allow for removal of the canopy as they believed it to be a building. Joint Ex. 1 ¶ 34. Within the month, the Lessors had answered the complaint and filed

[1] Mr. Hays, for the owners, testified that he knew that Colbea would not renew the lease. On June 7, 2016, the owners requested that the canopy not be removed but be preserved on the property. Ex. 6.

a counterclaim for breach of contract against Colbea and a cross-claim against Pikul to prevent him from issuing a demolition permit.

II

Standard of Review

The standard for granting a preliminary injunction has been established by our Supreme Court. The hearing justice must

> "[D]etermine whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I. 2003) (citing Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I. 1999)).

The irreparable harm must be both imminent and lack an adequate legal remedy. Fund for Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (R.I. 1997). The moving party is not required to demonstrate that he or she will certainly succeed on the merits of the underlying claim, but he or she must make out a prima facie case. DiDonato, 822 A.2d at 181 (citing Fund for Cmty. Progress, 695 A.2d at 521). The moving party must meet its burden by a preponderance of the evidence. Town of Smithfield v. Fanning, 602 A.2d 939, 943 (R.I. 1992). Our Supreme Court has explained that the purpose of a preliminary injunction is not to achieve a final determination on the merits of the case, "but is merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured." DiDonato, 822 A.2d at 181 (quoting Fund for Cmty. Progress, 695 A.2d at 521) (internal quotations omitted). "When an injunction mandatory in its nature is asked for, a stricter rule obtains. Owing to the extraordinary character of the remedy, it should be granted on preliminary application only in cases of great urgency and when the right of the

complainant is very clear." Smart v. Boston Wire Stitcher Co., 50 R.I. 409, 148 A. 803, 805 (1930).

III

Analysis

Rhode Island Superior Court Rules of Civil Procedure 65 provides the Court the ability to grant preliminary injunctive relief. Super. R. Civ. P. 65. Both parties in this case, Colbea and Defendants, have sought preliminary injunctions against one another. V. Compl. ¶ 69(c); Defs.' Countercl. and Cross-cl. Colbea seeks a preliminary mandatory injunction, defined as "one that commands a party, plaintiff or defendant, to perform a certain act or acts," to demolish the canopy. Jacob Klein, Mandatory Injunctions, 12 Harv. L. Rev. 95, 97 (1898). Defendants ask for a preliminary injunction, defined as "[a] temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case" in order to prevent Colbea from demolishing the canopy. Preliminary Injunction, Black's Law Dictionary 904 (10th ed. 2014).

Both a preliminary injunction and preliminary mandatory injunction must satisfy the same elements. Importantly, there is a stricter interpretation of those elements in a preliminary mandatory injunction. Smart, 50 R.I. at 409, 148 A. at 805. Lessors and Colbea must meet four requirements. See id. Logically, if one party meets the requirements for a preliminary injunction, the other party inherently fails to meet the same requirements. Our Supreme Court has laid out the following four requirements a party must meet, by a preponderance of the evidence, in order for a Court to grant a preliminary injunction. DiDonato, 822 A.2d at 181 (internal citations omitted). These requirements are:

> "[I]n deciding whether to issue a preliminary injunction, the hearing justice should determine whether the moving party (1) has

> a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." Id. (internal citations omitted).

Either party must first show that their side "has a reasonable likelihood of success on the merits." Id. "In determining the reasonable likelihood of success on the merits, [the Court] do[es] not require the moving party to establish 'a certainty of success[;]' rather, '[the Court] require[s] only that [the moving party] make out a prima facie case.'" Id. (citing Fund for Cmty. Progress, 695 A.2d at 521). In the case at hand, the question becomes which party is likely to succeed in their action for a breach of contract claim. The Rhode Island Supreme Court has stated that in order to prevail in a breach of contract claim, one must prove that there was a valid contract, the contract was breached, and the breach of the contract caused damages to the other party. Petrarca v. Fid. & Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005) (citing Rendine v. Catoia, 52 R.I. 140, 142, 158 A. 712, 713 (1932)).

As discussed above, both parties must make out only a prima facie case for breach of contract. DiDonato, 822 A.2d at 181. Both parties agree that the lease is valid, and that all parties, save Pikul, are parties to the agreement. See generally Joint Ex. 1. As such, the contract is a valid contract and that element is satisfied. Both parties allege damages in their filings satisfying the third element. See V. Compl.; Defs.' Countercl. and Cross-cl.

The second element, that the contract was breached, is the crux of the Court's analysis. The breach turns on the definition of the word "building" and whether the canopy at 1036 Reservoir Avenue is a building or an improvement under the lease. Colbea claims that the canopy is not a "building," but an improvement constructed by Colbea with Shell branding and should be removed. The Lessors, collectively, argue that the canopy is a "building" as defined

by several dictionaries and the State Building Code, meaning simply that the canopy would remain on the property. The City of Cranston claims that the owners of the property, pursuant to the State Building Code, must sign a demolition permit.

Our Supreme Court has held that a Court's determination of whether a contract is definite or ambiguous is "a question of law." Young v. Warwick Rollermagic Skating Ctr., Inc., 973 A.2d 553, 558 (R.I. 2009) (quoting Gorman v. Gorman, 883 A.2d 732, 738 n.8 (R.I. 2005)). A contract is ambiguous "where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken." Fashion House, Inc. v. Kmart Corp., 892 F.2d 1076, 1083 (1st Cir. 1989). An interpreting court will consider the contract language and its meaning entirely within the plain, ordinary, and usual meaning of its terms. Papudesu v. Med. Malpractice Joint Underwriting Ass'n of R.I., 18 A.3d 495, 498 (R.I. 2011) (internal citations omitted). If a contract is unambiguous, the Court will not interpret the words of the contract, but simply apply them as defined. Papudesu, 18 A.3d at 498 (quoting A.F. Lusi Constr., Inc. v. Peerless Ins. Co., 847 A.2d 254, 258 (R.I. 2004)).

The word "building" is a common and universally known word in the English language.

Webster's Third New International Dictionary defines "building" as:

> "[a] constructed edifice designed to stand more or less permanently, covering a space of land, by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy." Webster's Third New International Dictionary 292 (1961).

Similarly, although more succinctly, Black's Law Dictionary defines "building" as "[a] structure with walls and a roof, [especially] a permanent structure." Building, Black's Law

Dictionary 234 (10th ed. 2014). Lessors argue that walls are not required to make a building and that their interpretation that a canopy of the definition of "building" is correct.

This Court finds that the "plain, ordinary, and usual meaning" of the word "building" does not encompass a gasoline service station canopy. The instant canopy is "[a] constructed edifice designed to stand more or less permanently" to provide protection to customers from the elements while fueling their vehicles. Webster's Third New International Dictionary 292 (1961).[2] The canopy further is "covering a space of land," more specifically in this case, the gasoline pumps. Id. However, this canopy has no walls as buildings generally require. Id.; see also V. Compl. Ex. B. Further, the canopy does not serve "as a dwelling, storehouse, factory, shelter for animals, or other useful structure" as it simply acts as a cover for customers and gasoline pumps. Id. One may argue that among the enumerated uses, the canopy could be considered either a storehouse or a "useful structure." Id. The gasoline pumps are not brought between one place and the canopy, so the canopy cannot be considered a storehouse. Id. The definition's seeming catch-all "other useful structure" is defined further as "distinguished from structures not designed for occupancy . . . and from structures not intended for uses in one place. . . ." Id. The canopy is not built for occupancy, as occupancy suggests a permanent place for persons. Further, a canopy cannot be used in several different places, as this one is permanent. To suggest that the canopy is a place that is occupied would be to expand the definition of building too broadly.

Lessors argue that the lease agreement is ambiguous, and because the lease agreement is ambiguous, this Court should construe the lease's ambiguity against the drafter. Lessors point to

[2] This Court, as our Supreme Court has noted before, does not intend to "make a fortress out of the dictionary." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, 326 U.S. 404, 66 S. Ct. 193, 90 L. Ed. 165 (1945); Chambers v. Ormiston, 935 A.2d 956, 962 n.11 (R.I. 2007).

Section 5A of the Lease Agreement Addendum, which states that the Lessee may remove "any and all buildings presently on the premises, including any of Lessor's improvements and equipment now or hereafter located thereon." V. Compl. Ex. A. Lessors argue that this creates three different interpretations of the contract. This is a tenuous argument, as the next sentence states that "[a]t any termination of this lease hereof, any and all buildings constructed by Shell on the premises shall become the property of the Lessor." Id. (emphasis added). Read together, this language simply states that once the lease is terminated, buildings cannot be removed from the property. This language leaves no ambiguity—the only question before this Court is whether the canopy is a building.

As there is no ambiguity, and applying the "plain, ordinary and usual meaning" of the word "building," this Court finds that Colbea has more than "a reasonable likelihood of success on the merits." Iggy's Doughboys, 729 A.2d at 705. Further, this Court necessarily holds that the Lessors, collectively, do not have "a reasonable likelihood of success on the merits" for their injunction to prevent the issue of a demolition permit. Id.

The Court must next determine whether Colbea will suffer irreparable harm without the canopy being demolished. DiDonato, 822 A.2d at 181. Our Supreme Court has held that the irreparable harm must be both "imminent and for which no adequate legal remedy exists." Fund for Cmty. Progress, 695 A.2d at 521. "Ultimately, the existence of irreparable harm is a factual determination made at the conclusion of all the evidence." R. I. Tpk. & Bridge Auth. v. Cohen, 433 A.2d 179, 182–83 (R.I. 1981) (citing Sch. Comm. of Pawtucket v. Pawtucket Teachers' Alliance Local No. 930, 117 R.I. 203, 208, 365 A.2d 499, 502 (1976)).

Colbea claims that they will be irreparably harmed if the canopy remains on the property as the canopy is "proprietary business property" of Colbea, constructed to conform to Shell's

specifications and guidelines. Colbea expects to operate a gasoline service station, similar to the one in question, at a nearby location and as such, would be harmed by a competitor possessing its "propriety business property." See Test. of Andrew Delli Carpini. Colbea further argues that this harm would be immediate as the Lease has already expired and that if the canopy were transferred to a third party, they would suffer the damages. Lessors offer no rebuttal to Colbea's assertions.

Our Supreme Court has held that a preliminary mandatory injunction requires that there be a great urgency. King v. Grand Chapter of Rhode Island Order of E. Star, 919 A.2d 991, 995 (R.I. 2007). In the case at hand, the lease between the Lessors and Colbea ended on July 31, 2016. The continued control over the canopy by the Lessors and not by Colbea creates great urgency as Colbea is in an uncertain position when considering property. As such, this Court finds that there is great urgency in issuing a preliminary mandatory injunction.

The facts show that irreparable harm would result to Colbea. The canopy is constructed within the guidelines of Shell for the reason of running a Shell gasoline service station. V. Compl. ¶ 28. Colbea intends to run a similar station in the area, and a competitor holding proprietary equipment would harm Colbea. See Test. of Andrew Delli Carpini. The Court finds that there would be irreparable harm to Colbea if the canopy was left standing.

The Court is next required to consider whether "the balance of the equities, including the possible hardships to each party and to the public interest, tip in [Colbea's] favor." Iggy's Doughboys, 729 A.2d at 705. "A court may 'withhold injunctive relief after balancing the equities or, put another way, considering the relative hardships to the parties.'" Am. Condo. Ass'n, Inc. v. Mardo, 140 A.3d 106, 118 (R.I. 2016) (quoting Rose Nulman Park Found. ex rel. Nulman v. Four Twenty Corp., 93 A.3d 25, 30 (R.I. 2014)).

The Lessors will face several hardships if the canopy is demolished. First, the demolition would take time during which they would be unable to lease the property to a potential third party. Secondly, the gasoline service station would be without a canopy, which may require either the Lessors or the next lessee to build one. However, Colbea will suffer the hardship of both, not having a canopy which they constructed according to Shell guidelines. Colbea also may potentially suffer from a third party that could possibly take possession of the canopy. The demolition of the canopy would not damage any property that the Lessors are entitled to at this time, and failure to remove the canopy could result in damage to Colbea's business. This Court finds that the equities weigh in favor of Colbea. As this is only a preliminary mandatory injunction, the demolition of the canopy would not harm the Lessors. If they prevail in their claim against Colbea, the Lessors may possibly recover the cost of a new canopy.

A party seeking a preliminary mandatory injunction must also show that there is "no adequate legal remedy [that] exists to restore that plaintiff to its rightful position." Fund for Cmty. Progress, 695 A.2d at 521. Colbea argues that there is no legal remedy to remove the canopy without the City of Cranston approving its Demolition Permit Application. The City of Cranston is unwilling to remove the canopy without the signatures of all owners of the property. V. Compl. ¶ 46. Without the City of Cranston's approval of the Demolition Permit Application, Colbea has no other remedy to remove the canopy without action by the Court.

Finally, Colbea must "[show] that the issuance of a preliminary injunction will preserve the status quo." Iggy's Doughboys, 729 A.2d at 705. The Coolbeth Court explained:

> "[T]he office of a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but it is merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be

> irreparably injured or endangered." Coolbeth v. Berberian, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974).

In the case at hand, the status quo is simply that the Lessors have a property that Colbea has left. Colbea has taken all of its equipment, including gasoline service tanks, but has been unable to take its canopy. As the status quo is between two parties ending a business relationship, the status quo is now between two individual companies without a relationship. As such, the removal of the canopy would simply be the final step in ending the business relationship between the two organizations. Therefore, the removal of the canopy continues the status quo. See Coolbeth, 112 R.I. at 564, 313 A.2d at 659.

This Court finds that Colbea has met its burden and proven by a preponderance of the evidence that a preliminary mandatory injunction requiring the Lessors to allow for the demolition of the gasoline pump canopy should be issued. Colbea has shown very clearly the great urgency with which the business requires the injunction. Although this Decision is not a final decision on the merits, this Court is satisfied that Colbea has met its burden, by a preponderance of the evidence, to show that a preliminary mandatory injunction is necessary to secure the rights of both parties.

IV

Conclusion

Based on the foregoing this Court concludes that it must grant Colbea's motion for a preliminary mandatory injunction requiring the Lessors to permit the removal of the canopy from the property located at 1036 Reservoir Avenue in Cranston, Rhode Island. Further, this Court must deny the Lessors' request for an injunction preventing Stanley Pikul, in his capacity as the Director of Building Inspection for the City of Cranston, from issuing a demolition permit for the

canopy. The Court will reserve the request for writ for writ of mandamus unless the parties make a separate application for the writ to the Court.[3]

[3] The Court is hopeful that the Decision herein, establishing the law of the case, will obviate the need for a writ of mandamus, but it reserves the plaintiff's right to such a writ.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Colbea Enterprises, L.L.C. v. W.A.C. & Family, LLC, et al.
CASE NO:	PC 2016-3413
COURT:	Providence County Superior Court
DATE DECISION FILED:	December 15, 2016
JUSTICE/MAGISTRATE:	Lanphear, J.
ATTORNEYS:	
For Plaintiff:	Elizabeth McDonough Noonan, Esq.; Leslie D. Parker, Esq.
For Defendant:	Mark B. Morse, Esq.; Christopher M. Rawson, Esq.