Affirmed and Memorandum Opinion filed August 31, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-01031-CV

OSAKA JAPANESE RESTAURANT, INC., Appellant

V.

OSAKA STEAKHOUSE CORPORATION AND YU QING WENG, Appellees

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2009-68840

MEMORANDUM OPINION

In this accelerated interlocutory appeal, appellant, Osaka Japanese Restaurant, Inc., challenges the trial court's denial of its application for a temporary injunction.[1] We affirm.

[1] Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(4) (Vernon 2008).

FACTUAL AND PROCEDURAL BACKGROUND

Appellant operates two restaurants under the name Osaka Japanese Restaurant. Appellant's original location opened in 2001. That same year appellant filed its assumed name record with both Harris County and the Texas Secretary of State. Other than the name, which suggests appellant's restaurants feature Japanese cuisine, the only thing the record on appeal reveals about the food and décor of appellant's restaurants is that at least one of appellant's locations has a sushi bar and tables. The appellate record also reveals that both of appellant's restaurants are located in inner Houston, inside the 610 Loop.

In October 2009, one of appellees, Osaka Steakhouse Corporation ("Osaka Steakhouse"), opened a restaurant named Osaka Japanese Steak and Sushi, at 15242 Wallisville Road in northeast Harris County, near the Beltway 8 Loop, at least twenty miles from either of appellant's restaurants. The appellate record reveals little about the nature of the restaurant beyond its name and the fact the waitstaff wears custom-designed uniforms.

Once appellant discovered that Osaka Japanese Steak and Sushi had opened, appellant filed suit asserting that appellees were engaging in unfair competition and fraudulent behavior by operating a restaurant using the word "Osaka" in its name. According to appellant, due to its longtime use of the word "Osaka" in its restaurant's name, it had a protected property interest in it, which appellees were violating. In its lawsuit, appellant sought both injunctive relief and damages.

On November 6, 2009, the trial court heard appellant's request for a temporary injunction. Xue Yi Li, appellant's owner, testified regarding appellant's alleged damages. The only thing Li mentioned during her testimony was a loss of customers, which she attributed to the opening of Osaka Steakhouse's restaurant. However, while Li blamed Osaka Steakhouse's restaurant for her loss of business, she testified that, in her discussions

with her customers, they made reference to the opening of a Japanese steakhouse at a Bellaire location, not one located on Wallisville Road. On November 13, 2009, the trial court signed an order denying appellant's request for a temporary injunction. The trial court concluded that appellant did not establish (1) the existence of a likelihood of confusion among the names of the parties' restaurants; or (2) that it would suffer irreparable harm without injunctive relief. This interlocutory appeal followed.

DISCUSSION

While appellant raises three issues on appeal, in all of them appellant generally challenges the trial court's denial of its request for a temporary injunction and we therefore address them together.

I. The standard of review and applicable law.

A trial court has broad discretion in deciding whether to deny a temporary injunction. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). We review the denial of a temporary injunction for a clear abuse of discretion without addressing the merits of the underlying case. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). We will uphold the trial court's determination against issuing injunctive relief unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion. *Butnaru*, 84 S.W.3d at 204. In reviewing the trial court's exercise of discretion, the appellate court must draw all legitimate inferences from the evidence in the light most favorable to the trial court's decision. *EMS USA, Inc. v. Shary*, 309 S.W.3d 653, 657 (Tex. App.—Houston [14th Dist.] 2010, no pet.). When, as here, no findings of fact or conclusions of law are filed, the trial court's determination of whether to grant or deny a temporary injunction must be upheld on any legal theory supported by the record. *Id.*

An applicant for a temporary injunction seeks extraordinary relief. *In re Tex. Natural Res. Conservation Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002). The sole issue

before the trial court in a temporary injunction hearing is whether the applicant may preserve the status quo of the litigation's subject matter pending trial on the merits. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). The status quo is the last actual, peaceable, noncontested status which preceded the pending controversy. *RP & R, Inc. v. Territo*, 32 S.W.3d 396, 402 (Tex. App.—Houston [14th Dist.] 2000, no pet.) To obtain a temporary injunction, the applicant must plead a cause of action against the defendant and show both a probable right to recover on that cause of action and a probable, imminent, and irreparable injury in the interim. *EMS USA, Inc.*, 309 S.W.3d at 657 (citing *Butnaru*, 84 S.W.3d at 204). To show a probable right of recovery, the applicant must plead and present evidence to sustain the pleaded cause of action. *Id.* An injury is irreparable when the injured party cannot be adequately compensated in damages or if damages cannot be measured by any certain pecuniary standard. *Id.* An existing legal remedy is adequate if it is as complete, practical, and efficient to the ends of justice and its prompt administration as is equitable relief. *Hilb, Rogal & Hamilton Co. of Texas v. Wurzman*, 861 S.W.2d 30, 32 (Tex. App.—Dallas 1993, no writ.). There is no adequate remedy at law if damages are incapable of calculation or if a defendant is incapable of responding in damages. *Id.* The party applying for a temporary injunction has the burden of production, which is the burden of offering some evidence that establishes a probable right to recover and a probable interim injury. *Dallas Anesthesiology Associates, P.A. v. Texas Anesthesia Group, P.A.*, 190 S.W.3d 891, 897 (Tex. App.—Dallas 2006, no pet.). If an applicant does not discharge its burden, it is not entitled to injunctive relief. *Id.*

II. Appellant did not establish that the trial court abused its discretion when it denied appellant's request for a temporary injunction.

As already mentioned, the applicant for a temporary injunction bears the burden to present evidence to the trial court sufficient to demonstrate a probable, imminent, and irreparable injury. Here, the only evidence on appellant's alleged damages was Li's

testimony that her restaurant had experienced a decline in business. While Li blames the opening of Osaka Steakhouse's restaurant for that alleged loss of business, she also testified that her customers mentioned a Japanese steakhouse at a location different from Osaka Steakhouse's restaurant located on Wallisville Road. Based on this testimony, the trial court, as the factfinder, could have determined that any loss of business experienced by appellant was not caused by the opening of the Osaka Steakouse restaurant. *See EMS USA, Inc*, 309 S.W.3d at 657. In addition, based on Li's testimony regarding appellant's alleged loss of business, the trial court could have concluded that monetary damages constituted an adequate legal remedy if the appellant prevailed at trial. *See Daily Int'l Sales Corp. v. Eastman Whipstock, Inc.*, 662 S.W.2d 60, 64 (Tex. App.—Houston [1st Dist.] 1983, no writ).[2] Possibly suspecting that the trial court might conclude monetary damages were an adequate remedy for appellant's alleged lost business, appellant's counsel argued that since appellees' restaurant was a new business, it might be incapable of responding in damages. However, appellant offered no evidence on appellees' financial status to support that contention. While an applicant for a temporary injunction need not prove that it will win upon a final trial on the merits, it still has the burden to show a probable right to final recovery and an irreparable injury. *Hilb, Rogal & Hamilton Co. of Texas*, 861 S.W.2d at 32–33. In addition, a trial court possesses broad discretion to determine whether the applicant has met that burden. *Id.* at 33. We conclude that, when viewed in the light most favorable to the trial court's order, the evidence supports the trial court's refusal to grant appellant injunctive relief. Therefore, we conclude the trial court

[2] In support of its contention that the trial court erred in its determination that appellant did not establish irreparable harm, appellant cites the case of *Thompson v. Thompson Air Conditioning and Heating, Inc.*, 884 S.W.2d 555 (Tex. App.—Texarkana 1994, no writ). We conclude *Thompson* is distinguishable in part because, in that case, the trial court granted the applicant injunctive relief while the trial court here denied it.

did not abuse its discretion when it denied appellant's application for a temporary injunction. We overrule appellant's issues on appeal.[3]

III. Appellees' Motion for Sanctions on Appeal

Appellees included in their appellate brief a motion for sanctions arguing that appellant's appeal is frivolous and that appellant should be sanctioned pursuant to Rule 45 of the Texas Rules of Appellate Procedure. In determining whether an appeal is frivolous, we review the record from the appellant's perspective and decide whether the appellant had reasonable grounds to believe that the trial court's order could be reversed. *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Whether to grant sanctions for a frivolous appeal is a matter of discretion that an appellate court exercises with prudence and caution and only after careful deliberation in truly egregious circumstances. *Goss v. Houston Cmty. Newspapers*, 252 S.W.3d 652, 657 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

When dealing with a motion for sanctions for the filing of a frivolous appeal, we consider whether: (1) appellant failed to present a complete record; (2) appellant raised issues for the first time on appeal, even though preservation of error was required in the trial court; (3) appellant failed to file a response to a request for appellate sanctions; and (4) appellant filed an inadequate brief. *Tate v. E.I. Du Pont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.). This court has determined that in order to assess sanctions, we must find the appeal to be both objectively frivolous and subjectively brought in bad faith or for the purpose of delay. *See Azubuike v. Fiesta Mart,*

[3] We need not address appellant's contention on appeal that its use of the word "Osaka" is entitled to protection because, even if it is, appellant still must establish that it suffered irreparable harm as a result of appellees' use of "Osaka" to be entitled to injunctive relief. *See Beauty Elite Group, Inc. v. Palchick*, 14-07-00058-CV, 2008 WL 706601 *2 (Tex. App.—Houston [14th Dist.] March 18, 2008, no pet.) (mem. op.) ("Proving a wrongful act, standing alone, is insufficient to obtain injunctive relief; each of the remaining elements must be established.").

Inc., 970 S.W.2d 60, 66 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Even though appellant did not file a response to appellees' motion for sanctions and we overruled appellant's issues on appeal, it does not appear from the record that appellant's appeal was objectively frivolous or that appellant subjectively filed the appeal in bad faith or for purposes of delay.[4] Accordingly, appellees' motion for sanctions is denied.

CONCLUSION

Having overruled appellant's issues on appeal, we affirm the trial court's order denying appellant's request for a temporary injunction.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Seymore.

[4] Since filing an appeal for the purpose of delay is a factor to be considered when resolving a motion for sanctions for filing a frivolous appeal, we note that appellant, on July 30, 2010, submitted a letter to this court asking "[c]ould you please tell us the results of the accelerated appeal in the matter of Cause No. 14-09-01031-CV & 2009-68840; Osaka Japanese Restaurant vs. Osaka Steak House Corporation and Yu Qing Weng[?]" While this letter serves as some indication that appellant is not interested in delay but a timely and efficient resolution of its dispute, we observe that "the most expeditious way to obviate the hardship and discomfiture of an unfavorable temporary injunction order is to try the case on the merits and secure a hearing wherein the case may be fully developed and the courts, both trial and appellate, may render judgments finally disposing of controversies." *Sharma v. Vinmar Int'l, Ltd.*, 231 S.W.3d 405, 429 n.16 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Sw. Weather Research, Inc. v. Jones*, 160 Tex. 104, 111, 327 S.W.2d 417, 422 (1959)).