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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SILVERADO BREWING COMPANY
LLC,

Plaintiff and Respondent,

v.

JACKSON FAMILY INVESTMENTS III
LLC et al.,

Defendants and Appellants.

A132636

(Napa County
Super. Ct. No. 2655873)

Defendants Jackson Family Investments III, LLC and Jackson Family Wines, DBA Freemark Abbey Winery (Freemark Abbey) appeal from a preliminary injunction obtained by plaintiff Silverado Brewing Company LLC (Silverado). The preliminary injunction prevents Freemark Abbey from opening a wine tasting and sales room in the building occupied by the Silverado restaurant. We reverse and remand. The preliminary injunction is not based upon a reasonable interpretation of the terms in a lease between Freemark Abbey and Silverado and is therefore impermissibly overbroad. On remand, the trial court is directed to enter a preliminary injunction on the terms described in our disposition.

BACKGROUND

In May of 1991, Freemark Abbey leased approximately 5300 square feet of its building in St. Helena to Silverado's predecessor Abbey Restaurant, Inc. for "the purpose of operating a restaurant and an outside catering service." The lease, with certain modifications, remains in effect. Paragraph 32 of the lease provides:

32. **EXCLUSIVE RIGHT:** So long as this Lease shall be in force, Lessor will not operate or use, or permit any other person to operate or use, any portion of the building in which the Premises are located, as or for a restaurant or for catering services. The term "restaurant" shall be defined as a retail business purveying food and/or beverages for consumption on the Premises, and such definition shall not include packaged foods and canned or bottled beverages.

Since the inception of the lease, Freemark Abbey has operated a retail wine shop and tasting room in an adjoining property that is just 81 yards away from Silverado's restaurant. But in February 2011, Freemark Abbey notified Silverado of its intention to relocate the wine shop and tasting room from the adjoining property to a vacant portion of the building occupied by Silverado. It was Freemark Abbey's intention to sell its own bottled wines and conduct associated tastings of those wines in the new tasting room. Silverado agrees that Freemark Abbey can sell its bottled beverages at the new location. But it contends that the sales and tasting room would be a restaurant as defined in paragraph 32 of the lease because its wine tastings and related activities would involve purveying food or beverages for consumption on the premises. Silverado sought a preliminary injunction to prevent the opening or operation of the new sales and tasting room based upon the exclusive rights conferred by paragraph 32.

The trial court determined that Silverado demonstrated a probability of prevailing on the merits and that the balance of harms tipped in its favor. Therefore, it "enjoined [Freemark Abbey] from operating a wine tasting room in any portion of the building" during the pendency of the litigation. Freemark Abbey timely appealed.

DISCUSSION

A. The Standard of Review

When the trial court decides whether to issue a preliminary injunction, it weighs "two "interrelated" factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from the issuance or nonissuance of the injunction. [Citation.] Appellate review is limited to whether the trial

court’s decision was an abuse of discretion.’ . . . [¶] ‘The trial court’s determination must be guided by a “mix” of the potential-merit and interim-harm factors; the greater the plaintiff’s showing on one, the less must be shown on the other to support an injunction. [Citation.] Of course, “[t]he scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits.” [Citation.] A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. [Citation.] Unless potential merit is conceded, an appellate court must therefore address that issue when reviewing an order granting a preliminary injunction.’ ” (*McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, 135.)

B. The Availability of Injunctive Relief

Freemark Abbey claims that the trial court acted in excess of its jurisdiction because it granted the preliminary injunction without requiring Silverado to make a showing that it would be harmed by operation of the new tasting room. But a trial court has the discretion to issue an injunction notwithstanding a moving party’s inability to show harm when that party makes a sufficient showing that it is likely to prevail on the merits. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 447.) This is particularly true when the injunction is sought to enforce a tenant’s exclusive rights under a lease because the damages in such cases are difficult to prove and often cannot be measured with certainty. (See *Edmond’s of Fresno v. MacDonald Group Ltd.* (1985) 171 Cal.App.3d 598, 608 [exclusive right enforced by permanent injunction where it was assumed competition would cause harm]; *Flagg v. Andrew Williams Stores* (1954) 127 Cal.App.2d 165, 172-174 [injunction affirmed finding plaintiff harmed even though gross sales increased].) In light of Silverado’s prospects for success as discussed below, it was not required to prove the precise measure of economic harm it would suffer due to Freemark Abbey’s new tasting room.

Freemark Abbey also claims that Silverado unreasonably delayed in bringing its motion for preliminary injunction. But the facts show that Silverado acted to protect its exclusive right in a series of letters to Freemark Abbey when it first noticed activity

undertaken to renovate the space for the new tasting room in late 2010 and early 2011. By June Silverado was before the court seeking the preliminary injunction. Whether specific facts constitute laches is a matter primarily for the trial court's discretion, and we will not interfere with a trial court's decision that has adequate support in the evidence. (*Volpicelli v. Jared Sydney Torrance memorial Hosp.* (1980) 109 Cal.App.3d 242, 253.) There is no reason to conclude the trial court abused its discretion when it rejected Freemark Abbey's claim of laches.

C. The Scope of the Preliminary Injunction.

Freemark Abbey also argues the preliminary injunction is impermissibly overbroad because it prohibits the operation "of a wine tasting room" when paragraph 32 of the lease grants Silverado the exclusive right to operate a restaurant. In order to evaluate this claim, we must review the trial court's interpretation of paragraph 32.

If there is conflicting extrinsic evidence of the meaning of a term in a lease, we apply the substantial evidence test and uphold the trial court's construction if supported by the evidence. (*California Nat. Bank v. Woodbridge Plaza LLC* (2008) 164 Cal.App.4th 137, 142.) But when extrinsic evidence regarding the meaning of a contract is not in conflict nor considered by the trial court, construction of its terms is a question of law, and we review the contract de novo and apply our independent judgment. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.) Although considerable evidence was presented to the trial court in this case regarding the history of negotiations leading up to the lease, and Silverado's subjective understanding of the meaning and import of paragraph 32, that evidence was neither contested by Freemark Abbey nor considered by the trial court in formulating its decision to grant the preliminary injunction. Therefore, we will interpret paragraph 32 de novo.

Freemark Abbey argues that "all wine tastings, tours, and the like, whether sold or not" are permissible and do not intrude upon the exclusive right granted to Silverado under paragraph 32. It says the wine tastings are not a retail activity because they are not so specified in the Napa County Code. At the very least, Freemark Abbey contends it should be allowed to sell bottled wine and conduct complimentary tastings, wine-related

seminars and education without violating paragraph 32. Silverado argues that paragraph 32 prohibits any other retail business tenant from providing anyone food or beverages to be consumed on site. It argues this prohibition is clear from the words used to define a restaurant in paragraph 32 as “a retail business purveying food and/or beverages for consumption on the Premises.” Thus, according to Silverado, the wine tasting room would invade its exclusive right because customers would be provided beverages for consumption on the premises. The trial court agreed.

When we interpret the meaning of paragraph 32, we try and give effect to the mutual intent of the parties when the lease was formed. We look initially to its language in order to discern its clear and explicit meaning. We interpret its words in their ordinary and popular sense, unless they are used by the parties in a technical sense or a special meaning is derived from their usage. But the language of the lease must be interpreted as a whole, and in the circumstances of the case, and will not be found to be ambiguous in the abstract. Our construction cannot lead to an unfair or absurd result, but must be reasonable and fair. (*California Nat. Bank v. Woodbridge Plaza LLC, supra*, 164 Cal.App.4th at p. 143.)

Guided by these principles, we cannot reach the same conclusion as the trial court that Silverado’s interpretation of paragraph 32 is likely to prevail at trial. Silverado’s interpretation turns on a construction of “purveying” as used in paragraph 32 to mean the commonly accepted definition of provide or furnish. But that customary definition leads to absurd results when it is considered in the context of paragraph 32. For example, under Silverado’s construction the candle and gourmet shop that formerly occupied the space Freemark Abbey intends for its tasting room would violate paragraph 32 if it gave away samples of crackers offered for sale in its shop. A hair salon would violate paragraph 32 if it provided clientele with water or coffee while they waited for an appointment. Or, as Silverado’s principal testified in his deposition, a business would technically violate paragraph 32 if it provided free meals to its employees. To take this last example to its logical extreme, under Silverado’s construction it would even violate paragraph 32 if the food provided to the employees were purchased from Silverado.

Even if it was designed to give Silverado's restaurant the broadest permissible commercial protection, Silverado's construction of paragraph 32 is absurd and unreasonable.

The above examples show that "purveying" as used in paragraph 32 means "sell." Accordingly, the preliminary injunction is overbroad to the extent it prohibits Freemark Abbey from opening the tasting room and all provision of food or beverages to guests or customers for consumption on the premises during the pendency of this litigation. We agree with Freemark Abbey that, in addition to selling bottled wine in its tasting room, it should be able to provide complementary wine tasting, free events, wine-related seminars and education pending a trial on the merits.

Although a court has the discretion to issue an injunction notwithstanding a moving party's inability to show harm when that party makes a sufficient showing that it is likely to prevail (*Common Cause v. Board of Supervisors, supra*, 49 Cal.3d at p. 447), the scope of injunctive relief must be no more burdensome than necessary to provide the moving party complete relief (*San Diego Unified Port Dist. v. U.S. Citizens Patrol* (1998) 63 Cal.App.4th 964, 971). While the trial court in this case was genuinely seeking to preserve the status quo pending trial on the merits, a desire to preserve the status quo does not trump a proper assessment of the moving party's likelihood of success or the permissible measure of injunctive relief. (See *DVD Copy Control Ass'n Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 254-255.) The *most* Silverado could reasonably expect to achieve at trial is an injunction prohibiting all sales of food or beverages for consumption on the premises.

Under the abuse of discretion standard, we must uphold the trial court's preliminary injunction to the extent it reasonably reflects a balancing of the factors involved in deciding whether to grant injunctive relief. Since the court will likely conclude that some sales are prohibited by paragraph 32, the court could reasonably

decide that an injunction that prohibits all sales of food or beverages is necessary until the precise contours of the exclusive right can be determined at trial.¹

As paragraph 32 of the lease bars a competitor of Silverado from selling food or beverages for on-site consumption as part of its retail business, it is appropriate that the trial court enter a new and modified preliminary injunction limited in scope to the maximum protection that may reasonably be afforded by paragraph 32 should Silverado prevail. Accordingly, we will reverse the preliminary injunction and remand for entry of a new order.

DISPOSITION

The Ruling on Submitted Motion for Preliminary Injunction filed July 1, 2011 is reversed and this case is remanded to the superior court. On remand, the superior court is directed to enter a new preliminary injunction that prohibits Freemark Abbey from selling food or beverages for consumption on the premises in any portion of the building commonly known as the “Freemark Abbey Building” located at 3020 St. Helena Highway North, County of Napa, California. Each party shall bear its own costs on appeal.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.

¹ We express no opinion on the precise activities of Freemark Abbey’s tasting room that are proscribed by paragraph 32. There is evidence in the record that a variety of events may be held in the tasting room where food or beverages will be provided to customers or guests. Whether any of them constitute the *retail* sale of food or beverages remains an open question.