

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DICK ROAD-BLEND ALL HOTEL
DEVELOPMENT, INC. and WILL-RIDGE
ASSOCIATES, LLC

Plaintiffs

**MEMORANDUM
DECISION**

vs.

Index No. 4236/08

JOSEPH A. CIPOLLA, URBANDALE DEVELOPMENT
COMPANY, PASTA GRILL, INC., DAVID J.
BUFFAMONTI, T.D.K. NATIONAL CORPORATION,
and KEITH W. SCHILLO

Defendants.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Connors & Vilardo, LLP**
Attorneys for Plaintiffs
Lawrence J. Vilardo, Esq., of Counsel
Giuseppe A. Ippolito, Esq., of Counsel

Jaeckle Fleischmann & Mugel, LLP
Attorneys for Defendant Urbandale Development Company
Charles C. Swanekamp, Esq., of Counsel

Michael Bly Santa-Maria, Esq.
Attorney for Defendant Pasta Grill, Inc.

CURRAN, J.

Plaintiffs have moved for an order holding defendants, Urbandale Development Company (“UDC”) and Pasta Grill, Inc. (“Pasta Grill”), in contempt of court for violating this

Court's Order granted on August 19, 2008, and filed in the Erie County Clerk's Office on August 20, 2008 ("Permanent Injunction Order"). Plaintiffs also seek various forms of relief incidental to the contempt, including fines and/or damages.

Procedural History

This action was commenced on April 11, 2008. Plaintiffs previously moved for a preliminary injunction and declaratory relief. The Court conducted an evidentiary hearing on the application in May of 2008. Pursuant to its Memorandum Decision dated May 30, 2008, the Court granted the motion for injunctive relief enjoining UDC and Pasta Grill from using the premises which is the subject of this action in violation of Section 5(a) of the Easement Modification Agreement dated February 28, 2006 ("Agreement"). The parties ultimately stipulated to the Permanent Injunction Order.

Plaintiffs brought the instant motion by Order to Show Cause and counsel for plaintiffs, UDC and Pasta Grill appeared on November 25, 2008, when plaintiffs also presented a request for a temporary restraining order. The Court executed a "Second Amended Order to Show Cause" which contains a temporary restraining order prohibiting UDC and Pasta Grill from playing any music whatsoever at the subject premises until thirty minutes after the closing time of the Hobby Lobby store next door.

Plaintiffs' Contentions

Plaintiffs contend that they are entitled to an Order of Contempt because Pasta Grill, in a coordinated effort with its landlord, UDC, has acted in violation of the Permanent Injunction Order by operating the subject premises in violation of Sections 5(a)(17) and (a)(20) of the Agreement. Specifically, plaintiffs allege that UDC and Pasta Grill have cooperated in

violating the Court's Order by operating a bar at the premises which serves alcohol, other than in connection with the operation of a restaurant [Agreement, Section 5(a)(17)], and/or by operating a "nightclub, discotheque or dance hall" [Agreement, Section 5(a)(20)].

Plaintiffs assert that, on every inspection they have undertaken of the premises since October of 2008, the restaurant purportedly being operated thereat is not bona fide because its food sales are insignificant to the overall sales of the operations conducted thereat and that the introduction of food sales was nothing more than a transparent and illicit attempt to evade the Permanent Injunction Order. Moreover, plaintiffs argue that the predominant use of the premises is as a "nightclub, discotheque or dance hall" featuring extremely loud music (provided by live entertainment, disc jockeys and/or overhead music), cover charges, bouncers, a dress code, strobe lighting, a fog machine, dance platforms (including a "stripper pole"), multiple bars, multiple bartenders, drink specials, limitation of patrons to persons age 21 and older, and the overall promotion of alcohol sales as opposed to the sales of food.

Defendants' Contentions

Defendants UDC and Pasta Grill contend that the introduction of food sales at the premises converts the premises to a restaurant and that the bar Pasta Grill is operating complies with the Agreement because it is a bar in connection with that restaurant. Further, defendants claim that: (1) because a nightclub operates only at night and the restaurant here is open during the day, seven days a week, the establishment within the premises cannot by definition be deemed a "nightclub;" (2) the term "discotheque" is no longer in use and in any event disco music is not played within the premises; and (3) the premises is not being operated as a "dance hall" because of the food sales, the presence of tables on the dance floor and

because the dance floor comprises approximately only ten percent (10%) of the use of the premises.

Factual Background

Plaintiffs own the former Ames Store within the Urbandale Plaza, along with parking lot space and an out parcel. UDC owns the rest of the plaza, including the subject premises occupied by Pasta Grill which is located directly next to the former Ames Store.

This action was initially commenced because plaintiffs sought to lease the former Ames Store to Hobby Lobby. In order to do so, plaintiffs were required to fulfill a contingency in the contractual relationship with Hobby Lobby whereby plaintiffs agreed that the adult bar being operated next to the prospective Hobby Lobby store would cease operations by June 1, 2008.

During the proceedings on the application for a preliminary injunction, it became clear that Hobby Lobby would not commence its operations at the former Ames Store until approximately September of 2008. For this reason, the Court accepted the defendants' request that any preliminary injunction not become effective until the Fall of 2008.

The record reflects that the establishment previously operated within the subject premises, known as "Coyotes" and "Rock 'n Roll Heaven," ceased operation in accordance with the Permanent Injunction Order. The record further reflects that, in September of 2008, UDC and Pasta Grill cooperated together to introduce a "restaurant pizzeria" as a concessionaire within the subject premises. The "restaurant pizzeria" concession is operated by MBJJ, Inc., with Michael Lopez as Vice President thereof. Mr. Lopez has submitted an affidavit confirming that he operates the "restaurant pizzeria" within the premises from

11:00 a.m. to 10:00 p.m. every day except for Wednesdays, Fridays and Saturdays when it is open from 10:00 a.m. to 3:30 a.m. Mr. Lopez has offered photographs of the kitchen and food prep areas. He also has stated that his average food sales for September through early November of 2008 are approximately 17.2% of the overall total sales for the operations conducted within the subject premises.

Pasta Grill continues to possess the liquor license for the operations now being conducted within the subject premises under the name of “Coyotes Restaurant, Pizzeria and Sports Lounge.” Pasta Grill’s president, David Buffamonte, offered an affidavit describing the installation of a kitchen, booths and tables, plasma televisions, and the conversion of some portions of the interior of the premises to be consistent with a sports bar restaurant.

It is undisputed that food is served at the establishment operated by Pasta Grill. It also cannot be disputed on this record that alcohol sales are the overwhelming source of revenue for the establishment.

Plaintiffs have introduced photographs, testimony and other evidence demonstrating that, at various times in November of 2008 through early January of 2009, the premises has been operated at night as an establishment primarily devoted to the service of alcohol and the provision of entertainment in the form of music and dancing. The music played at night was described by various witnesses as very loud and to the point of being unable to carry on a conversation with anyone standing nearby. Other witnesses described the extensive consumption of alcohol, including a bartender strutting down the top of a bar and pouring shots into the mouths of patrons. Patrons of the establishment were routinely seen dancing, including at a “stripper pole” located on an elevated platform.

Plaintiffs offered the testimony of an expert who opined that the standard in the restaurant industry for the definition of a “restaurant” is one serving at least 50% of food sales and no more than 50% of alcohol sales. This expert witness characterized the operations within the subject premises as a “nightclub, discotheque or dance hall.”

Defendants disputed this proof and offered the testimony of an experienced marketing person within the entertainment industry and the affidavit of Joseph Cipolla, a principal with UDC, who also has experience in the bar and entertainment industry. Both of these witnesses testified that a “nightclub” is primarily defined by a club that operates only at night. It also provides a venue for music and dancing.

Conclusions

The language of Section 5(a)(17) of the Agreement refers to a bar being operated in connection with a restaurant. This language demonstrates that the restaurant must be the predominant use.

The record before the Court clearly supports the conclusion that Pasta Grill is not primarily operating a restaurant within the subject premises. The food sales by the establishment are negligible in comparison to the revenues generated by alcohol sales. Under no circumstance can this operation as a whole be construed as a restaurant with a bar operating in connection therewith.

Because the establishment is not a restaurant, it cannot operate as it currently does without violating the Permanent Injunction Order. The current operations conducted by Pasta Grill must therefore cease and abide by the parameters established by this decision.

Rather than directing the closing of all operations at the subject premises, the Court will adopt a more surgical approach. As defendants agree, the activities resembling a “nightclub” are occurring only at night. Accordingly, Pasta Grill is prohibited from operating after 10:00 p.m. except to operate a restaurant. The Court adopts the only definition of a “restaurant” offered by any party and therefore declares that any such restaurant operated by Pasta Grill within the subject premises must generate at least 50% of its revenue from food sales.

Furthermore, a bar cannot be operated at any time within the subject premises unless it is in connection with a restaurant. Accordingly, alcoholic beverages may not be served at any time within the subject premises unless at least 50% of all revenues are generated by food sales.

Pasta Grill also is prohibited from advertising itself or otherwise holding itself out as a “nightclub,” “club,” “music venue,” “dance venue,” “discotheque,” or any other description emphasizing music and dance as the primary form of entertainment to be offered within the premises. Essentially, Pasta Grill may operate a restaurant (as defined by this decision) and may operate a bar in connection therewith.

Plaintiffs characterize Pasta Grill’s violations of the Permanent Injunction Order as a “transparent attempt” to evade the terms of that Order. However, the Court will accept at face value the representation of Mr. Buffamonte that he did not intend to violate the Court’s Order and did not intend to impede or prejudice plaintiffs’ rights with respect to the leasing of property to Hobby Lobby. For this reason, a Conditional Order of Contempt will be issued as described below.

Plaintiffs also claim that UDC was an equal participant in the violations. This appears to be true as UDC does not deny its extensive involvement in promoting the operation of the premises which violates the Permanent Injunction Order. Nevertheless, as with Pasta Grill, the Court will accept at face value the representations of Mr. Cipolla that he did not intend to violate the Court's Permanent Injunction Order and instead the Court will include UDC within the parameters of the Conditional Order of Contempt.

Even in the absence of defendants' intentional violation of the Permanent Injunction Order, it cannot be doubted that the operations conducted at the premises by Pasta Grill, in which UDC fully cooperated and promoted, violate the Permanent Injunction Order. Defendants Pasta Grill and UDC are therefore in contempt of that Permanent Injunction Order. In order to purge their contempt, UDC and Pasta Grill must immediately comply with the parameters set forth in this decision as to the operation of the subject premises. They must do so on or before February 5, 2009. Should UDC and Pasta Grill fail to purge their contempt by complying with the parameters described above by this deadline, plaintiffs may seek a Final Order of Contempt imposing fines, attorneys' fees, and/or damages.

In the event that UDC and Pasta Grill purge their contempt on or before the above date, the finding of contempt shall be withdrawn and the motion in all respects denied.

Settle Order.

DATED: January 26, 2009

HON. JOHN M. CURRAN, J.S.C.